



Rono v Insurance Regulatory Authority & 4 others (Constitutional Petition E008 of 2023) [2024] KEHC 11373 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11373 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CONSTITUTIONAL PETITION E008 OF 2023**

JK SERGON, J

SEPTEMBER 26, 2024

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 ARTICLES 10,19(2),20(1), (2), (3) & (4),21(1),23(3),27(1),40(3) 46,47(1),48,50(1),258(1) AND 259(1) AND IN THE MATTER OF: SECTION 203 OF THE INSURANCE ACT CAP 487 OF THE LAWS OF KENYA AND IN THE MATTER OF: SECTION 4,10 OF THE INSURANCE MOTOR VEHICLES THIRD PARTY RISK ACT CAP 405 OF THE LAWS OF KENYA

BETWEEN

CHERUIYOT KOSKEI RONO PETITIONER

AND

INSURANCE REGULATORY AUTHORITY 1ST RESPONDENT

INVESCO ASSURANCE CO LIMITED 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

THE STATUTORY MANAGER INVESCO ASSURANCE CO LTD 4TH RESPONDENT

LEAH CHEPCHIRCHIR CHERUIYOT & SHEILA CHELANGAT (SUING AS ADMINISTRATORS OF THE LATE HILLARY KIPLANGAT MOI) 5TH RESPONDENT

JUDGMENT

1. The petitioner herein has moved to court by way of a petition dated 20th June, 2023 seeking the following reliefs;
 - i. That the execution proceedings by the 5th respondents as against the petitioner are unlawful.



- ii. A declaration that the fundamental rights and freedoms of the petitioner have been violated by the respondents herein.
 - iii. A declaration and order that the 1st and 2nd respondents jointly and severally should meet and make payments of all decretal sums and costs against the defendants in the cases arising from the accidents for which the petitioner had obtained insurance cover with the 2nd respondent under section 4 of the Insurance (Motor Vehicle Third Party Risks) Act.
 - iv. An order for permanent injunctions to restrain the 5th respondents by themselves or through their representatives from executing the court judgment and decree against the petitioner in respect of the accident for which the petitioner had obtained insurance cover under section 4 of the Insurance (Motor Vehicle Third Party Risks) Act specifically in Sotik Civil Suit No. 106 of 2017.
 - v. An order for restitution for all the properties belonging to the petitioner already proclaimed and sold by agents of the 4th respondent.
 - vi. Costs of this petition.
2. A brief factual background to the petition is as follows; The constitutional petition stems from a judgment delivered on 27th April 2021 in PMCC No. 106 of 2017 Leah Chepchirchir Cheruiyot & Sheila Chelangat (Suing as Administrators of the Estate of Hillary Kiplangat Moi (Deceased) v Cheruiyot Koskei & Kitungi Munyoki Isaac. Upon conclusion of the case, the trial court awarded damages in the sum of 2,082,885/ =. The 5th Respondent through M/s Gachathi & Co. Advocates took out a decree and proclaimed the assets at the petitioner's workplace and his matrimonial home. The petitioner is aggrieved that as a result of the respondent's respective actions, the petitioner's rights were violated.
 3. The petitioner is aggrieved because following the accident as required by the policy, he reported the claim to the 2nd respondent herein, the above notwithstanding, as a result of the judgment entered in Sotik Civil Suit No. 106 of 2017, the petitioner has constantly been proclaimed by auctioneers acting on instructions of the 5th respondents and is apprehensive of execution by way of committal to civil jail.
 4. The petitioner faulted the 1st respondent for failing to discharge its mandate as a regulator in the insurance sector. The 1st respondent neglected and/or reneged on taking decisive action against the 2nd respondent and/or advising unsuspecting consumers from taking out insurance policies with the said company despite signs that all was not well thereby imperiling consumers such as the petitioner upon receivership and the vagaries of execution.
 5. The petitioner faulted the 2nd respondent for suffering double jeopardy on account of payment of premiums and excess yet there is subsequent proclamation of their property and risk of committal to civil jail in execution of the decree in the primary suit being Sotik Civil Suit No. 106 of 2017.
 6. The petitioner faulted the 5th respondents for flouting the law in pursuing the policy holder instead of the insurance company. The petitioner sought the intervention of this court and was granted stay orders pending the hearing and determination of this petition.
 7. The petition is supported by the supporting affidavit of Cheruiyot Koskei Rono the petitioner herein.
 8. In response to the petition, the Insurance Regulatory Authority, the 1st respondent herein and Attorney General's Chambers, the 3rd respondent herein jointly filed grounds of opposition dated 27th September, 2023 opposing the petition of the following grounds;



- i. That section 204A of the *Insurance Act* Cap 487 grants the 1st respondent with powers to settle disputes between a policy holder and an insurance company.
 - ii. That if the policy holder is not satisfied by the determination of the 1st respondent following the written complaint, the aforementioned section grants the right to an appeal to the Insurance Tribunal.
 - iii. That the petitioner failed to adduce any evidence to show that he lodged a complaint with the 1st respondent against the 2nd respondent
 - iv. That the 1st respondent denies infringement of the petitioner's rights considering the petitioner did not abide with the requisite dispute resolution process stipulated under the *Insurance Act* to enable the 1st respondent to exercise its powers and therefore the case against the 1st respondent is devoid of a cause of action and ought to be dismissed with costs.
9. The 1st respondent filed a replying affidavit sworn by Geoffrey Kiptum the Commissioner of Insurance and the Chief Executive Officer of the Insurance Regulatory Authority.
 10. The 1st respondent avers the Insurance Regulatory Authority is a statutory regulatory body established under the *Insurance Act* Cap 487 Laws of Kenya with the mandate to supervise, regulate and promote the development of the insurance and industry in Kenya.
 11. The 1st respondent set out the objects and functions of the Insurance Regulatory Authority as set out in section 3A of the *Insurance Act* which includes and is not limited to protect the interests of insurance policy holders and insurance beneficiaries in an insurance contract.
 12. The 1st respondent avers that in fulfillment of its mandate to protect policyholders, the 1st respondent receives complaints under section 204A of the *Insurance Act* and that the petitioner never lodged a written complaint with the 1st respondent against the 2nd respondent as provided for in the aforementioned section, hence the 1st respondent is not privy to the dispute that is the subject matter of the instant petition.
 13. The 1st respondent avers that the instant petition offends the doctrine of privity to contract as the 1st petitioner was neither a party to the contract or privy to the agreement between the said parties.
 14. The 1st respondent avers that the orders sought by the petitioners offends the mandatory statutory exclusion of liability against the 1st respondent under section 168 of the *Insurance Act* which stipulates that no legal proceedings shall be instituted against the 1st respondent and no compensation shall be payable to any person for any loss, damages or home directly or indirectly caused by anything done or intended to be done by the 1st respondent.
 15. The 1st respondent avers that the instant petition fails to meet the constitutional threshold in *Anarita Karimi Njeru v Republic* (1979) KLR 154. The 1st respondent further reiterated that constitutional petitions should be framed with a reasonable degree of precision and specificity of that which is complained of, the provisions said to be infringed and the manner in which the provisions were infringed.
 16. The court directed that the petition be canvassed by written submissions. At the time of writing this judgment, the petitioner complied and filed written submissions which the court has considered in rendering a fair and just determination.
 17. The petitioner submitted that the substratum of the petition relates to violation of fundamental human rights and that this Court has been conferred jurisdiction by dint of Article 165(3)(b) as



read with Article 23(1) of *the Constitution*. The petitioner reiterated that this court has the requisite jurisdiction to hear and determine applications for violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

18. The petitioner conceded that Article 159 (2) of *the Constitution* recognizes alternative dispute resolution and that the courts have upheld this constitutional requirement. However, cases have timeously developed to combat unique and peculiar circumstances by recognizing exceptional circumstances to the exhaustion of local remedies. The petitioner cited the High Court case of *Krystalline Salt Limited v Kenya Revenue Authority (2019) eKLR* defined exceptional circumstances as; "What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile. This Court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to respect the applicable remedy." The petitioner relied on section 9(4) of the *Fair Administrative Action Act* which stipulates that a High Court may in exceptional circumstances and on application exempt such a person from obligation in exhausting local remedies before instituting proceedings. The petitioner contended that he was apprehensive of committal to civil jail and given the urgency of the matter, an application to lift the warrant of arrest was necessary. The Petitioner was therefore adamant that he had proven exceptional circumstances on exhaustion of local remedies.
19. The petitioner maintained that his rights had been violated and/or threatened and reiterated that section 10 of the *Insurance Act* (Motor Vehicle Third Party Risks) provides that insurance companies have a duty to satisfy judgments against persons insured by paying the amount payable thereunder with respect to liability yet the 2nd respondent has blatantly failed to honor the judgment in *Sotik Civil Suit No. 106 of 2017*. The petitioner cited the case of *Maingi v Insurance Regulatory Authority & 3 others; Nguli & another (Interested Parties) (Constitutional Petition 18 of 2022)* which is *pari passu*, where the court declared that the petitioner's constitutional right to liberty, movement and association and peaceful ownership of his property were violated by the third party by the execution process, decrees, judgment and claims against the policyholder, thereby warranting the court's intervention.
20. The petitioner contended that the objects and functions of the Insurance Regulatory Authority as espoused in Section 3A of the *Insurance Act* have been adjudicated upon. In the case of *Commission on Administration Justice v Insurance Regulatory Authority & Another (2017)*, the court outlined the roles of the 1st Respondent as follows; "Insurance as a business vested or affected with the public interest. Thus, the business of insurance, although primarily a matter of private contract, is nevertheless of such concern to the public as a whole that it is subject to governmental regulation to protect the public's interests. Therefore, the fundamental purpose of insurance regulatory law is to protect the public as insurance consumers and policyholders. Functionally, this involves: - a) Licensing and regulating insurance companies and others involved in the insurance industry; b) Monitoring and preserving the financial solvency of insurance". The supervisory role accorded to the 1st respondent against the 2nd respondent cannot be circumvented as it is to ensure that all persons are protected if any insurance company is struggling to stay afloat. The petitioner was adamant that the 1st respondent therefore failed to exercise the supervisory role and convey information to unsuspecting customers.



21. I have considered the pleadings and submissions by the parties. I find that the issues for determination by this court is whether the petition meets the threshold for a constitutional petition and whether the petitioner exhausted the dispute resolution mechanisms.
22. As to whether the petition meets the threshold for a constitutional petition, constitutional petitions should be framed with a reasonable degree of precision and specificity of that which is complained of, the provisions said to be infringed and the manner in which the provisions were infringed. In *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot* [2021] eKLR the court observed as follows; “ It is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints. ” This court finds that the petition was not pleaded with precision as it did not state the alleged provisions violated and the acts and or omission leading to the alleged violation of *the Constitution* of Kenya, 2010. Further no particulars and manner of the contravention or injury to be suffered was demonstrated.
23. As to whether, the petitioner exhausted the dispute resolution mechanisms before filing his petition, this court finds that the petitioner did not demonstrate any efforts made to invoke the dispute resolution mechanisms set out in section 204A of the *Insurance Act* CAP 487 stated as follows;

“Power of the Authority to settle disputes

 1. Any insurance customer may lodge a written complaint with the Commissioner against a regulated entity in relation to the provision of its services.
 2. Subject to subsection (3), where the Commissioner determines a dispute such determination shall be binding on the parties to the dispute.
 3. A party that is dissatisfied with the determination of the dispute by the Commissioner may within thirty days appeal the determination to the Tribunal.” The Court of Appeal in the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others*(2015) eKLR. observed as follows: “It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.” This court finds that the petitioner did not demonstrate peculiar or exceptional circumstances that precluded him from exhausting local remedies before instituting the instant proceedings.
24. In the premises, this Court is satisfied that in the present matter there was no violation and/or infringement of any constitutional provisions under the Bill of Rights to justify the petitioner to invoke the constitutional jurisdiction of this Court and that the petitioner did not exhaust the dispute



resolution mechanism set up by the regulator in the Insurance Sector. In the foregoing, the instant constitutional petition is not tenable and it is accordingly struck out and dismissed with each party bearing their own costs. This judgment to apply to Kericho High Court Constitutional Petition. No. E013 Of 2023.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 26TH DAY OF SEPTEMBER, 2024

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Kiprono for the Petitioner

Ojwang for 1st & 3rd Respondents

