REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

THE INSOLVENCY CAUSE NO. 1 OF 2018

IN THE MATTER OF INVESCO ASSURANCE COMPANY LIMITED

AND

IN THE MATTER OF INSOLVENCY ACT, NO. 18 OF 2015

AND

IN THE MATTER OF COMPANIES ACT, CAP. 486 (NOW REPEALED)

INVESCO ASSURANCE COMPANY LIMITED.....DEBTOR

AND

DAMA CHARO NZAI & 58 OTHERS.....CREDITORS

CORAM: Hon. Justice R. Nyakundi

Kibet Rop Advocates for the Applicant

Wambua Kilonzo Advocates for the respondent

RULING

This is a notice of motion under certificate of urgency filed in court on 20.6.2019 against the applicants seeking declaratory orders pending the final determination of the appeal to be instituted in the Court of Appeal.

In essence the motion expressed to be brought pursuant to Section 468 of the Insolvency Act and regulation 10 of the Insolvency Regulations is seeking leave of this court to stay or and withdraw the advertisement of Malindi Insolvency Petition published in the Kenya Gazette on 1.6.2019.

The insolvency proceedings which the respondents have applied to institute arise from the ruling of my **Brother Judge W. Korir** dated 21.2.2019. it is in the affidavit of the applicant that the respondents petition for liquidation of Invesco Insurance Company or the underlying reasons of winding up are not sufficient as defined in the Insolvency Act 2015.

In support of the application is a detailed affidavit sworn by **Kennedy Abincha,** the Chief Executive Officer of the company. Although for convenience purposes the issue of review was not raised by the applicants. This application is at the heart of the ruling made by **Honourable Korir J** on 21.2.2019.

In sum the application avers that the petition as filed is premature as underpinned over settlement of decrees with the creditors arising from the various court Judgments. In any event the applicant deposes that besides payment and settlement of claims in terms of the policy insurance to the insured, the company has been making its other obligations to the shareholders. That initially the company had experienced top management challenges which necessitated a restructuring process to turn the company into full profitability. The applicant further depones that the change over resulted in an operative logistics and challenges for the new management to appraise the status of the various insurance policies and outstanding claims.

Further the applicant depones that in filing of the petition, subject provisions in Section 122 and 41 of the Insurance Act. Insolvency were not compiled with by the petitioner.

Thus whereas the respondents filed the insolvency petition, in light of Section 41, 67 (c) (1) to 10, 12, 122 and 123 of the Insurance Act the requirement of the involvement of the commissioner of Insurance in liquidation proceedings is a fatal defect rendering the petition void abinitio.

In sum the applicants avers that this court does not have the necessary jurisdiction to adjudicate this matter. The applicant urged this court to allow the application in view of the fact that the petitioners failed to give notice of intention to make good their threat to liquidate the company.

The respondents through counsel **Mr. Kilonzo** filed a replying affidavit dated 9.7.2019. The respondent cited numerous factual and evidential material in opposition to the application. Some of the averments made were in respect of non-compliance with the terms of the ruling of the court delivered on 21.2.2019.

Further, the respondents alleged that the applicant failed to honour the order of the court to pay the creditors a sum of Kshs.10,000,000/= within 60 days from the ruling date instead it proceeded to file a notice of appeal. It was further alleged that the issue of non-joinder of the commissioner of insurance is a non-suited matter. In so far as the insolvency petition is concerned the respondents that even at this stage of the proceedings nothing bars the commissioner from seeking leave to enter appearance as a party to ventilate and safeguard the interest of the public and policy holders. The respondent position was that the applicant was duly served with the court process and was therefore obligated to inform the commissioner of insurance.

The respondent contended that the Kenya gazette and advert of the petition has been done within the confines of the Insolvency 2015 and the Regulation 2016. The respondent evidence is to the effect that there is no sufficient material for this court to stop or suspend the advertisement of the petition obtained in full compliance of the law.

At the hearing of this notice of motion, the applicant's counsel in addition to the affidavit evidence filed heads of arguments accompanied with length submissions on legal perspectives.

In support of the application Learned Counsel **Mr. Kibet** submitted that under the Law the commissioner of insurance to be made a party to a winding up petition against an insurance company is mandatory. For this proposition counsel cited the case of the **Minister of Finance & Commissioner of Insurance as licensing and regulating officer v Charles Lutta Kasamani T/a Kasamani & Co. Advocates [2005] eKLR, Kensilver Express Ltd & 3 others v Commissioner of Insurance & others [2007] eKLR**

Learned counsel for the applicant, argued and contended that the liquidation or winding up of an insurance company is provided for in Section 122 of the Insurance Act. Therefore, the issue on liability of an insurance company not able to pay its debts is determined under a different scheme relative to other companies envisaged in the insolvency Act 2015.

Learned counsel further submitted that the minimum standards of statutory demand served on the applicant were not fulfilled by the respondent. He outlined the essential elements of the statutory demand in the decision of the court. In **Blueline properties Ltd v Mayfair Insurance Company Ltd [2019] eKLR**

In a nutshell the applicant prayed for the orders in the notice of motion:

> ***1. That this application be certified as urgent and heard ex-parte in the first instance.***
>
> ***2. That pending the hearing and determination of this application, this honourable court be pleased to issue an interim order suspending the advertisement of Malindi Insolvency Petition No. 1 of 2019 published in the Kenya Gazette on 14th June 2019.***
>
> ***3. That pending the hearing and determination of this application, this honourable court be pleased to issue an interim order staying all other intended/on-going insolvency proceedings against the applicant.***
>
> ***4. That this honourable court be pleased to issue an order suspending the advertisement of the insolvency petition against the applicant and stay of any insolvency proceedings against the applicant pending the hearing and determination of the intended substantive appeal.***
>
> ***5. That the gazette advertisement be vacated/set aside.***
>
> ***6. That the costs of this application be provided for.***

On consultation of the matter I take into account the affidavits by the petitioners and the applicant, in exercising discretion to determine the notice of motion beforehand.

Analysis

The Law

In the present case the subject matter of litigation is regulated by the provisions of the Insolvency Act 2015 Section 423 of the Insolvency Act provides for various forms of liquidation. One of such model is liquidation by the court. In these provisions of the Act the definition of court means the High Court indeed the Act as it were under Section 424 of the Insolvency Act provides that a company may be liquidated by the court if:

a). the company has by a special resolution resolved that the company be liquidated by the court.

b). Being a public company that was registered as such on its original incorporation.

(i) The company has not been issued with a trading certificate under the Companies Act 2015.

(ii). More than twelve months has elapsed since was so registered.

c). the company does not commence its business within twelve months from its incorporation or suspends its business for a whole year.

d). except in the case of a prudent company limited by shares or by guarantee the number of members is rendered below two.

e). the company is unable to pay its debts

f). the court is of the opinion that it is just and equitable that the company should be liquidated.

The practical operation on liquidation or an application for liquidation is provided under Section 425 of the Insolvency Act. In this section the following persons qualify to file a petition for liquidation.

a). The company or its directors.

b). A creditor or creditors (including any …… prospective creditor or creditors,

c). A contributing or contributories of the company.

d). A provisional liquidator or an administrator of the company.

e). If the company is on voluntary liquidation- the liquidator.

The real crux of the applicant's submissions is that liquidation framework under the Insurance act is materially different from the provisions of the Insolvency Act. It was also argued that any request for assistance to liquidate the insurance company cannot come directly from the creditors but the commissioner of insurance.

The affidavit of **Kennedy Abincha** filed on behalf of the applicant company indicates that the liquidation proceedings as commenced without involvement of the commissioner of insurance is fatally defective.

The respondents on the other hand argue that these proceedings involve an inquiry into the capacity of the applicant to meet its financial obligations. That capacity as an insurance company has been lawfully in question by virtue of its failure to settle the court Judgments arising from accident claims of their insured.

In my Judgment, the present application can be construed from the ruling delivered on 21.2.2019. The evidence showed that the applicant is indebted to the respondents (creditors) for a sum at that time ascertained at Kshs.10,000,000/=. The applicant was entitled to a suspension of the statutory on condition of making payment of the standard sum within 60 days.

As at the time of filing the insolvency application in June 2019 its established to the satisfaction of the court that the applicant has not fulfilled the condition of payment of the sum due and as ordered by the court.

An application to proceed to liquidate the company was to be presented subject to the provisions of Insolvency Act. From the material before court it seems to me that the respondents have complied with the procedure of placing an advertisement with the Kenya Gazette. It is not disputed that from the date of the ruling there is precisely no amount owing has been paid to the respondents.

In the context of a notice requiring the applicant to have its pecuniary under inquiry whether an act of bankruptcy has been committed by the applicant is now a live matter to be determined in accordance with the provisions in the Insolvency and Insurance Act. In this case the respondents are seeking permission to commence proceedings against the applicant.

I have no hesitation in accepting the submissions that the commissioner is a necessary and indispensable party to insolvency proceedings against the applicant. The real question to be determined is the bonafides and financial obligations of the applicant based on capitalization and the evidence that it has neglected to pay its debts. In any event the plea as crafted in the notice of motion is clearly without substance in respect to the statutory demand and to gazette of the petition.

Based on the ruling of the court it would be unconscionable and unjust for the applicant to assert his right to seek suspension of the demand and advertisement of the petition.

In the face of the current findings of the court I see no basis to subject the petition to an estoppel. Consequently, where a trial Judge has reached a decision on the primary facts of the dispute its only in the rarest occasions such a decision would be a subject of review under Section 80 of the Civil Procedure Act and Order 45 (1) of the Civil Procedure Rules.

The insight gained by my brother **Judge Weldon** in his ruling issued on 21.2.2019 can only be reviewed if it meets the criterion laid out in *"Nyamogo & Nyamogo v Kogo (2001) EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."*

As to the merits of this application **Smith C – The Law of Insolvency 3rd Edition Butter Worths 1998 (Durban)** had this to say:

> ***"Insolvency under the Act exists when a debtor is unable to pay his debts. It is also generally referred to a state of affairs of a person or a company where his or its liability exceeds the known assets."***

Fletcher I. F. C The Law of insolvency Sweet & Maxwell London 1990:

> ***"The essence of the concept of insolvency consists in a debtor's ultimate inability to meet his financial commitments, upon a balance of liabilities and assets, the former exceed the latter with the consequences that it is impossible for any of the liabilities to be discharged in full at the time of falling due."***

In the instant insolvency petition under Section 425, the creditors have approached this court that they have obtained Judgments in respect of the decree against the applicant upon which the statutory demand is based. Within the provisions of this Act unless otherwise stated the creditors are exercising their bonafide right under the Law. The mere fact that the precise amount of the debt is yet to be settled by the company is not a bar for the creditor to file for liquidation under the Insolvency Act.

For instance, in **Mann v Goldstein [1968] IWLR 1091 Thomas J** put it this way:

> ***"I come now to the allegation of bona fides and to abuse of process. It seems to me that to pursue a substantial claim in accordance with the procedure and in the normal manner, though with personal hostility or even venom and form some ulterior motive, such as the hope of compromise or some indirect advantage, is not an abuse of the process of the court or acting mala fide, but acting bona fide in accordance with the process. When the creditors debt is clearly established it seems to me to follow that this court would not, in general at any rate, interfere even though the company would appear solvent, for the creditor would, as such, be entitled to present a petition and the debtor would have its own remedy in paying the undisputed debt which it should pay."***

The question was also examined in the case of **Rosenback & Co (Pty Ltd v Singh's Bazaans Ply Ltd) 1962 SA 593**

> ***"That the court will have regard to the fact that a creditor who cannot obtain payment of his debt is entitled as between himself and the company ex-debits justifier to an order if he brings his case within the Act. He is not barred to give time. The fact that there is due to the petitioner's a liquidated sum, then the debt is not disputed, and there the petitioner has demanded payment without success, affords cogent prima facie evidence of the company, inability to pay its debts, and is the ordinance must commonly vetted on."***

The issue before court is whether the insolvency petition has filed against the applicant company is based on the process and procedure prescribed by the Act.

It is not disputed that prior to the petition against the company the creditors issued a statutory demand of the debt due and owing in terms of the Judgment of the courts. Nor is it in issue that the company has made no proposal to liquidate the amount to the creditors.

There is no reason in this regard to differentiate the rights and obligations that exist under the Insurance Act and the ones vested in the Insolvency Act 2015. The above mentioned provisions by the applicant as they relate to the role of the commissioner of Insurance is not bar to set aside the entire liquidation process commenced by the creditors. Therefore, save as the orders must be viewed in terms of Section 122 and 67 of the Insurance Act, nothing is far from the truth that the commissioner is not aware that the creditors intended to prove that the company has failed to honor its financial obligations. This means that the commissioner is not precluded in joining the proceedings as an interested party to show that he has a direct and substantial interest of the company subject to liquidation.

Broadly speaking given this background a company can be wound up or liquidated by the shareholders, or the creditors or a petition can be filed to compulsorily or voluntarily wind it up.

In the instant petition, it is the creditors who have filed a petition against the applicant upon its inability to pay the outstanding claims. The question in the instant petition which ought to be answered is whether the applicant as alleged is unable to repay its debts. But this question is only able to be ascertained at the main trial when the petitioners must show that they are entitled to present the petition. It is not a remedy at the interlocutory stage of these proceedings.

Looking at the matter from various angles the answer to the notice of motion dated 20.6.2019 can only be in the negative. Thereafter, the costs of this application to abide the main petition.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF DECEMBER 2019.

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Wambua for the respondent

2. The respondent