



**Consumers Federation of Kenya (COFEK) (Suing Through its Officials Namely S Mutor, E Kanake and Ochieng) v Cabinet Secretary for National Treasury and Economic Planning & 24 others (Petition E381 of 2023) [2024] KEHC 16213 (KLR) (Constitutional and Human Rights) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16213 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E381 OF 2023  
LN MUGAMBI, J  
DECEMBER 20, 2024**

**BETWEEN**

**CONSUMERS FEDERATION OF KENYA (COFEK) ..... PETITIONER  
SUING THROUGH ITS OFFICIALS NAMELY S MUTOR, E KANAKE AND  
OCHIENG**

**AND**

**CABINET SECRETARY FOR NATIONAL TREASURY AND ECONOMIC  
PLANNING ..... 1<sup>ST</sup> RESPONDENT  
INSURANCE REGULATORY AUTHORITY ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT  
POLICY COMPENSATION FUND ..... 4<sup>TH</sup> RESPONDENT  
AAR INSURANCE ..... 5<sup>TH</sup> RESPONDENT  
BRITAM INSURANCE ..... 6<sup>TH</sup> RESPONDENT  
CAPEX INSURANCE ..... 7<sup>TH</sup> RESPONDENT  
CORPORATE INSURANCE ..... 8<sup>TH</sup> RESPONDENT  
CORPORATE INSURANCE GENERAL INSURANCE ..... 9<sup>TH</sup> RESPONDENT  
CORPORATE LIFE INSURANCE ..... 10<sup>TH</sup> RESPONDENT  
DIRECTLINE INSURANCE ..... 11<sup>TH</sup> RESPONDENT  
INVESCO INSURANCE ..... 12<sup>TH</sup> RESPONDENT**



KENINDIA INSURANCE .....	13 <sup>TH</sup> RESPONDENT
KENYA ORIENT INSURANCE .....	14 <sup>TH</sup> RESPONDENT
MADISON LIFE INSURANCE .....	15 <sup>TH</sup> RESPONDENT
XPLICO INSURANCE .....	16 <sup>TH</sup> RESPONDENT
KENYAN ALLIANCE INSURANCE .....	17 <sup>TH</sup> RESPONDENT
MONARCH INSURANCE .....	18 <sup>TH</sup> RESPONDENT
ALLIANCE INSURANCE .....	19 <sup>TH</sup> RESPONDENT
MUA KENYA INSURANCE .....	20 <sup>TH</sup> RESPONDENT
OCCIDENTAL INSURANCE .....	21 <sup>ST</sup> RESPONDENT
PACIS INSURANCE .....	22 <sup>ND</sup> RESPONDENT
SANLAM GENERAL INSURANCE .....	23 <sup>RD</sup> RESPONDENT
TAKAFUL ISURANCE .....	24 <sup>TH</sup> RESPONDENT
XPLICO INSURANCE .....	25 <sup>TH</sup> RESPONDENT

## JUDGMENT

1. The Petition dated 3<sup>rd</sup> October 2023 is supported by the Petitioner’s affidavit in support of even date sworn by its Secretary General, Stephen Mutoro.
2. The gist of this Petition is that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have permitted the 5<sup>th</sup> to 24<sup>th</sup> Respondents to operate insurance business despite being non-compliant with the provisions of the *Insurance Act* Cap 487.
3. As a consequence, the Petitioner alleges that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are in violation of Article 46 of *the Constitution*, in that policy holders and the public are entitled to insurance services of reasonable quality and to the information that is necessary to allow them gain full benefit from insurance services and compensation for loss or injury whenever due.
4. For this reason, the Petitioner seeks the following relief that:
  - a. This suit be declared a public interest suit.
  - b. A declaration be issued that the fundamental rights and freedoms of the Petitioner and Kenya public seeking insurance claims have been violated by the Respondents.
  - c. A declaration be issued that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have failed, neglected and or refused to protect the rights of consumers of insurance services.
  - d. A declaration be issued that the actions of the 2<sup>nd</sup> Respondent of allowing continued operation of non-compliant and or partially compliant 5<sup>th</sup> to 24<sup>th</sup> Respondents is a threat to the rights and wellbeing of consumers of insurance services.
  - e. A declaration be issued that the 2<sup>nd</sup> Respondent should meet all costs against the insured in cases arising from accidents for which any insured (a member of the Petitioner) would have



obtained insurance Cover under Section 4 of the [Insurance \(Motor Vehicles Third Party Risks\) Act](#), Cap 405.

- f. A declaration be issued that the 2<sup>nd</sup> Respondent should meet all costs against the insured in cases arising from loss of property and or life for which any insured (who is a member of the Petitioner) would have obtained insurance under the provisions of the [Insurance Act](#), Cap 487.
- g. A declaration be issued that any of the 4<sup>th</sup> to 23<sup>rd</sup> Respondents which does not have adequate capital ratios and or other requirement of the [Insurance Act](#) is operating outside the law.
- h. An order be issued compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to comply with [Insurance Act](#), Cap 487 and in particular Sections ....187, 193.
- i. This court be pleased to grant such further order or orders as it may deem just and appropriate.
- j. Cost of this petition be met by the Respondents.

### **Petitioner's Case**

5. It is the Petitioner's case that the 5<sup>th</sup> to 24<sup>th</sup> Respondents do not publish information regarding claims that have been approved for compensation.
6. Further, that the 4<sup>th</sup> Respondent does not compensate policy holders, where the 5<sup>th</sup> to 24<sup>th</sup> Respondents fail to honour claims, despite the Respondents (5<sup>th</sup> to 24<sup>th</sup>) continued collection of premiums from policy holders.
7. As a consequence, on 14<sup>th</sup> August 2023 the Petitioner wrote to the 2<sup>nd</sup> Respondent highlighting concerns of non-compliance in the insurance sector stating that some of the insurers had been operating without licenses.
8. Citing Article 46 of [the Constitution](#) in the said letter, the Petitioner pointed out that lack of compliance was exposing unsuspecting policy holders to high risks and requested that action be taken to address the matter. According to the Petitioner, the 2<sup>nd</sup> Respondent did not provide a response to this correspondence.
9. On the 1<sup>st</sup> September 2023, the Petitioner yet again wrote to the 2<sup>nd</sup> Respondent and to the 1<sup>st</sup> Respondent. In this letter, the Petitioner emphasized that the 2<sup>nd</sup> Respondent's licensees had been and continue to operate without adhering to the minimum threshold on capital adequacy ratio contrary to the law and Article 46 of [the Constitution](#).
10. In its response on 18<sup>th</sup> September 2023, the 2<sup>nd</sup> Respondent indicated that it had taken note of the concerns raised and that it would take remedial action.
11. Although aggrieved by the delayed response, the Petitioner in a letter dated 20<sup>th</sup> September 2023, welcomed the same and indicated that it looked forward for a dialogue between the 2<sup>nd</sup> Respondent and the 5<sup>th</sup> to 24<sup>th</sup> Respondents which it suggested be held on 29<sup>th</sup> September 2023. That proposal was not taken up by the 2<sup>nd</sup> Respondent and was so even by the time this Petition filed.
12. Consequently, the Petitioner brings this Petition against the Respondents for their failure to comply with Article 46 of [the Constitution](#) and the [Insurance Act](#). In addition, violation of policy holders' legitimate expectation.



### 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' case

13. In response, the above-named Respondents filed their grounds of opposition dated 15<sup>th</sup> February 2024 stating that:
- i. This Petition does not meet the test of a constitutional petition laid down in the case of Anarita Karimi Njeru v Republic (No.1) (19791 KLR 154 and emphasized in the case of Mumo Matemba v Trusted Society of Human Rights alliance (2014) eKLR, and hence the petition should fail. That apart from citing omnibus provisions of *the Constitution*, the petition has provided neither particulars of the alleged complaints nor the manner of alleged infringements as against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
  - ii. The 2<sup>nd</sup> Respondent is a statutory body under Section 3 of the *Insurance Act* Cap 487 with the mandate to supervise, regulate and promote development of the insurance industry in Kenya and its functions stipulated under Section 3A of the *Insurance Act*.
  - iii. The 2<sup>nd</sup> Respondent's mandate is aimed at the realization of a stable insurance industry through appropriate regulatory and supervisory measures including effecting amendments to the *Insurance Act*, as well as issuance of regulations and circulars to the industry players.
  - iv. Pursuant to Section 183 of the *Insurance Act*, the Commissioner is required and maintains a register of all registered members of the insurance industry. This register is published both in the Kenya Gazette and its website (www.ira.go.ke).
  - v. There are 56 licensed insurance companies operating in Kenya including the 5<sup>th</sup> to 24<sup>th</sup> Respondents. As such the Petitioner's allegations in this regard are unfounded.
  - vi. Pursuant to the 2<sup>nd</sup> Respondent's statutory mandate under Section 3A(2)(b) of the *Insurance Act*, there are systems to ensure that insurance consumers and their beneficiaries are well protected and have value for their monies paid to insurers for various insurance covers. These are:
    - a. Development, publishing and implementation of various guidelines to ensure insurance consumers and their beneficiaries are treated well by insurance companies,
    - b. Created a consumer complaints section where any consumer with a complaint against any insurance company reports and a team reviews and follows up on the complaint with the relevant insurance company.
    - c. Created the Insurance Fraud investigation Unit (IFU) through Directorate of Criminal Investigation (DCI) to ensure that insurance consumers and Insurance Industry are protected from fraudulent activities which are rampant country wide.
    - d. Approval of products to ensure products offered in the market are well priced and there is value for money on what is offered to insurance consumers by the insurance companies.
  - vii. The 2<sup>nd</sup> Respondent while carrying on its mandate under the *Insurance Act* continually monitors the insurance industry business in Kenya and publishes annual reports which capture the performance of all insurance companies, and that the published reports are in the public domain and accessible to the general public contrary to the allegation by the Petitioner in Paragraph 52 of the Petition.



- viii. The 2<sup>nd</sup> Respondent in enforcing Section 41(1) and (2) of the *Insurance Act* issued the Capital Adequacy Guidelines in 2017 which gives parameters used to compute the Capital Adequacy Ratio (CAR).
- ix. Accordingly, the Insurance (Capital Adequacy) Guidelines provide a framework under Rule 17 where non-compliant insurers take remedial measures to ensure compliance with CAR.
- x. The Petitioner's contention that the 2<sup>nd</sup> Respondent's use of words like "industry median (average) is a form of "guidelines outside the Statute" and is "a way to cover up for non-performing insurers" is a gross misconception regarding the 2<sup>nd</sup> Respondent's published reports.
- xi. The Insurance Act under Section 197 requires the Commissioner to maintain records to be maintained by registered persons.
- xii. With regards to the decision of the High Court in Machakos Petition No. 20 of 2018 -Peter Mwuinde & Intercountry Express Ltd vs Insurance Regulatory Authority & 2 others, the 2<sup>nd</sup> Respondent being aggrieved, filed a Notice of Motion Application that is Nairobi Civil Application No. E364 of 2022 Insurance Regulatory Authority v Peter Muinde, Intercountry Express Ltd, Invesco Assurance Co. Ltd & Attorney General on 3<sup>rd</sup> October 2022 seeking stay of execution.
- xiii. The Application was heard by a three-judge bench of the Court of Appeal on 30<sup>th</sup> November 2022 and the Ruling was delivered on 17<sup>th</sup> April 2023. The Court of Appeal, granted stay of execution as it found that it was a matter of public interest that the impugned judgment was being used as a precedent and the Authority was facing multiplicity of suits.
- xiv. The Authority subsequently filed its appeal in Nairobi Civil Appeal No. E323 of 2023 Insurance Regulatory Authority & Attorney General v Peter Mwuinde & 3 others, which is pending hearing and determination together with the Invesco Assurance Co. Ltd's appeal Nairobi Civil Appeal No. E523 of 2022 Invesco Assurance Co. Ltd v Peter Mwuinde & 4 others.
- xv. The Respondents position in the appeal is that the Honourable Judge erred in law and fact by inter alia by making a finding that:
  - a. The State (IRA) must compensate the Petitioners for the failure by the insurer to settle its claims that arose out of a contract between the Petitioners and the insurer contrary to the doctrine of privity of contract;
  - b. The Authority failed in its statutory duty to supervise and regulate the operations of the 3<sup>rd</sup> Respondent on the basis that the insurer had failed to settle the Interested Parties' claims;
  - c. The Authority was liable for the insurer's claims in disregard of the principles of liability in negligence and in misinterpretation of the provisions of the Insurance (Motor Vehicle Third Party) Act, Cap 405 Laws of Kenya and made a finding that the 3<sup>rd</sup> Respondent was liable for the Interested Parties third-party claim;
  - d. The Authority was liable contrary to the provisions on limitation of liability under Section 168 of the *Insurance Act*;



- e. The Authority should have proved that it had carried out its statutory mandate by ensuring that the insurer had settled the claims thus shifting the burden of proof.
- xvi. The Petitioner has not provided evidence of probative value to support the orders sought in the Petition.
- xvii. For all the reasons set out herein, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents urge this Court to dismiss the Notice of Motion Application and the Petition in its entirety with costs.

### **5<sup>th</sup> Respondent's Case**

- 14. This Respondent filed a Replying Affidavit through its Principal Officer, Justine Kosgei sworn on 2<sup>nd</sup> November 2023. On the onset, he informs that the 5<sup>th</sup> Respondent is a duly registered and licensed insurer under the provisions of the *Insurance Act* and regulated by the 2<sup>nd</sup> Respondent.
- 15. He states that it is the 2<sup>nd</sup> Respondent's function to determine whether or not an insurer meets the minimum capital and maintains the capital adequacy ratio required. Moreover, that the 2<sup>nd</sup> Respondent has the power to cancel an insurer's Certificate of Registration for non-compliance as provided under Section 196 of the *Insurance Act*.
- 16. It is further averred that the Petitioner has not demonstrated whether it or any of its members are insured by the 5<sup>th</sup> Respondent. This is since settlement of claims is made on the premise of individual insurance policies as between the 5<sup>th</sup> Respondent and the party it has insured. For this reason, it is argued that the Petitioner does not have the right to lodge any claim on this basis.
- 17. Similarly, it is argued that the remedy for breach of terms of any contract of insurance if any lies with the Civil Court as the issue is a civil claim. In the same manner, information regarding claims lodged by a party insured by the 5<sup>th</sup> Respondent is private information. It is stressed that the Petitioner did not demonstrate the right that is sought to be enforced by seeking this information.
- 18. He as well asserts that contrary to the Petitioner's allegation, the 5<sup>th</sup> Respondent had no obligation to meet the demands set out in its letters in as far as relates to it.
- 19. It is also submitted that the Petition has not identified with specificity the provisions claimed to be violated and the manner of such violation by the 5<sup>th</sup> Respondent. As such, it is asserted that no case has been made out to warrant the grant of any of the reliefs sought.
- 20. The 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 22<sup>nd</sup> and 23<sup>rd</sup> Respondents position in their replying affidavits was substantially similar to the position of the 5<sup>th</sup> Respondent.

### **21<sup>st</sup> Respondent's Case**

- 21. The 21<sup>st</sup> Respondent filed its Replying Affidavit through its Managing Director, Jean Moegi, sworn on 15<sup>th</sup> November 2023.
- 22. He depones that the 21<sup>st</sup> Respondent is a duly licensed and registered insurer that is regulated by the 2<sup>nd</sup> Respondent and has at all times been in compliance with the law and has always published its financial statements annually and submitted the same to the 2<sup>nd</sup> Respondent.
- 23. It further depones that information concerning claims is personal data protected by law owing to privacy issues. In view of this, he argues that the Petitioner has failed to demonstrate whether he was granted permission by the individual policy holders to access the sought information. Nonetheless,



he notes that there is an internal mechanism through which a policy holder seeking compensation is verified before payment is transmitted.

24. The 21<sup>st</sup> Respondent maintained that it was not a recipient of the Petitioner's cited letters as the same were addressed the 2<sup>nd</sup> Respondent as the regulator hence there is no obligation on the part of the 21<sup>st</sup> Respondent to act on the Petitioner's concerns. Similar position was taken in regard to maintenance of the capital adequacy ratios and cancellation of an insurer's certificate.
25. In any case, the 21<sup>st</sup> Respondent contends that the Petitioner has not demonstrated how the 21<sup>st</sup> respondent violated the Petitioner's rights.
26. It labelled the Petition a fishing expedition which ought to be dismissed with costs.

#### **24<sup>th</sup> Respondent's Case**

27. The 24<sup>th</sup> Respondent through its Counsel, Paul Mucai Gitau, filed a Replying Affidavit sworn on 27<sup>th</sup> October 2023. It asserted that the Petition is made in bad faith, is frivolous, vexatious and an abuse of the Court process.
28. Likewise, he asserts that the Petitioner's allegation on collection of premiums from unsuspecting policy holders are unsubstantiated and in violation of Article 28 of *the Constitution*. Additionally, it is argued that the Petitioner lacks the requisite expertise in the industry to make the stated assertions.
29. He as well contends that the Petitioner has assumed a narrow interpretation of Article 46 of *the Constitution* and is misdirected. This is because the Petitioner did not demonstrate how any of the 24<sup>th</sup> Respondent's insurance products caused loss or injury.
30. It is further averred that the Petitioner's correspondence to the 2<sup>nd</sup> Respondent purporting to direct the 2<sup>nd</sup> Respondent's, sought to have the regulator breach Articles 27(1), 28, 31, 46(c) and 47 of *the Constitution* which would be prejudicial to the 24<sup>th</sup> Respondent.
31. It is deponed finally that the Petition fails to meet the minimum threshold established under Section 10(2) (b) and (c) of *Legal Notice No. 17 of 2023* hence incompetent. As a consequence, he avers that this Court lacks jurisdiction to entertain the Petition in its current form. In like manner, that the Petition does not contain particulars on the alleged constitutional infringements on the 24<sup>th</sup> Respondent's part.

#### **Parties Submissions**

##### **Petitioner's Submissions**

32. On 11<sup>th</sup> March 2023, the Petitioner through O. Ouma J and Associate Advocates filed submissions and highlighted the issues for determination as: whether the Petition is properly before this court; whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have neglected to protect the rights of insurance consumers and whether neglecting to protect insurance consumer rights amounts to violation of consumer rights.
33. Counsel in this matter answered in the affirmative and relied in Nation Media Group Limited vs. Attorney General [2007] 1 EA 261 where it was held that:

“A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive



hearing...Although the application may be vague for citing the whole of Chapter 5 of *the Constitution*, however the prayers sought are specific and they refer to freedom of expression guaranteed under *the Constitution*.”

34. Like dependence was placed in CNM vs WMG (2018) eKLR.
35. Counsel, stated that it was evident from the Respondents’ replies that they had understood the Petition and the prayers sought, as relates to violation of Articles 35 and 46 of *the Constitution*. Further, it was submitted that the Petitioner had set out the provisions with precision and also the manner in which they had been violated. For this reason, it was stated that this Court has jurisdiction to entertain this suit.
36. In the second issue, Counsel submitted that the 2<sup>nd</sup> Respondent had failed to protect the rights of insurance consumers contrary to its legal mandate. First, it was noted that the 13<sup>th</sup>, 16<sup>th</sup> and 24<sup>th</sup> Respondents were not licensed to operate in Kenya.
37. Second that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are required to ensure that the mandatory requirement of capital adequacy ratio is 100% but failed to do so. Tying to this, it was argued that the 2<sup>nd</sup> Respondent had failed to publish the list of insurance companies that did not meet the minimum capital adequacy ratio. It was also contended that the Respondents are relying on the Insurance (Capital Adequacy) Guidelines, 2017 to circumvent this mandatory requirement.
38. Reliance was placed in Republic v Council of Legal Education & another Ex parte Sabiha Kassamia & another [2018]eKLR where the effect of the mandatory term shall in statutes was explained as follows:

“20. The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.”

39. On the final issue, Counsel was certain that the Respondents had violated consumer rights in that neglected to protect policy holders. Counsel pointed out that this assertion transcends the argument of a relationship between a policy holder and the insurer as advanced by the Respondents. As such the instant matter was dubbed a constitutional matter. Reliance was placed in Commission on Administrative Justice vs. Insurance Regulatory Authority & Another [2017]eKLR where it was held that:

“A statutory body is bound to adhere to mandate stipulated in the statute creating it and its actions must conform to the constitutional prescriptions as clearly provided in our transformative constitution. In my considered view, Insurance regulatory law is the body of statutory law, administrative regulations and jurisprudence that governs and regulates the insurance industry and those engaged in the business of insurance. Insurance regulatory law is primarily enforced through regulations, rules and directives by state insurance departments as authorized and directed by statutory law enacted by the legislature. Insurance is characterized 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.”

40. Similar dependence was placed in Petition No. 20 of 2018 at Machakos Peter Mwau Muinde, Intercountry Express Ltd vs Insurance Regulatory Authority & 2 others.

### **1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Submissions**

41. State Counsel, Stephen Terrell, in the submissions dated 27<sup>th</sup> May 2024 set out the issues for determination as: whether the Petition meets the threshold of a Constitutional Petition; whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have neglected to protect the rights of insurance consumers and whether there is a justiciable issue before the Court.
42. Counsel in the first issue was positive that the Petition does not meet the constitutional threshold underscored in the Anarita Karimi case (supra). He similarly relied on Kenya Bus Services Ltd & 2 others v Attorney General & 2 others [2005] eKLR, Matiba v Attorney General H C Misc Appl 666 of 1990 and *Cyprian Kubai V Stanley Kanyonga Mwenda – Nairobi – Hc Misc 612 of 2002* (unreported).
43. This is because, whereas the Petition cites Articles 1, 10, 22, 23, 24, 35, 46, 156, 258 and 259 of *the Constitution* as the constitutional provisions violated by the Respondents, the Petitioner at paragraphs 7 to 26 of the Petition, goes ahead to state the provisions of the law but does not address how the said provisions were violated. Owing to the lack of precision, Counsel argued that the Petition ought to be struck out.
44. In the second issue, counsel citing the function of the 2<sup>nd</sup> Respondent under Section 3A of the *Insurance Act* stressed that the regulator's mandate is to ensure the realization of a stable insurance industry through appropriate regulatory and supervisory measures.
45. Particularly, Counsel noted that the Insurance (Capital Adequacy) Guidelines, 2017 provide a framework under which non-compliant insurers take remedial measures to ensure compliance. For this reason, the Petitioner's allegations that there were guidelines established outside the law, was deemed a gross misconception in view of the 2<sup>nd</sup> Respondent's published reports and its overall mandate to maintain records.
46. Counsel submitted in the final issue that there is no justifiable constitutional issue for determination in this matter by the Court. Reliance was placed in Apollo Mboya vs The Attorney General and National Employment Authority Nairobi Constitutional Petition Number E335 of 2023(unreported) where it was held that:
- “We shall now turn to the Constitutional Avoidance Doctrine. The doctrine is at times referred to as the Constitutional Avoidance Rule. Black's law Dictionary, 10<sup>th</sup> Edition at page 377 defines it as: The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.”
47. Comparable reliance was placed in Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR.
48. In the same manner, it was argued that the lack of cogent evidence to support the claims in this matter makes the Petition an academic exercise. It was asserted that the Petitioner has not provided evidence of probative value to support the orders sought in the Petition.



## 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 22<sup>nd</sup> and 23<sup>rd</sup> Respondents' Submissions

49. In the submissions dated 6<sup>th</sup> March 2024, Havi and Company Advocates for the above Respondents submitted that for a constitutional petition to be sustainable, the cause of action in relation to violation of a constitutional right must be particularized and supported by evidence.

50. In this matter, the Petitioner was accused of making bare reference to Article 35 and 46 of *the Constitution* without any demonstration of the manner in which the provisions were violated, as required in constitutional petitions. Reliance was placed in Kenya Bus Services Ltd (supra) where it was held that:

“The respondents have no cause of action against the Interested parties at all because there is no contravention shown even on a prima fade basis under s 84 of *the constitution*. For a contravention to exist the requirements set out in the following cases must be met and have not been met.”

51. It was further submitted that the Petitioner seeks to advance a claim for breach of contracts of insurance which is purely a civil matter through a constitutional petition. This is reasoned to be an abuse of the Court process. The case of Uhuru Muigai Kenyatta v The Nairobi Star Publications Ltd (2013) eKLR was cited in support of this submission in which the Court held thus:

“I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S. K. Dutambala Cr. Appeal No. 37 of 1991 (Tanzanian Court of Appeal) such sanctions should be reserved for appropriate and really serious occasions.”

52. Equal dependence was placed in Alphonse Mwangemi Mungai & 10 others v African Safari Club Limited (2008) eKLR.

53. It was contended finally that while the norm is not to award costs in constitutional petitions, this matter did not amount as one. As a consequence, Counsel stressed that the costs in this matter ought to be awarded against Stephen Mutoro in person as he is not a novice in filing matters without a cause of action. Reference was made to the matter in Consumer Federation of Kenya (COFEK) v Attorney General & 4 Others (2012) eKLR where the Court held that:

“More importantly, it must be stated that in bringing matters such as this before the court, which have a critical bearing on the rights, lives and livelihoods of citizens, it is not enough to make bare statements with regard to the violation of rights without seriously addressing oneself to the manner in which the violations have occurred and the reasonableness or otherwise of the measures taken to avert or ameliorate their impact. At this nascent stage in the implementation of the new Constitution, parties in the position of the petitioner, should they determine to take on cases which have a bearing on the public interest, must take them on with all due seriousness.”

## 21<sup>st</sup> Respondent's Submissions

54. Muma and Kanjama Advocates for this Respondent filed submissions dated 20<sup>th</sup> May 2024 where the outlined issues for discussion were: whether the Petition is supported by sufficient evidence; whether



the issues in the Petition are ripe for hearing and based on the doctrine of constitutional avoidance; whether the allegations of constitutional violations against the 21<sup>st</sup> Respondent meet the precision principle established in the case of Anarita Karimi Njeru (supra) and whether the Petition is an abuse of the Court process.

55. On the first issue, counsel reiterating the averments in the 21<sup>st</sup> Respondent’s replying affidavit, submitted that the Petitioner’s allegations against the 21<sup>st</sup> Respondent despite their grave and libelous nature are not supported by any evidence. It was also noted that the information sought with regards to the claims, is personal data protected under Article 31 of *the Constitution*. For this reason, Counsel stated that the Petitioner did not deserve the reliefs sought. Reliance was placed in Section 107 and 109 of the *Evidence Act* and *Christian Juma Wabwire v Attorney General [2019]eKLR* where it was held that:

“It is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record ...When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation.”

56. Equal dependence was placed in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR* and *Michael Rubia v Attorney General (2020) eKLR*.
57. Counsel further argued that the issues raised herein are not ripe for determination owing to the doctrine of constitutional avoidance in that the matter is a civil claim. It was stressed that the core of the Petition is the lack of compliance with the provisions of the *Insurance Act*, Cap 487. Consequently, Counsel frowned upon the issue raised herein being disguised as constitutional issues. Reliance was placed in *Hakizimana Abdoul Abdulkarim v Arrow Motors (EA) Ltd & another (2017) eKLR* where it was held that:

“I am alive to the fact that every case has a constitutional underpinning be it criminal cases, civil or commercial. However, it is important to point out that not every dispute ought to be filed in the constitutional division of the high court unless it raises constitutional issues.”

58. Similar dependence was placed in *KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289*.
59. Counsel further argued that the Petitioner had failed to satisfy the threshold set out in the *Anarita Karimi* case (supra). That is, the Petition was not set out with a reasonable degree of precision that which the Petitioner complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.
60. Like dependence was placed in *Kavirondo Community Based Organization v Attorney General & 2 others (Constitutional Petition E021 of 2021) [2022]*.
61. In this regard, Counsel submitted that the Petitioner had failed to establish how the 21<sup>st</sup> Respondent had failed to publish the serviced claims yet has always done so by submitting its statements to the 2<sup>nd</sup> Respondent. Equally, that it was not shown how the 21<sup>st</sup> Respondent had violated consumer rights in provision of its services or operating outside the confines of the law.



62. In conclusion, Counsel submitted that the Petition was indeed an abuse of Court process and hence should be dismissed. To buttress this point reliance was placed in *Arthur Wamiti Njoroge v The Disciplinary Tribunal & another* [2017] eKLR where it was held that:

“The black’s law dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete deparlure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use”

The concept of abuse of court/Judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of Judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.”

### **24<sup>th</sup> Respondent’s Submissions**

63. There were no submissions by the 24<sup>th</sup> Respondent in the Court file or in Online Court Platform (CTS).

### **Analysis and Determination**

64. It is my considered opinion that the issues that arise for determination are as follows:

- i. Whether the threshold of a Constitutional Petition has been met in the instant Petition.
- ii. Whether the instant Petition offends the doctrine of constitutional avoidance.
- iii. Whether the 2<sup>nd</sup> Respondent failed to uphold its mandate as provided under the *Insurance Act* in relation to the 5<sup>th</sup> to 24<sup>th</sup> Respondents’.
- iv. Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ violated consumer rights under Article 46 of *the Constitution*.
- v. Whether the Petitioner is entitled to the reliefs sought.

### **Whether the threshold of a Constitutional Petition has been met by the instant Petition**

65. A constitutional petition, like any other pleading must be pleaded with reasonable degree of specificity to avoid embarrassing the adverse party. It must give sufficient details of the complaint that the opposing party is required to answer and not generalized claim that has the capacity of broadening the issues to infinitude. A well-defined pleading also enables the Court to appreciate and correctly identify the issues in controversy so as to render a just determination in a fair trial.

66. Courts have thus emphasized the need for Constitutional Petition to set out with reasonable degree of precision the provisions of *the Constitution* alleged to have been violated and the manner in which the violation is alleged to have taken place, a principle that has gained judicial acceptance in Constitutional litigation since the celebrated case of *Anarita Karimi Njeru* (1979) KLR where it was held thus:

“... if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that



he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...”

67. The Supreme Court adopted with approval the above principle in the *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR by holding as follows:

“(349) .... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

68. Equally, the Court of Appeal in *Mumo Matemu* (supra) acknowledged that:

“...The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to defined issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars... We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case...”

69. In the instant Petition, Mr. Terrell for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents argued that whereas the Petition cites Articles 1, 10, 22, 23, 24, 35, 46, 156, 258 and 259 of *the Constitution* as the constitutional provisions violated by the Respondents, the Petitioner at paragraphs 7 to 26 of the Petition, goes ahead to recapitulate the provisions of the law but does not indicate how the said provisions were violated hence urged the Court to strike out the Petition.



70. Mr. Havi for 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 22<sup>nd</sup> and 23<sup>rd</sup> Respondents echoed that Petitioner only makes bare reference to Article 35 and 46 without making any corresponding allegations of violation of the said Articles.
71. Responding to the above submissions, O. Ouma J for the Petitioner submitted that it was evident from the Respondents' replies that the Respondents had understood the Petition and the prayers sought, as relates to the violation of Articles 35 and 46 of *the Constitution*. Further, it was submitted that the Petitioner had set out the provisions with precision and the manner of violation.
72. I have carefully read out the Petition. I have to confess that the particulars of breach of Articles 35 and 46 are evidently omitted in the Petition. A Petition pleaded in this manner does not restrict or limit the Petition to specific facts and may keep on expanding to infinite making the trial needlessly nebulous and tedious. It is embarrassing to both the Respondents and the Court.
73. It is my finding that the Petition fails the legal threshold of a Constitutional Petition. I could have stopped here but I also find it necessary to consider the next issue, of whether the instant Petition offends the doctrine of Constitutional avoidance.

### **Whether the Petition offends the doctrine of Constitutional avoidance**

74. The doctrine of Constitutional avoidance is a jurisdictional issue. It has been developed jurisprudentially through precedents as a principle in Constitutional Interpretation. The doctrine asserts that disputes or controversies that can conveniently be dealt with on any other legal basis other than *the Constitution* should be resolved without resorting to *the Constitution*. Consequently, controversies and matters that may appropriately be resolved on the basis of a statute or a regulatory regime should not be a subject of Constitutional litigation.
75. Elaborating on the doctrine of constitutional avoidance, the Court in Ibrahim Wakhanyanga & 2 others v Chief Magistrate's Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party) [2022] eKLR held:

“17. One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain such a dispute. A party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through an ordinary suit as opposed to a constitutional petition. In that regard, the Court of Appeal stated in Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR as follows:

... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).

- (17) In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on *the Constitution*. Accordingly, the petition



being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ....

18. Similarly, the same court stated in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR thus:

Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation....

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.”

76. Equally, in *C O D & another vs Nairobi City Water & Sewerage Co. Ltd* (2015)eKLR the Court noted as follows:

- “ 11. Similarly, in *Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi* Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:

“All the authorities above would point to the fact that *the constitution* is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes.... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.” (Emphasis added)

12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in *Re Application by Bahadur* [1986] LRC (Const) the Court expressed itself as follows at page 307;

“The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under *the Constitution*. This case highlights the un-wisdom of ignoring that advice.... *The Constitution* sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of *the Constitution* might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, “a general substitute for the normal procedures for invoking judicial control of administrative action.” (See *Harrikissoon v A-G* [1979] 3 WLR 62).



13. It was further observed in the case of Minister of Home Affairs vs Bickle & Others (1985) LRC Const(per (Georges C.J);

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

77. Turning to the present Petition, the Respondents opposed the Petition for offending the doctrine of constitutional avoidance by pointing out that the issues raised principally revolve around a breach of the *Insurance Act* hence can be resolved under that said statute without invoking *the Constitution*. The Petitioner maintained that the Petition raises constitutional questions.
78. To support their claim the Respondents, relied in Hakizimana Abdul Abdulkarim (supra) where it was observed as follows:
- “37. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute...When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values. The issues stated above fall mostly in the realm of negligence, contract, breach of implied terms or conditions only to mention but some.”
79. It is manifest from the reading of this Petition the essential complaint is that the 2<sup>nd</sup> Respondent has endorsed the operation of non-compliant and unlicensed insurers being the 5<sup>th</sup> to 24<sup>th</sup> Respondents in contravention of the *Insurance Act*. For this Court to address this allegation, it has examine in detail the provisions of the *Insurance Act* to establish the extent of the 1<sup>st</sup> to 4<sup>th</sup> Respondents mandate vis-à-vis the allegations of breach of that duty as set by the statutory standards to determine if the Respondent is liable. To determine that, the Court will need not look at *the Constitution* as the basis of finding if there is indeed any violation.
80. This conclusion alone persuades me that the dispute that this Petition presents is not a Constitutional controversy as it can effectively be resolved without application of *the Constitution*. Its resolution squarely lies in the application of the provisions of the *Insurance Act*.
81. The Petition does not seek invalidate any provisions of the Act or the Insurance (Capital Adequacy) Guidelines, 2017 that deals with the capital adequacy ratio.
82. The dispute that the Petitioner cites in submissions as being premised on the Insurance (Capital Adequacy) Guidelines is that there are three Insurance Companies, namely, the 13<sup>th</sup>, 16<sup>th</sup> and 24<sup>th</sup> that have not met capital adequacy requirements yet the respondent has allowed them to operate.
83. That in my view does not require the application of *the Constitution* to resolve. This Court cannot assume jurisdiction over a matter if there is a statutory mechanism capable of resolving it. It is not permissible for a litigant to found a cause of action on *the Constitution* when there is legislation to deal with the situation and the Constitutionality of such legislation or regulation is not in issue.



84. It is legally objectionable for the Petitioner to approach this Court alleging violation of *the Constitution* in a matter that the statute has provided a remedy and its inadequacy has not been demonstrated.
85. In view of the foregoing, this Court declines jurisdiction to entertain this Petition on the basis of the doctrine of Constitutional avoidance. I will not consider the rest of the issues framed and thus down my judicial tools at this point.
86. The upshot is that the Petition is hereby dismissed.
87. As the Petition was instituted in public interest in that the Petitioner does not directly seek any personal benefit going by the prayers in this Petition; each Party to bear its own costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF DECEMBER, 2024.**

**L N MUGAMBI**

**JUDGE**

