



Too (suing as the Administrator and /or Personal Representative of the Estate of Duncan Kiprono Mosonik - Deceased) v Africa Merchant Assurance Co. Ltd (Insolvency Petition 1 of 2023) [2023] KEHC 23726 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23726 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
INSOLVENCY PETITION 1 OF 2023
JK SERGON, J
OCTOBER 12, 2023
IN THE MATTER OF THE INSOLVENCY ACT, 2015
AND
IN THE MATTER OF THE INSURANCE ACT CAP 486 OF THE LAWS OF KENYA
BETWEEN
JOHN MOSONIK TOO (SUING AS THE ADMINISTRATOR AND /OR
PERSONAL REPRESENTATIVE OF THE ESTATE OF DUNCAN KIPRONO
MOSONIK - DECEASED) PETITIONER
AND
AFRICA MERCHANT ASSURANCE CO. LTD RESPONDENT**

RULING

1. The petitioner/creditor in this case filed the instant petition dated 4th May, 2023 as the respondent herein was indebted to the petitioner in the sum of Kshs. 800,000/=.
2. The Petitioner Creditor outlined the circumstances leading to the Respondent's indebtedness that on 9th April, 2015 the deceased (son to the petitioner) was a lawfully riding motor cycle registration no. KMDN 896 X along Bomet - Sotik Road when near Kapkwen, Motor Vehicle Registration No. KAV 033 S which was being recklessly and/or negligently driven by the Respondent's insured that he caused the same to collide into motor cycle registration no KMDN 896 X as a result of which the deceased suffered fatal injuries. As a result of the accident the petitioner herein sued the owner of the motor vehicle registration no. KAV 033 S for injuries and damages occasioned vide Bomet PMCC No. 85 of 2015, the said suit was finalized in favour of the petitioner and judgment delivered on 20th June, 2016.
3. The respondent herein failed to make good of the decretal sum and the petitioner instituted a declaratory suit Bomet PMCC No. 87 of 2016 seeking a declaration order against the respondent



- herein who had insured motor vehicle KAV 033 S to satisfy the judgment in Bomet PMCC No. 85 of 2015 in accordance with section 10 of the Insurance (Motor Vehicle Third Party Risks) CAP 405 Laws of Kenya and that on 12th May, 2017 judgment was entered against the respondent in the sum of Kshs. 3,000, 000/=.
4. The Petitioner instituted execution proceedings against the respondent in BOMET PMCC No. 87 of 2016 and the auctioneers were partially successful as they received part payment in the sum of Kshs. 2,200,000/= leaving an outstanding sum of Kshs. 800,000/= to date. The Respondent failed and/or ignored to settle the decretal balance and the petitioner proceeded to file garnishee proceedings, which were abortive since the monies held by the garnishees had been depleted by a myriad of garnishee order absolute that had been issued against them.
 5. The Petitioner contended that the amount of Kshs. 800,000/= owed by the respondent is within the prescribed level in accordance with the [Insolvency Act](#) and Rules thereunder.
 6. The Petitioner contended that the respondent is unable and has no reasonable prospects of paying the debt. The petitioner issued a statutory demand in respect of the debt owed by the respondent and twenty one (21) days had lapsed since the petitioner served the statutory demand and no part of the debt had been settled by the respondent and further that there was no application filed by the Respondent to set aside the statutory demand in respect of the debt owed by the petitioner. The petitioner was not aware of any assets belonging to the Respondent that can be subjected to execution of the decretal amount.
 7. The petitioner/creditor was therefore seeking the following orders;
 - a) The respondent be liquidated by an order of this court and in accordance with the [Insolvency Act](#), 2015
 - b) That this court appoints an official receiver/statutory manager who is an authorized insolvency practitioner to act as a provisional liquidator
 - c) That the cost of this petition and the petitioner's debt of Kshs, 800,000/= be provided from the assets of the respondent.
 - d) The assets registered in the name of the respondent be disposed off by way of public auction and proceeds be applied towards settlement of the decree issued by the court in Bomet PMCC No. 87 of 2016
 - e) The Honourable Court be pleased to issue any other orders as it may deem just and/or fit in the circumstances.
 8. The petition was supported by a verifying affidavit sworn by John Mosonik Too the legal representative of the estate of Duncan Kiprono Mosonik (Deceased) and the petitioner herein.
 9. The petitioner avers that he was informed by his advocates on record that on 28th March, 2023 the respondent herein and the commissioner of insurance were served with the statutory demand and that the same was received and that twenty-one (21) days had lapsed from the date of the statutory demand upon the respondent.
 9. The Respondent did not file any response to the petition.
 10. The matter came up for hearing on July 20, 2023 Mr. Rono Learned Counsel representing the petitioner reiterated that the respondent had not filed any response to the petition and that the instant insolvency cause was related to insolvency cause no. 3 and insolvency cause no. 4. He urged the court



to grant orders in the petitions as the same were unopposed. There was no attendance on behalf of the respondent.

11. This is an insolvency matter and the relevant legal provisions are section 425 (1) (b) of the *Insolvency Act*, No. 18 of 2015 and regulation 77B of the *Insolvency (Amendment) Regulations*, 2018 which are applicable in the instant petition. Regulation 77B of the *Insolvency (Amendment) Regulations*, 2018 provides that:

- “(1) (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. ”

12. Section 424 (1) (e) of the *Insolvency Act*, No. 18 of 2015 provides that a company may be liquidated by the court if the company is unable to pay its debts. Section 384 of the said Act sets out the circumstances in which a company is unable to pay its debts as follows;

- “(1) For the purposes of this Part, a company is unable to pay its debts—
- (a) If a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for twenty—one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor;
- (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; or
- (c) If it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.
- (2) A company is also unable to pay its debts for the purposes of this Part if it is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities).
- (3) The insolvency regulations may increase or reduce the amount specified in subsection (1) (a)

13. It is clear that in the instant petition the respondent herein is unable to pay its debts due to the fact that part of the decretal sum in Bomet PMCC No. 87 of 2016 remains unsatisfied. I therefore find that the respondent's refusal/failure to settle the decretal amount is prima facie evidence that the company is unable to pay its debt. Consequently, I find that it would, in the circumstances of this case, only be just, equitable and fair to grant the orders sought liquidation petition.



14. However, the sole issue for this court determination is whether the insolvency petition filed against the respondent is based on the process and procedure prescribed by the law. 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 court in Bomet PMCC No. 87 of 2016.
15. However, section 121 of the *Insurance Act* provides as follows; “ (1) If an application for the liquidation of an insurer is presented by a person other than the Commissioner, the applicant shall serve a copy of the application on the Commissioner. (2) On being served with a copy of such an application, the Commissioner becomes a party to the proceedings and is entitled to be heard at the hearing of the application.”
15. It is worth noting that the above provision is couched in mandatory terms. The petitioner has not shown that the Commissioner of Insurance was served with the Petition herein as required by section 121 above.
16. Therefore this court having noted that the presence and/or appearance of the Commissioner of Insurance is a critical requirement in the winding up proceedings involving insurance companies, this court directs that the Petition and all the other pleadings filed herein be served on the Commissioner of Insurance within fifteen (30) days from the date of this decision to enable the said Commissioner give his input to the Petition before this court can make its decision on the Petition. This ruling to apply to Insolvency Petition No. 3 and Insolvency Petition No. 4 respectively.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF OCTOBER, 2023.

.....

J.K. SERGON

JUDGE

In the presence of:

C/Assistant – Rutoh

No Appearance for the Parties

