



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO. 7 OF 2019

MWAI WAIGWA.....PETITIONER

VERSUS

INSURANCE REGULATORY AUTHORITY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

UNITED INSURANCE CO. (L).....3RD RESPONDENT

AND

PETER GITHAIGA NGATIA.....INTERESTED PARTY

JUDGEMENT

Brief Facts

1. The petitioner brought this petition dated 14th November 2019, under **Section 1A, 1B, 3 & 3A of the Civil Procedure Act, Section 10(2) of the Insurance (Motor Vehicles Third Party Risks) Act, Section 203(1) & (2) of the Insurance Act** and all other enabling provisions of the law. The significant orders sought in the petition are a permanent injunction restraining the claimant from executing the court judgment against the petitioner by way of committal to civil jail and an order directing the 1st respondent to perform its duty to have the petitioner claims settled forthwith. The Petitioner obtained conservatory orders in this petition barring the execution of the decree against him on 18/11/2019.

2. In opposition to the petition, the interested party filed a replying affidavit dated 30th November 2019 and filed in court on 2nd December 2019.

The Petitioner's case

3. It is the petitioner's case that he insured the subject motor vehicle registration number KAH 671D Nissan matatu with the 3rd respondent thereafter the motor vehicle got involved in a road traffic accident in which the interested party was injured. The petitioner contends that the interested party subsequently filed a suit against him in Nyeri CMCC No. 381 of 2003 and obtained judgment. However the matter was suspended due to a moratorium declared by the statutory manager.

4. The petitioner contends that in 2019, the interested party took out a Notice to Show Cause why he should not be committed to civil jail. The petitioner adds that he applied for stay of execution on the grounds that the execution proceedings were a nullity. However, the trial court dismissed both applications and found that the moratorium protected the company and not the petitioner.

5. The petitioner further states that the insurance company ought to protect policy holders and ensure that no third party claim is left unpaid. The petitioner adds that placing the insurance company under a statutory manager protects the insuring public from being fleeced by the insurance company.

6. The petitioner is apprehensive that he will be committed to civil jail and that he may lose his job as he is a principal and the student are currently doing O level examinations. He adds that he will suffer double jeopardy as he has paid premiums and excess and yet he is still being called upon to satisfy the claim. As such, he seeks the court's intervention to protect him from being committed to civil jail.

The Interested Party's Case

7. It is the interested party's case that there is no basis for the orders being sought by the petitioner as the issues between the petitioner and the respondents arise from a purely commercial transaction on which a court has pronounced a decree and there is no constitutional issue to warrant the filing of the petition as well as the application herein. Consequently, filing a constitutional petition simply to stop execution of a civil process is an abuse of the court process. The interested party further adds that the issues between the petitioner and the respondents should not be used to bar the interested party from executing the decree of the lower court.

8. The interested party contends that no declaratory suit has been filed and thus he should not be entangled in the matter herein or adverse orders issued against him as the respondents in the matter herein were not parties to the lower court case, Nyeri CMCC No. 381 of 2003. He adds that failure of the 3rd respondent to pay the decretal sum in Nyeri CMCC No. 381 of 2003 does not bar him from executing the decree from the petitioner as he is the one who bears the primary responsibility to satisfy the judgment. Further the interested party contends that there is no law that precludes him from executing the lower court decree against the petitioner simply because he is insured with the 3rd respondent.

9. The interested party states that he is not party to the contract between the petitioner and the 3rd respondent and thus should not be dragged into their dispute or prevented from enjoying the fruits of his judgment.

10. The interested party further contends that the petitioner has not stated in his petition that he is unable to pay and he should therefore be ordered to pay and follow the respondents for indemnity if at all.

11. The interested party further adds that the Order in Nairobi HCCC No. 748 of 2009 is more than 10 years old and not binding on anyone. Moreover, the moratorium issued by the statutory manager only protects the 3rd respondent and not the petitioner from execution proceedings.

12. The interested party contends that judgment was entered in his favour on 20/5/2011, which is more than 8 years ago and thus the application and petition herein are time barred, an afterthought meant to evade the payment of the decretal amount and an abuse of the court process and it ought to be dismissed with costs.

13. The petitioner filed a Supplementary Affidavit dated 20th February 2020 and filed in court on 24th February 2020 in which he states that the application herein is still urgent as his fundamental freedoms and rights are threatened. He adds that the matter herein is not only a civil matter as his fundamental rights are threatened thus making it a constitutional issue.

14. The petitioner adds that insurance cover for motor vehicles in Kenya is compulsory over and above being statutory. This is why the insurance industry is carefully centred and why the government of Kenya takes over insurance companies when they become insolvent such as the 3rd respondent herein.

15. The petitioner contends that the interested party is misguided as the primary responsibility of liability lies with the insurance company and in the event that it is unable to pay, the same liability is taken up by the policyholders' compensation fund which was set up in 2005. As such, he is not liable to pay the claim herein.

16. The petitioner contends that the order is still valid since the statutory manager is still in force and yet to complete its work. The interested party therefore can wait for the statutory to complete its work or file a declaratory suit.

17. Parties agreed by consent on 22nd March 2021 to canvass the application by way of written submissions. The petitioner though granted seven days on 18th May 2021 to file written submissions, he did not do so. A summary of the interested party's submissions is as follows:-

The Interested Party's Submissions

18. The interested party submits that pursuant to Article 48 of the Constitution of Kenya, he has a right to execute the decree awarded to him in Nyeri CMCC No. 381 of 2003 against the petitioner directly. In saying so, he relies on the following cases **Dollk Limited vs Invesco Assurance Company Limited & 5 Others [2018] eKLR; James Ng'ang'a Njenga vs Commissioner of Insurance & 3 Others [2011] eKLR; Mercy Waithera vs United Insurance Company Statutory Manager & 3 Others [2019] eKLR; Kennedy Jayden Kwaji vs Minister for Finance & 3 Others [2005] eKLR and Duncan Mogaka Michira & Another vs Minister for Finance & 4 Others [2017] eKLR** to support his contention that the insured has the primary responsibility of meeting any claims made against him/her.

19. The interested party further submits that pursuant to **Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act**, it is the duty of the insurer to satisfy judgments against persons insured. As such, the 3rd respondent was liable to pay the decretal sum awarded however, the 3rd respondent was declared insolvent and put under statutory management. From 15th July 2005 till date, the moratorium declared by the statutory manager is still functional.

20. The interested party submits that it has been almost 10 years since he was awarded his decree and the decretal sum still is outstanding yet in that period, the petitioner has never showed his inability to satisfy the decretal sum. Thus, the petitioner ought to pay the decretal sum and the interested party pursuant to section 38 of the Civil Procedure Act has a right to execute his judgment by way of committal to civil jail. The interested party supports his contention by relying on the case of **Charles Luta Kasamani vs Concord Insurance Co. Limited & Another [2018] eKLR**.

21. The interested party thus prays that in the interest of justice that the petitioner's petition and application be denied.

Issues for determination

22. After careful analysis, we humbly submit that the main issues for determination are:

- a) Whether the petition meets the threshold of a Constitutional petition.
- b) If it does, what remedies is the petitioner entitled to.

The Law

23. It is imperative to begin by setting out what constitutes a constitutional petition as per the principles established in the case of **Anarita Karimi Njeru vs The Republic (1979) eKLR** which principle was later restated by the Court of Appeal in the case of **Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**. In **Anarita Karimi Njeru** Case (supra), the principle established was that a constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed. In **Mumo Matemo Case** (supra) the court reaffirmed the principle as set out in the **Anarita Njeru Case** (supra) where the court stated:-

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. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these short comings, it was not enough for the superior Court below to lament that the petition before it was not the "epitome of precise, comprehensive or elegant drafting, without remedy by the 1st respondent"

24. Further at paragraph 87(3) in the same judgment the Court on its findings stated as follows:-

"It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the constitution of Kenya and the Ethics and Anti-corruption Commission Act, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case."

25. It is thus indisputable that a constitutional petition must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. As such, it is not enough to merely cite constitutional provisions, there has to be some particulars of the alleged infringements to enable the respondent to be able to respond to and/or answer to the allegations or complaints.

26. In the instant petition, the petitioner has not stated with precision which provisions of the constitution have been violated or are threatened to be violated. Neither has the petitioner set out the manner of the violation and/or threatened violation. The petitioner has only stated that his fundamental rights are threatened or are likely to be threatened which is not sufficient in a petition of this nature.

27. It therefore follows that the petitioner has failed to satisfy the threshold of specificity as espoused in the **Anarita Njeru** and **Mumo Matemu** cases.

28. Further, it is the interested party's contention that the matter herein is a civil claim and thus not a constitutional issue. Looking to the pleadings herein, it is evident that the instant case is a civil matter that has being christened as a constitutional petition which is not proper. To buttress my position I rely on the following cases:-

29. **Godfrey Paul Okutoyi & others –vs- Habil Olaka & Another (2018) eKLR Chacha J** stated:-

"It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure."

30. Similarly in **Bernard Murage vs Fine Serve Africa Limited & 3 Others [2015]eKLR** where the Supreme Court stated that :-

"Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first."

31. It thus follows that where there is an alternative remedy of filing a suit in the ordinary civil courts, such as this instant case, a party ought not to invoke the jurisdiction of the constitutional court.

32. This petition arises from a decree in a civil suit between the interested Party and the petitioner whereas the Interested party obtained judgement in his favour against the petitioner. The decree having been obtained had to be enforced. Committal to civil jail is provided for in **Section 38** of the Civil Procedure Act as one of the ways of execution of a decree. In my view, the petitioner is indebted to the Interested party who is lawfully executing the decree.

33. The issue of whether it is lawful to seek orders to commit the petitioner to civil jail for refusal or for inability to satisfy the decree is a matter to be decided by the court that determined the civil case. The contract of insurance is a contract between the insured and the insurance company. In the event of breach by one party, the offended party has a right to sue and get a legal remedy. If the insurance company becomes insolvent and is unable to pay a third party, claim, the judgement debtor is obligated to satisfy the judgement and pursue compensation against the insurance company or through the receiver as the case may be. The policy holder is not exonerated from liability by the fact that a valid policy in favour of a 3rd party exists.

34. Having found that the petitioner has not cited any constitutional provision that has been violated by the respondents, I am of the considered view that this petition is misplaced, incompetent and fails to meet the threshold of constitutional petitions.

35. For the foregoing reasons, I hereby strike out this petition with costs.

36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 24TH DAY OF JUNE, 2021.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 24th day of June 2021