

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
INSOLVENCY PETITION NO. 11 OF 2023

ELINA **ZAWADI**
ANGORE**PETITIONER**

VERSUS

INVESCO **ASSURANCE**
LTD.....**DEBTOR** **CO.**

JUDGMENT

1. By a Petition dated 29.8.23, the Petitioner seeks orders THAT:
 - a) The company be liquidated by the Court under the provisions of the Insolvency Act, 2015.**
 - b) The Court appoints an Official Receiver who is an Insolvency Practitioner as the Provisional Liquidator.**
 - c) The cost of this petition be granted to the petitioner and be paid out of the company's assets.**
 - d) Such other order may be made in the circumstances as the Court shall deem fit.**
2. The Petition is premised on grounds that the Debtor is indebted to the Petitioner in the sum of Kshs. 469,980/= pursuant to a judgment and orders obtained on 12.4.22 by the Petitioner in Malindi CMCC No. E208 of 2021. The Petitioner avers that in spite of repeated requests, the Debtor has failed, neglected, refused or declined to pay the amount due.
3. The Petitioner further stated that she served a statutory demand on the Debtor on 8.7.22, which notice has not been set aside. She stated that the Debtor is deemed unable to or has no reasonable prospects of paying its debts and the amount owed to the Petitioner.
4. The Debtor opposed the Petition *vide* a notice of preliminary objection dated 15.5.24. The objections are that the Petition is incurably defective as it is not in the prescribed form provided under Section 425 of the Insolvency Act (the Act) and Regulation 77B of the Insolvency Regulations, 2016. Further, that the petition is not accompanied by a statement of financial position as required under regulation 77B(2)(b).
5. Section 425 of the Act makes provision for applications to the Court for liquidation of companies. The provision stipulates who may make an application for liquidation as follows:

- (1) An application to the Court for the liquidation of a company may be made any or all of the following—**
 - (a) the company or its directors;**
 - (b) a creditor or creditors (including any contingent or prospective creditor or creditors);**
 - (c) a contributory or contributories of the company;**
 - (d) a provisional liquidator or an administrator of the company;**
 - (e) if the company is in voluntary liquidation, the liquidator.**
- (2) ...**

6. It is evident that the Petitioner is a creditor of the company. She is thus entitled to bring this petition under section 425(1)(b) of the Act.

7. Regulation 77(B) of the Insolvency Regulations makes procedural provisions for the filing of a petition as follows:

- (1) For the purposes of section 425 of the Act an application for liquidation shall be —**
 - (a) by way of a petition in Form 32C as set out in the First Schedule; and**
 - (b) accompanied by a verifying affidavit in Form 32D as set out in the First Schedule.**
- (2) The petition for liquidation shall be accompanied by the following documents—**
 - (a) a statutory demand in Form 32E set out in the First Schedule if the reason for petition is indebtedness; and**
 - (b) a statement of financial position in Form 32 as set out in the First Schedule where necessary.**

8. The Court notes that the Petition was not in full conformity with Form 32C prescribed under the Regulations. The procedural lapse however, does not go to the substance of the matter. It is a technicality that can be overlooked pursuant to Article 159(2)(d) of the Constitution that requires that justice be administered without undue regard to procedural technicalities. There is on record a statutory demand which was duly served upon the Debtor as a pre-condition for presentation of this Petition. As regards the statement of financial position, the law requires that this accompany a petition where necessary. The Court has not been told that it was necessary that such statement accompany the Petition herein. I accordingly find that the provisions of Section 328 of the Act and Regulation 77B have been complied with. The preliminary objection is thus without merit.

9. Section 424 of the Act stipulates the circumstances in which a company may be liquidated by the Court, which include inability to pay debts.
10. Section 384 provides for the circumstances in which a company is unable to pay its debts. Subsection (1)(b) provides:

For the purposes of this Part, a company is unable to pay its debts—

(b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part;

11. It is trite that a liquidation order will not be made where the debt claimed is disputed. In **Matic General Contractors Limited vs. The Kenya Power and Lighting Company Limited (2001) LLR 4837 (CAK)** as cited by Kasango, J. in **In re Ukwala Supermarket Limited [2019] KEHC 7877 (KLR)**, the Court held:

It is thoroughly settled now that, on a Petition to wind up, no order can be made until the debt is proved, where there is a bonafide dispute, as to its existence. But if a man will present a Petition to wind up when he has distinct notice that the debt is disputed, and the circumstances show that it is bonafide disputed, and also when he knows that the Company is solvent, if he will have recourse to this vexatious mode of proceeding, I can entertain no doubt that the duty of the Court, under those circumstances, would be, not to suspend the Petition, but absolutely dismiss it, with costs. And my opinion is, that this Court ought not, and I think will not at all events, I will not until I am controlled by higher authority permit the procedure under the winding up Acts to be made the vehicle of oppression.

12. It is uncontroverted that there is a court decree against the Debtor, which remains unsatisfied to date. Demand has been made for payment, but the decree remains unsatisfied. Under Section 384(1)(b) of the Act, the Debtor is unable to pay its debts. The Petitioner has therefore established grounds for liquidation of the Debtor and as a result, the Petitioner is entitled to an interim order of liquidation pursuant to section 427(1)(c) of the Act.
13. The upshot is that the petition succeeds and I make the following orders:
 - (1) An interim liquidation order is hereby issued in respect of Invesco Assurance Company Limited;
 - (2) The Official Receiver is hereby appointed as the provisional liquidator of Invesco Assurance Company Limited;
 - (3) The costs of this Petition shall be paid out of the company assets.

DATED SIGNED and DELIVERED in MALINDI this 13th day of March 2026

M. THANDE

JUDGE