



**Kenya Human Rights Commission v Insurance Regulatory Authority; Association of Kenya Insurers (Interested Party) (Petition E002 of 2022) [2024] KEHC 16211 (KLR) (Constitutional and Human Rights) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16211 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E002 OF 2022  
LN MUGAMBI, J  
DECEMBER 20, 2024**

**BETWEEN**

**KENYA HUMAN RIGHTS COMMISSION ..... PETITIONER**

**AND**

**INSURANCE REGULATORY AUTHORITY ..... RESPONDENT**

**AND**

**ASSOCIATION OF KENYA INSURERS ..... INTERESTED PARTY**

**JUDGMENT**

1. The Petition dated 4<sup>th</sup> January 2022 is supported by the Petitioner’s affidavit in support of even date.
2. The gist of this Petition is that the Interested Party unconstitutionally and unlawfully increased insurance premiums and that 1<sup>st</sup> Respondent has allowed insurance companies to abandon granting comprehensive insurance cover for motor vehicles older than 12 years or of a value of less than Ksh.600,000/-.
3. The Petition assails the Respondent for its failure to exercise its supervisory role in the matter.
4. For this reason, it is alleged that the Petitioner’s rights under Articles 10, 27 and 46 of *the Constitution* were violated by the Respondent and the Interested Party. Consequently, the Petitioner seeks the following reliefs:
  - a. A declaration that the decision to increase premiums for motor vehicle insurance up-to 50% being devoid of the principle of public participation is illegal, unconstitutional, null and void.



- b. A declaration that the decision to exclude a category of vehicles which are more than 12 years old or worth less than Kshs. 600,000/- from the motor vehicle insurance comprehensive cover is discriminatory and in violation of consumer rights.
- c. Costs of the Petition.

### **Petitioner's Case**

5. The Petitioner avers that motor vehicle insurance is a mandatory requirement in Kenya and is classified into two categories: comprehensive cover and a third-party cover.
6. The insurance industry is regulated by the Respondent as authorized by the *Insurance Act*
7. The Petitioner asserts that a number of insurance companies resolved to implement an increase of up to 50% of premiums starting from the year 2022 for both insurance covers. Additionally, that the insurance companies would not offer the comprehensive insurance cover for vehicles older than 12 years or whose value is less than Ksh.600, 000. This was previously tabulated based on 4% of the value of the motor vehicle.
8. The Petitioner avers that the justification for the increase was said to arise from surge in claims some of which are fraudulent. According to the Petitioner this is not a reasonable basis to increase the premiums as the law provides for safeguards which allows the insurance companies to repudiate claims which are not genuine.
9. Furthermore, the Petitioner is aggrieved that the Respondent has violated its fiduciary duty owed to the policy holders and the public. This is because it allowed the insurance companies to disproportionately increase the premiums without public participation. The petitioner states that this is in violation of the principles of consumer protection.
10. Equally the insurance companies' determination to exclude vehicles older than 12 years or with a value less than Ksh. 600,000 from the comprehensive cover, is discriminatory, punitive and oppressive. The Petition asserts that the Interested Parties actions consumer protection rights of the policy holders and the general public.

### **Respondent's case**

11. The Respondent in reaction to the Petition filed grounds of opposition dated 13<sup>th</sup> January 2022 on the premise that:
  - i. The orders sought in the application are final in nature and ought not to be granted at an interlocutory stage without granting the Respondent the benefit of presenting its case.
  - ii. The grant of orders sought in the application and Petition will severely prejudice multiple private insurance companies who are not parties to the Petition herein.
  - iii. The Petition raises no constitutional questions for determination.
  - iv. The Petitioners have failed to draw a nexus between the actions of the Respondent if any, and any violation of the rights of consumers as alleged.
  - v. Under Section 204(A) of the *Insurance Act*, there is provided an alternative dispute resolution procedure where any insurance customer who is aggrieved



by the actions of a registered insurer may lodge an official complaint with the Respondent for determination

- vi. The Petition herein is misdirected at the Respondent and no evidence has been provided on the manner of breach by the Respondent.
- vii. No details have been provided as to how the Respondents have breached *the Constitution*.
- viii. It is unjust for the court to interfere with the business of third parties who are not parties to the suit herein.
- ix. The Petitioner has misunderstood and misapprehended the role of the Respondent in matters insurance.
- x. The requirement under the law for there to be car insurance, is a requirement for third-party insurance.
- xi. The complaints raised by the Petitioner with regard to the increase of premiums falls within the realm of private law and specifically the law of contract.
- xii. Members of the public are free to engage any insurance provider of their choice and to negotiate the terms of their contracts.
- xiii. It is not against the law for businesses to determine their prices independently and to inform their clients of the same. Further that owners of motor vehicles are at liberty to use whichever insurer whose terms they find fit for their purpose.
- xiv. The orders sought by the Petitioner seeks to violate the principle of privity of contract.
- xv. There is no requirement in the law for public participation under Article 10 of *the Constitution*, in the affairs of private businesses and the Petitioner is put to strict proof of a requirement of the same.
- xvi. The Petitioner has misapprehended the right to non-discrimination in so far as it applies to private businesses entering into private contracts with its clients.
- xvii. The Petitioner has misunderstood the law as it pertains to the mandatory nature of insurance for motor vehicles.
- xviii. There is no requirement in law for owners of motor vehicles to have comprehensive motor vehicle insurance cover.
- xix. The Petition and application herein are premised wholly on conjecture and the documentation provided by the Petitioner fails to meet the standards for the production of documentary evidence and is of no real or probative value.
- xx. The Petition herein is against public interest and ought to be dismissed.

12. The Respondent additionally filed its replying affidavit by its Chief Executive Officer, Godfrey Kiptum sworn on 10<sup>th</sup> February 2022.



13. He swore that pursuant to its mandate under Section 3A of the *Insurance Act*, the Respondent through various Regulations has purposed to protect the interests of insurance policy holders and their beneficiaries. In particular, the implementation of the standardized insurance contracts for motor private, motor commercial and motor commercial (PSV) to ensure uniformity and fair terms and conditions in insurance policies.
14. Contrary to the Petitioner's allegation, he asserts that the Respondent is not mandated to set the premium rates for motor vehicle insurance. He states that these rates are set by the insurance companies based on a number of factors. For this reason, he argues that the Petitioner's claim that the same should be subjected to public participation is erroneous.
15. He as well avers that the consumers have a right to engage the services of any of the licensed insurers whereas the insurance companies are at liberty to assess and select the risks which they will underwrite. Accordingly, the claim for discrimination is adjudged to be unfounded.
16. The Respondent also avers that Petition contains a number of falsehoods. In particular, it is stated that only the third-party insurance cover is mandatory. Further that the 50% increase starting from the year 2022 is false. Equal sentiments are registered for the claim that motor vehicles older than 12 years or of a value less than Ksh.600,000/= will not receive a comprehensive insurance cover and that the same was initially calculated based on 4% of the value of the car.
17. He depones that owing to the high underwriting losses that insurance companies incurred, in a bid, to curb the same, the Respondent developed the Motor Insurance Underwriting Guidelines, 2009 which came into effect on 1<sup>st</sup> March 2010. During the period the Guidelines were in force, he stated that the underwriting losses at the end of 2010 had declined by 32%.
18. He notes that these Guidelines were however challenged in the High Court for being null and void. Subsequently the High Court decision affirming the same was appealed against. In light of this, he asserts that the Respondent has been keen to make efforts to ensure that the interests of policy holders and its beneficiaries are protected.
19. The Respondent additionally contends that the Petition fails to meet the threshold set out in Anarita Karimi Njeru vs Republic (1979) KLR 154. Equally, that the Petitioner failed to adduce evidence to corroborate its claims and thus in sum not entitled to the reliefs sought. For this reason, he asserts that the Petition should be dismissed.

### **Interested Party's case**

20. The Interested Party in opposition to the Petition filed its grounds of opposition dated 10<sup>th</sup> February 2022 on the basis that:
  - i. The Petitioner has not established any cause of action against the Interested Party.
  - ii. The Notice of Motion and the Petition are incompetent for misjoinder of parties as the Insurance Companies subject of these proceedings are not party to the proceedings herein.
  - iii. The Petitioner herein has failed to establish that the variation by some of the insurance companies of premiums payable by their policyholders have violated the consumers right to access Motor Vehicle Comprehensive cover and Third-Party vehicle cover protected under Article 46(1)(a) and (c) and 47 of *the Constitution* and Section 5(1) of the *Consumer Protection Act*.



- iv. The Petitioner has failed to establish any trade restrictive practices on the part of the Interested Party and its member insurance companies as a result of the purported increase in premiums payable by policyholders under the Motor Vehicle Comprehensive cover and Third-Party Vehicle Insurance cover.
  - v. The Petition and the Notice of Motion have been brought in violation of Section 21 (2) (b) and (3) (a) and (i) of the Competition Act, 2010.
  - vi. The Application dated 16<sup>th</sup> November 2021 is vexatious, frivolous and an abuse of the Court process.
21. The Interested Party correspondingly filed its undated replying affidavit sworn by Thomas Maara Gichuhi, its Chief Executive Officer.
22. To commence with, he avers that the allegation that insurance companies increased premiums up to 50% is false. It is noted that insurance companies who ordinarily set the premiums payable by their policy holders consider a number of factors before setting the same.
23. Particularly, factors that are considered are the policy holder's past, the anticipated loss experience, the characteristics of the subject matter of the insurance cover, the level of risk the insurer is exposed to when it provides the cover, the demand and supply variations among other factors. Consequently, owing to the individualistic nature of determining the same, he stresses that it is not possible to have a blanket increase in premiums as alleged.
24. Furthermore, it is averred that insurance business is contractual in nature as between the insurance company and the policyholder. As such a policy holder is at liberty to consider the various offers and select an insurer of their choice based on their needs. He contends thus that, variance of premiums by various insurance companies does not deny a policy holder the right to access an insurance cover. Equally that the insurance companies have a right to earn income from their insurance business.
25. He in closing also asserts that the Petitioner's allegations are not substantiated. Likewise, that annexure 'DM2' is in violation of Section 35 and 63(1) and (2) of the Evidence Act as amounts to hearsay while annexure 'DM 3' is inadmissible for being in violation of Section 65 (5)(6) and (8) of the Evidence Act. Subsequently, he urges the Court to dismiss the Petition.

## **Parties Submissions**

### **Petitioner's Submissions**

26. The Petitioner through its counsel, Chimei and Company Advocates filed submissions dated 15<sup>th</sup> June 2023 where the issues for determination were identified as: whether there was public participation; whether there was discrimination of some vehicles and whether there was violation of consumer rights.
27. On the first issue, Counsel submitted that contrary to Article 10 of the Constitution, no public participation was conducted before the impugned decision was made. Counsel pointed out that before the decision to increase the premium by 50% was made, neither the public nor the policy holders were involved in the making of the decision. Counsel added that the Respondent ought to have ascertained that public participation was carried out by the insurance companies but failed to do so in the end making the decision illegal and unconstitutional.



28. In support, Counsel cited the case of Poverty Alleviation Network & Ors v President of the Republic of South Africa & Ors [2010] ZACC 5 (24 February 2010) where it was held that:

“...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.”

29. Like dependence was placed in Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR and Robert N. Gakuru & Others v Governor, Kiambu County [2014] eKLR.

30. Referring to the insurance companies’ decision not to grant a comprehensive cover for cars older than 12 years or with a value less than Ksh.600,000/-, Counsel submitted that this decision is discriminatory as no vehicle owner should be sidelined in accessing an insurance cover. This is also argued to be unfair treatment lacking any reasonable justification for the exclusion.

31. Lastly, Counsel argued that the Respondent in view of the impugned decisions violated the fiduciary duty it owes its policy holders and the public. That is to protect its consumer interests in line with Article 46 of *the Constitution*. This action is said to be contrary to the dictates set out in Section 3 of the *Insurance Act*, 2015. Reliance was placed in Commission on Administrative Justice v Insurance Regulatory Authority & another [2017] eKLR where it was held that:

“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. 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 companies;
- c. Regulating and standardizing insurance policies and products;
- d. Controlling market conduct and preventing unfair trade practices; and
- e. Regulating other aspects of the insurance industry.”

### **Respondent’s Submissions**

32. Principal State Counsel, Stephen Terell filed submissions for the Respondent dated 2<sup>nd</sup> February 2024. Counsel sought to discuss: whether there was public participation; whether there was discrimination and violation of consumer rights and whether the Petitioner is entitled to the prayers sought.

33. Counsel reiterating the Respondent’s averments in its Replying Affidavit submitted that contrary to the Petitioner’s conviction, public participation essentially concerns the concept of checks and balances in governance in the execution of functions by the various arms of government. Reliance was placed in British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet



Secretary for the Ministry of Health, Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR where it was held that:

“Since the promulgation of *the Constitution* 2010, the question of the rationale, scope and application of public participation as a principle of governance has been subject of numerous decisions by the courts. The High Court in this matter appraised itself of the various decisions on the same, which appraisal the Court of Appeal readily endorsed. In the Matter of the National Land Commission, the Supreme Court placed the principle of public participation at the core of the concept of checks and balances in governance in the execution of their functions by the various arms of government, when we stated:

“[308] The conditioning medium within which these functions have to be conducted, is constituted by the national values and principles outlined in Article 10 of *the Constitution*: in particular, the rule of law; participation of the people; equity; inclusiveness; human rights; non-discrimination; good governance; integrity; transparency and accountability. It is to be noted that, the very essence of checks-and-balances touches on the principles of public participation, inclusiveness, integrity, accountability and transparency; and the performance of the constitutional and statutory functions is to be in line with values of integrity, transparency, good governance and accountability...”

34. In this matter, Counsel submitted that the decision to increase the premiums as alleged was noted in the Petition to have been taken out by a number of insurance companies not the Respondent. It is stressed thus the decision was made by private companies and not public body to necessitate application of the principle in the decision. Consequently, Counsel argued that the Petitioner’s argument was erroneous.
35. Furthermore, in the second issue, Counsel submitted that insurance companies being private in nature are at liberty to select the risks which they can underwrite based on the pertinent factors. Equally, it is stated that the policy holders are also at liberty to engage an insurer of their choice after considering offers from different premium rates.
36. Nonetheless it was stressed that no evidence had been adduced to support the Petitioner’s claims. According to Counsel insurance companies cannot thus be adjudged to be discriminatory in making their decision in view of the determining factors.
37. Counsel urged the Court to be guided by the decision in *President of the Republic of South Africa & Anor vs. John Philip Hugo 1997(4) SACC* where it was held that:

“We need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.”
38. Like dependence was placed in *Federation of Women Lawyers Fida Kenya & 5 Others vs. Attorney General & Anor* [2011] eKLR.
39. Counsel submitted that in view of the claim of violation of consumer rights, insurers are only obliged to provide services that are of reasonable quality as per Article 46(1) of *the Constitution* as read with Section 5(1) and 87 of the *Consumer Protection Act*. Considering this, Counsel argued that



the Petitioner's argument that insurers were discriminatory and in violation of consumer rights was misleading. Counsel also pointed out that the Respondent in carrying out its supervisory role assessed the adequacy of the premium rates as outlined in its affidavit.

40. In closing, Counsel submitted that it was evident from the raised issues that the Petition does not raise constitutional issues and neither does it outline the provisions deemed to be violated nor the injury suffered by the Petitioner as a result of the alleged violations. Accordingly, Counsel submitted that the Petition failed to meet the threshold set in *Anarita Karimi Njeru vs Attorney General* (1979) KLR 154 (1976-1980) KLR 1272) and upheld in *Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 Others* (2013) eKLR.
41. Furthermore, Counsel pointed out that the Petitioner's case had not been supported by any evidence. To that end, Counsel submitted that the Petitioner is not entitled to the reliefs sought.

### **Interested Party's Submissions**

42. On 30<sup>th</sup> June 2023, the Interested Party through John Mburu and Company Advocates filed submissions where the issues for determination were set out as: whether the Petitioner has led evidence of probative value to demonstrate the increase in premiums or exclusion of motor vehicles older than 12 years or less than Kshs. 600,000 only from the motor vehicle comprehensive insurance plan; whether the purported increase in premiums for motor vehicle comprehensive insurance violated the principle of public participation under Article 10 of *the Constitution* and whether the decision to exclude vehicles of more than 12 years or less than Kshs. 600,000 only in value from the motor vehicle comprehensive insurance cover is discriminatory and violates consumer rights.
43. Counsel in the first issue answered in the negative. Counsel submitted that the Petitioner in advancing its case had relied on print outs (marked as 'D1' and 'DM 3') obtained from various websites yet failed to file a certificate to certify the correctness of the information as required under Section 78A and 106B of the *Evidence Act*.
44. Considering this, the evidence is argued to be unreliable and in violation of Section 65 (8) and 78 A (3) of the *Evidence Act* as held in *Elizabeth Ongoro Amollo vs Francis Kajwang Tom Joseph & 2 others* Nairobi HC Election Petition No. 5 of 2017 (2017) eKLR. Like dependence was placed in *Idris Abdi Abdulla hi vs Ahmed Bushane & 2 others* Nairobi HC Election Petition No. 6 of 2017 (2018) eKLR.
45. Similarly, Counsel submitted that annexure 'DM 2' is based on hearsay evidence. It consists of a certificate of insurance and renewal policy schedule by one, Haggai Shikuku Chimei. It is stated that this person did not swear an affidavit to that effect. Reliance was placed in *Bettie Atieno Nanga vs Middle East Bank Kenya Limited* Nairobi HC Civil Suit No.1200 of 2000 (2016) eKLR where it was held that a court has the discretion to admit a document into evidence where the maker was available but not called as a witness only if the conditions of Section 35(1) of the *Evidence Act* have been satisfied.
46. On the second issue, Counsel submitted that the Interested Party's members are not obligated to carry out public participation before setting the premiums payable by their policy holders. According to Counsel, application of Article 10 of *the Constitution* focusses on state organs and public officers who are mandated to enact laws and regulations. Counsel submitted that this element was also echoed by the Supreme Court in the *British American Tobacco Kenya Limited* case (supra).
47. Counsel further argued that the supposed requirement to conduct public participation was in breach of the principles of free market economy in the making a contract between the insurance companies and policy holders. Besides, it was stated that Section 75 of the *Insurance Act* grants insurance companies the leeway to determine the premiums to be paid by the policy holders. In support reliance



was placed in *Eliud Langat & 20 others vs the Board of Trustees, Postal Corporation of Kenya Staff Pension Scheme Nakuru HCCC No. 41 of 2008*(2011) eKLR where it was held that:

“A demand that an owner of property must involve potential purchasers in determining the sale price violates the principles of the free market economy.”

48. Turning to the third issue, Counsel submitted that the Interested Party had not violated Article 27 of *the Constitution*. It was stated that the Petitioner had not established that the insurance companies do not offer comprehensive cover for vehicles older than 12 years or with a value less than Ksh.600,000. Nonetheless Counsel argued that even if there was differential treatment the same would be justifiable under the dictates of Article 24 of *the Constitution*.
49. Reliance was placed in *Samson Gwer & 5 others vs Kenya Medical Research Institute & 3 others SC Petition No. 12 of 2019' (2020) eKLR* where the Supreme Court established that one who claims that they have been discriminated against bears the obligation to establish that it existed. Like dependence was placed in *Council of Governors vs Salaries & Remuneration Commission Nairobi HC Petition No. 328 of 2016 (2018) eKLR*.
50. Countering the Petitioner’s dispute on consumer protection, Counsel submitted that each insurance company has a right to determine what product to offer and to which segment of the market that product is available. Correspondingly that they have the right to determine which risk they are willing to admit. Likewise, an insurance company has the right not to offer a product that exposes it to losses.
51. Considering this, Counsel contended that insurance companies do not have an obligation to offer their products and services to all potential consumers. To buttress this point reliance was placed in *Mark Ndumia Ndung’u vs Nairobi Bottlers Limited and another (2018) eKLR* where it was held that:
- “under Article 46 of *the Constitution* a manufacturer, producer or marketer of consumer products only have an obligation to provide goods or services of reasonable quality, avail necessary information to enable customer take full benefit of the product or service and ensure the protection of the consumer's health, safety and economic interests.”
52. Counsel noted in closing that the Petitioner had not demonstrated how the consumer rights under Article 46 of *the Constitution* had been violated. In sum, Counsel submitted that the Petition lacked merit and thus should be dismissed with costs.

### **Analysis and Determination**

53. It is my considered opinion that the issues that arise for determination are as follows:
- i. Whether the Petition satisfies the threshold for constitutional Petitions;
  - ii. Whether this dispute raises a Constitutional question
  - iii. Whether the Petitioner’s rights under Articles 10, 27 and 46 of *the Constitution* were violated; and
  - iv. Whether the Petitioner is entitled to the reliefs sought.

### **Whether the Petition satisfies the threshold for constitutional Petitions**

54. An essential requirement for Constitutional Petitions is that they must be drawn with reasonable precision by setting out the Articles of *the Constitution* that were violated and providing sufficient



details of how the violation took place. This underscored by the Court in *Husus Mugiri v Music Copy Right Society of Kenya & another* [2018]eKLR where it noted that:

“ 18. In order for a petition to qualify to be a constitutional petition that seeks to enforce or protect fundamental rights and freedoms under the bill of rights, it must meet the test set in *Anarita Karimi Njeru vs. Republic* [1979] eKLR. That is, the applicant must specify which specific provisions of *the Constitution* that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights. This position has been reiterated time and again.”

55. Likewise, in *Meme v Republic* [2004] eKLR the Court stated as follows:

“Where a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant’s instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complaints without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants”.

56. This test was also affirmed by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR 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...”

57. My reading of this Petition shows that it details the provisions of *the Constitution* that were infringed but the descriptive information on the manner in which the violation occurred is either sketchy or too general.

58. Whereas the Petitioner alleges that the Respondent, i.e. the Insurance Regulatory Authority is the regulator of insurance business and is among others mandated to regulate, supervise and develop insurance Industry; The Petitioner at paragraph 21 of the Petition where it purports to provide the details of alleged violation states:

“Vide various mass media communique sent to their customers, a number of insurance companies have publicly announced an increase of up to 50% of premiums starting year 2022 for motor vehicle comprehensive cover and third party cover and will not offer a comprehensive insurance cover for motor vehicles which are older than 12 years or with value of less than 600,000/-“



59. This paragraph omits very vital particulars. It pleads states in general terms ‘a number of insurance companies’ but does not identify them. It also does not make them parties in the Petition despite the claiming they are the ones directly responsible for the alleged infringement. The Petition is pleaded indistinctly and does meet the threshold required of a Constitutional Petition.

60. The other issue is whether the Petition raises Constitutional questions.

### **Whether the present dispute raises a Constitutional question**

61. A Constitutional question is one that requires only the application of *the Constitution* to determine. If a dispute can be resolved on any other basis without invoking *the Constitution* for the resolution, then it is that other means that should be pursued, and not *the Constitution* resolution. That is what is meant by the doctrine of Constitutional avoidance.

62. This principle was explained by the Court in the case of C O D & another vs Nairobi City Water & Sewerage Co. Ltd (2015)eKLR 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.”

63. An insurance cover is essentially a private contract that is entered into between the Insured and the Insurer. As a contract, it is subject to the doctrine of privity of contract. The premium that is paid becomes the consideration that validates the contract which is usually preceded by the offer and acceptance. However, the law provides that the taking third Party Insurance for motor vehicles a statutory mandatory. That cover extends 3rd Parties who may not be privy to the contract and may include pedestrians and passengers. Nevertheless, there is no requirement that an insured must apply for insurance from any particular insurer. The insured has the liberty to pick any of the licensed insurers of his choice.
64. There is no requirement in law that the Respondent that approves the increase of premiums or sets premiums for different insurance companies which are private business entities in a free-market economy. As attested by the Interested Parties they are responsible for pricing their products based on the assessment of the risk factors the product may attract. The Petitioner does not cite any legal provision that mandates the Respondent to set or approve those premiums. How setting premiums based on market factors by a private entity becomes a constitutional question in a free-market economy is difficult to fathom.
65. In my view, these grievances should be dealt with under the provisions of the *Insurance Act* Cap 487 which has comprehensive in-built mechanism for addressing any possible complaints pertaining to matters of insurance. The Insurance Regulatory Authority should be able to handle such complaints and in case of dissatisfaction, they may well be escalated to the Tribunal established under Section 169 of the *Insurance Act* Cap 487. A direct invocation of *the Constitution* is thus unwarranted.
66. I am not convinced therefore a dispute of the nature contained in this Petition is a Constitutional matter. It is my finding that this Petition offends the doctrine of Constitutional avoidance. Furthermore, even if I were to assume that the dispute is indeed properly before me, I doubt if sufficient proof exists to establish the allegations of infringement made.

#### **Whether the Petitioner’s rights under Articles 10, 27 and 46 of *the Constitution* were violated**

67. For the Petitioner’s claim to succeed it must be proved that the Respondent and the Interested Party violated provisions of *the Constitution* as alleged in the Petition.
68. The Supreme Court in *Samson Gwer & 5 others* (supra) emphasized the need for proof as follows:

“(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”



69. Correspondingly, in *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro* (2015) eKLR it was held that:

“ 15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya)...

16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him...”

70. In the instant Petition, despite the Petitioner stating that a number of Insurance Companies had increased the premiums by 50% and had refused to provide comprehensive cover for vehicles older than 12 years or of a value less than 600,000/- in communication to their customers, there was no affidavit provided by any of the alleged customers to back this allegation. In any case, the Petitioner did not tell the Court with exactitude which insurance companies were being referred to in the Petition. The Petition is simply hypothetical and is not backed by any facts. The annexures exhibited do not meet the requirements of admissibility of electronic evidence as spelt out under the *Evidence Act* particularly, Section 106 (B) (4).

71. The Petition lacks merit and is hereby dismissed. Considering it was a public interest litigation; each Party will bear its own costs.

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

.....

L N MUGAMBI

JUDGE

