



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Resolution Insurance Company Limited (Insolvency Petition E077 of 2023)
[2025] KEHC 1949 (KLR) (Commercial and Tax) (25 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E077 OF 2023
A MABEYA, J
FEBRUARY 25, 2025**

IN THE MATTER OF RESOLUTION INSURANCE COMPANY LIMITED IN LIQUIDATION

BETWEEN

INSURANCE REGULATORY AUTHORITY PETITIONER

AND

RESOLUTION INSURANCE COMPANY LTD RESPONDENT

RULING

1. Before Court is the application dated 6/6/2024. The same was brought under sections 429, 431(3), 435(1), 443(a), 444, 459(2)(d), 678, 680, 681, 692 of the Insolvency Act 2015, regulations 10(4) of the Insolvency regulations 2016.
2. The application seeks orders that a declaration be made to the effect that the Policy Holders Compensation fund was not entitled to make any payments out of the bank accounts held by Resolution Insurance Company from the date of the appointment of the Interim Liquidator on 21/12/2023.
3. That it should be declared that Kshs. 113,584,798.10 and Kshs. 7,785,371.90 paid out to Milimo Muthomi & Co advocates on 5/1/2024 and 12/1/2024, respectively by the Policy Holders Compensation Fund (“the Fund”) forms the assets of the Insurance company. That the actions of the Fund were unlawful and ultra VIRES. That consequently, the Fund be compelled to pay the sum of Kshs. 36,074,952.40 to the applicant
4. The application was supported by the grounds set out on the face of it and the affidavit sworn by LONGET TERER on 10/7/2024. He stated that on 21/12/2023, this Court placed the Company under liquidation and appointed an interim Liquidator. The order was served upon the Fund on



- 2/1/2024. That upon the appointment of the interim Liquidator, the mandate and control of the assets of the Company as well as all its assets became vested in the Interim Liquidator.
5. That upon such appointment, the Interim Liquidator made persistence requests to the Fund to transfer the Bank Mandate to him but the officials of the Fund declined. Unbeknown to him, the Fund unlawfully transferred Kshs.122,410,978/- from the accounts of the Company at NCBA to unsecured creditors. On 192/2024, through Milimo & Muthomi C. Advocates, the Fund refunded to the Company accounts Kshs.85,295,217.60 and retained Kshs.36,074,952.40 which the Interim Liquidator now seeks to recover.
 6. The application was opposed by the Fund through the affidavit of Noel Zuma sworn on 10/7/2024. He stated that the appointed liquidator had no capacity to institute any proceedings since he was not a party to the suit. That the Fund had not been enjoined in the proceedings and no order therefore could be made against it. That since the Company was under liquidation, it had no capacity to sue.
 7. He further stated that the Fund was a state corporation under the *Insurance Act* mandated to act as a statutory manager of insurance companies. That under section 67C(2)(i) of the *Insurance Act*, the statutory manager took the role of the board of directors of the insurance company.
 8. It was contended stated that any expenses incurred by the statutory manager in discharge of his duties should be met by the insurance company. That at the time of its appointment, there had been ongoing cases and others came up during the pendency of the statutory management. That in view thereof, the statutory manager appointed the firm of Millimo, Muthomi & Company Advocates to prosecute and defend legal proceedings.
 9. That this attracted legal fees amounting to Kshs 57,445,596/= and on 4/1/2024, the statutory manager paid Kshs 28,289,581/- and Kshs 7,785,371.90 on 12/1/2024 leaving a balance of Kshs. 21,370,623.10. It was stated that there was nothing wrong with the partial payment to the law firm.
 10. The application was canvassed by way of written submissions which I have considered. It was submitted for the applicant that despite knowledge of the appointment of an interim Liquidator, the Fund transferred the sum of Kshs 113,584,798.10 to Hollard Health International and Kshs 7,785,371.90 to Milimo Muthomi & Co Advocates.
 11. That in view of section 431 of the *Insolvency Act*, any transfer of assets after a liquidation order is made is void. It was additionally submitted that the two parties who received the funds were unsecured creditors of the company and there was no justification as to why they received the payments. That upon appointment of an interim liquidator, the Fund had no right or mandate to dispose of any of the company's property.
 12. For the Fund, it was submitted that the applicant had been placed under interim Liquidation therefore had no capacity to institute legal proceedings before any court of law. That in line with section 432 of the *Insolvency Act*, a Liquidator cannot commence legal action on behalf of the company unless with the approval of the Court or liquidation committee.
 13. It was further submitted that the applicant did not file any application for enjoinder of the Fund to the application. That pursuant to section 67C(2) (i) of the *Insurance Act*, the Fund was appointed take over the role of the board of directors of the Company. That any expenses incurred by the Fund in discharge of its statutory duties is met by the insurance company. That pursuant to Section 67F of the *Insurance Act*, the Fund partially settled the legal fee amount owed to the law firm of MMC. That the Fund did not immediately cease to be concerned with the affairs of the Company rather it remained responsible for the affairs of the Company until the Liquidator takes over the operations of the Company.



14. I have considered the rival contestations and the submissions on record. The main issue for determination is whether the applicant is entitled to the orders sought.
15. Before delving into the merits of the application, the Court notes that the Fund challenged the competency of the application. It argued that the interim Liquidator lacked the mandate to institute legal proceedings, citing section 432 of the *Insolvency Act*, which restricts a liquidator from commencing legal action without obtaining leave of the Court.
16. On this issue, the Court acknowledges that its jurisdiction to supervise the Liquidation of a company is derived from section 423 of the *Insolvency Act*. However, I do not agree with the contention that the Liquidator must seek leave under Section 432 aforesaid to initiate proceedings. Section 432 outlines the consequences of a liquidation order, specifically requiring leave of the Court for actions brought against the company. In the present case, the proceedings have been initiated by the Liquidator against the Fund for the Company and not against the Company. Accordingly, the Fund's argument is inapplicable.
17. Moreover, Sections 678, 679, and 680 of the *Insolvency Act* explicitly provide for the realization of property under liquidation, allowing an officeholder to take necessary steps to recover the assets of the Company under liquidation. Therefore, I find that the application is properly before the court and is not incompetent.
18. As regards the objection that the Fund had not been enjoined and that therefore no orders can be made against it, I agree that if the Fund had not been served and participated in these proceedings, that objection would be valid. However, in the circumstances of this case where clearly the Fund was served, it responded and opposed the application, no prejudice has been shown to have been suffered for lack of a joinder order. The full participation by the Fund in the proceedings cures the lack of that order as the constitutional right to fair hearing has been safeguarded. The Fund is hereby deemed to have been properly enjoined for purposes of opposing the Motion.
19. On merit, the applicant sought a declaration that the Fund was not entitled to make payments out of the bank accounts held by the Company after the appointment of the Interim Liquidator. He further sought the refund of the sum of Kshs 36,074,952.40.
20. The applicant argued that any transaction made after the liquidation order was void and the two parties who received the funds were unsecured creditors. That any disposition of the company property was a violation of section 429(1) of the *Insolvency Act*.
21. Section 429(1) of the *Insolvency Act* provides: -
 - “(1) In a liquidation ordered by the Court—
 - (a) any disposition of the company's property; and
 - (b) any transfer of shares, or alteration in the status of the company's members, made after the commencement of the liquidation is void, unless the Court otherwise orders.
 - (2) Subsection (1) does not apply to action taken by an administrator of a company while a liquidation application is suspended under section 558(1)(b) (effect of administration order on pending liquidation application).”
22. This provision means that once a company is placed under liquidation by a court order, any transactions involving its assets, shares, or membership status that occur after such order are



automatically considered void unless the Court grants specific approval. The intent behind this restriction is to preserve the Company's assets and prevent any unauthorized dealings that could undermine the rights of creditors and other stakeholders in the liquidation process.

23. In the present case, the Fund has not contested that it transferred funds from the Company accounts to 3rd parties after the liquidation order had been made. Further, the evidence shows that the Fund was served with the order on 2/1/2024 but it proceeded to effect the transfers on 5/1/2024 and 12/1/2024, respectively. There was allegation that the interim Liquidator requested for the change of the Bank Mandate for the Company but the officials of the Fund dilly dallied or simply ignored the request and went ahead to deal with the assets.
24. Its justification is that the Fund remained in control of the company's affairs until the provisional liquidator formally assumed operations. Additionally, it contended that under section 67F of the *Insurance Act*, it was legally entitled to incur and settle any expenses arising from the discharge of its statutory duties.
25. Having carefully considered the arguments presented by both parties, the Court acknowledges that the Fund plays a critical role under section 67 of the *Insurance Act* in managing insurance companies that are under distress. The purpose of this statutory intervention is to safeguard the interests of policyholders and creditors by ensuring that the company's operations are handled prudently during the financial distress. The Fund is mandated to take over management functions, oversee financial transactions and make crucial decisions aimed at stabilizing the insurer's affairs.
26. However, once there are no viable means of turning around an ailing insurance company and a liquidation order is made and a provisional Liquidator is appointed, the role of the Fund immediately ceases and passes over to the Interim Liquidator. At that point, in accordance with section 431 of the *Insolvency Act*, the liquidation process commences immediately upon the issuance of the order thereby bringing the statutory manager's role to an end.
27. In this regard, the Court does not agree with the Fund's contention that it could continue exercising management functions beyond this point. Its role was limited to facilitating the smooth handover of the Company's affairs to the appointed Liquidator.
28. In view of the foregoing, the Fund acted illegally. It sought to defeat the provisions of the *Insolvency Act* by attempting to favor some unsecured creditors over others. That is illegal and must be discouraged. A statutory body acting as such is being rogue. It is conduct that MUST be discouraged.
29. It is very clear that the officials of the Fund acted mala fides with a view to defeat the law and the liquidation order. It is in such circumstances that this Court has in the past and even now opines that the losses suffered by the statutory body should be borne by the officials who subject such bodies to such losses.
30. The withdrawal of funds from the Company's accounts after the commencement of liquidation was rendered void under section 429 of the *Insolvency Act*. While the Court does not dispute that the expenses incurred during the period of statutory management needed to be settled, such payments should have been made under the direction and oversight of the appointed Liquidator. By hurriedly effecting the said payments, the Fund acted illegally and utter contempt of the liquidation order. If the orders had been sought against the officials of the Fund personally, this would have been a proper case to so order.
31. Accordingly, the Court finds the application to be meritorious and the same is allowed as prayed.
It is so ordered.



SIGNED AT KISUMU THIS 18TH DAY OF FEBRUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2025.

F. GIKONYO

JUDGE

