**Association of Insurance Brokers of Kenya v Cabinet Secretary For National Treasury & Planning & 4 others (Petition 288 of 2019) [2021] KEHC 451 (KLR) (Constitutional and Human Rights) (29 July 2021) (Judgment)**

*Association of Insurance Brokers of Kenya v Cabinet Secretary for National Treasury & Planning & 4 others [2021] eKLR*

Neutral citation: [2021] KEHC 451 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 288 OF 2019**

**JA MAKAU, J**

**JULY 29, 2021**

**IN THE MATTER OF ARTICLES 22(1), 23, 27, 47, 50 (1) AND 165(3)(B), (D) & (E) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010;**

**IN THE MATTER OF INTERPRETATION OF THE PRESIDENT'S MEMORANDUM CONTAINING THE REFUSAL BY THE PRESIDENT TO ASSENT TO THE INSURANCE (AMMENDMENT) BILL OF 2018;**

**IN THE MATTER OF INTERPRETATION OF SECTION 156 OF THE INSURANCE ACT AS AMENDED BY THE INSURANCE (AMENDMENT) ACT 2019;**

**IN THE MATTER OF THE INSURANCE ACT, CAP 487, LAWS OF KENYA;**

**BETWEEN**

**ASSOCIATION OF INSURANCE BROKERS OF KENYA ..... PETITIONER**

**AND**

**CABINET SECRETARY FOR NATIONAL TREASURY & PLANNING ..... 1ST RESPONDENT**

**THE ATTORNEY GENERAL ..... 2ND RESPONDENT**

**INSURANCE REGULATORY AUTHORITY ..... 3RD RESPONDENT**

**ASSOCIATION OF KENYA INSURERS ..... 4TH RESPONDENT**

**THE NATIONAL ASSEMBLY OF KENYA ..... 5TH RESPONDENT**

**Section 156 of the Insurance Act as amended by the Insurance (Amendment) Act, 2019 was unconstitutional.**

*An amendment was introduced to section 156 of the Insurance Act. In effect it prohibited the receipt of premiums by an intermediary on behalf of an insurer, absolved an isurer from liability for claims wherein the premiums from the insured had not been received and criminalized actions that were against the provision. The High Court held that the provision was unconstitutional for various reasons including that the intermediaries were not afforded a hearing and their rights to fair administrative action under article 47 of the Constitution were violated. The court also held that the intermediaries' rights to property, in terms of potential loss of commission earnings, were adversely impacted as the general public might not see the need for their services as premiums were payable directly to the insurer and also some insurers might not pay them their commission after receiving premiums from the insured that got insurance through them. The High Court also found that public participation requirements were generally not met as the public and insurance stakeholders were not consulted as per the required threshold for public participation.*

Reported by Chelimo Eunice

***Statutes*** *– interpretation of statutes – interpretation of statutory provisions - what were the principles applicable in interpreting statutory provisions – constitutional validity of a statute - what were the parameters of determining the constitutional validity of a statute - presumption of constitutionality of a statute and determinations on the constitutionality of the mischief, intention and purpose of a statute - principles applicable when determining whether section 156 of the Insurance Act as amended by the Insurance (Amendment) Act (Act No. 11 of 2019) was constitutional.*

***Statutes*** *– interpretation of statutes – Insurance Act – interpretation of section 156 of the Insurance Act as amended by the Insurance (Amendment) Act, 2019 on the protection of the insurer from assuming risks of insured persons – what was the purpose of the amendment - whether section 156 of the Insurance Act as amended by the Insurance (Amendment) Act, 2019 was constitutional – what was the effect of the insurance amendment law on insurance stakeholders - whether the provisions of the insurance amendment law were discriminatory against the insurance brokers and intermediaries – Constitution of Kenya, articles 27, 47 and 50.*

***Constitutional Law*** *– fundamental rights and freedoms – right to property – requirement for due process to be followed when dealing with proprietary rights – whether section 156 of the Insurance Act as amended by the Insurance (Amendment) Act, 2019 had the effect of depriving the petitioner of their property hence unconstitutional – Constitution of Kenya, 2010, article 40.*

***Constitutional Law*** *- national values and principles of governance - public participation - public participation during legislative processes - what was the standard to be applied when determining whether the obligation of facilitating public participation had been met - whether constitutional standards of public participation were met when amending section 156 of the Insurance Act through the Insurance (Amendment) Act, 2019 - Constitution of Kenya 2010, articles 10 and 118(b).*

***Words & Phrases*** *– premiums – definition of premiums – periodic payment required to keep an insurance policy in effect and was also termed as insurance premium - Black's Law Dictionary, 8th Edn, pg 3741.*

***Words & Phrases*** *– commission – definition of commission - a fee paid to an agent or employee for a particular transaction, usually as a percentage of the money received from the transaction, such as cases of brokers - Black's Law Dictionary, 8th Edn, pg 813.*

**Brief facts**

The petitioner challenged the constitutionality of section 156 of the Insurance Act as amended by the Insurance (Amendment) Act, 2019, and sought an order of a permanent injunction to restrain and stay the operation and implementation of the section. The petitioner argued, among other allegations, that the proposed amendment did not balance the rights of the industry players, being the insured and the brokers,

and that the proposed law as framed would frustrate the current government policy of encouraging insurance penetration. Its other major concern was the criminalization of handling premiums by insurance brokers which would lead to massive closures of insurance brokerage firms thereby jeopardizing the constitutional rights of the members of the petitioner.

The petitioner, in addition, averred that in a bid to include their views in the Bill, they presented a proposed substituted bill addressing and resolving the challenges identified in the Bill, which was amended by the 5th respondent accordingly and passed. That when the Bill was presented to the President, the President declined to assent to it setting out reasons for refusal and making his recommendation. The bone of contention on the President's recommendation was an amendment to section 156(1) of the Insurance Act which provided that no insurer would assume a risk in Kenya until the premium payable was received by the said insurer.

The petitioner's argument was that the repealed section already provided that the insurer would not assume risk until the premium was paid or guaranteed and therefore the President's recommendations aimed at reverting the Bill to its original frame as expressed in the June 2018 Bill. The petitioner argued that the President exceeded his powers in directing the National Assembly on the wording of the Bill.

**Issues**

i. What were the principles applicable when interpreting statutory provisions?
ii. What were the parameters for determining the constitutional validity of a statute?
iii. Whether section 156 of the Insurance Act as amended by the Insurance (Amendment) Act, 2019, on the protection of the insurer from assuming risks of insured persons was constitutional.
iv. What was the effect of section 156 of the Insurance Act as amended by the Insurance (Amendment) Act, 2019 on insurance stakeholders?
v. Whether section 156 of the Insurance Act as amended by the Insurance (Amendment) Act, 2019 had the effect of depriving the petitioner of their property.
vi. What was the standard to be applied when determining whether the obligation of facilitating public participation had been met?
vii. Whether constitutional standards of public participation were met when amending section 156 of the Insurance Act through the Insurance (Amendment) Act, 2019.

**Relevant provisions of the Law**

**Insurance (Amendment) Act, No. 11 of 2019**

**Section 156 - Advance Payment of premiums**

*(1) No insurer shall assume a risk in payment of Kenya in respect of insurance business unless and until the premium payable thereon is received by the insurer.*

*(2) An intermediary shall not receive any premiums on behalf of an insurer.*

*(3) An intermediary who contravenes subsection (2) shall be liable to a penalty equivalent to twenty percent of the unremitted premium on each contravention, payable to the Policyholders Compensation Fund.*

*(4) Any officer or director of an intermediary who contravenes subsection (2) shall be guilty of an offence, and upon conviction shall be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term of three months, or to both.*

*(5) An insurer shall pay an intermediary insurance commission due within thirty days upon receipt of premium.*

*(6) An insurer who contravenes subsection (5) shall be liable to a penalty of five million shillings on each contravention, payable to the Policyholders Compensation Fund.*

**Insurance Act (cap 487)**

**Section 156 - Advance Payment of premiums;**

*1. No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed, or unless and until a deposit of a prescribed amount, is made in advance in the prescribed manner.*

*3. No agent shall collect the premium of a policy of insurance canvassed or solicited by him, and no agent shall signify acceptance of the risk on a policy of insurance canvassed or solicited by him, except in so far as to the extent that he has been authorized by an insurer to collect the premium or to issue cover notes, as the case may be; but nothing in this section shall prohibit an agent from collecting and transmitting to an insurer a cheque drawn in favour of an insurer.*

*4. A premium collected by an agent or a cheque received by him shall be deposited with, or dispatched and received by the insurer before the commencement of the insurance cover.*

*5. The requirements of this section may be relaxed by regulations in respect of particular categories of the policies.*

*(6) A broker shall prepare, as at 30th June and 31st December of each financial year, a statement in the prescribed form showing the premium due to insurers from the broker for the prescribed durations and shall furnish each statement, duly signed in the prescribed manner, to the Commissioner within two months after the end of the period to which it relates.*

*(8) All moneys received by a broker from a client or an insurer shall be deposited in a separate client account in a bank licensed under the Banking Act, which shall be held in trust and under no circumstances be mixed with moneys or working capital belonging to a broker: Provided that the broker may draw money from the client account for the purpose of remitting premium payments to insurers or payments to insurers or payment of claim money received from an insurer on behalf of his client.*

*(9) In effecting the premium payments under subsection (8), the broker may deduct the brokerage commission due to him under the specific risks in respect of which the payment is made and shall prepare a statement showing such details with respect to the remittance, as the Commissioner may prescribe.*

*(10) Any moneys earned by way of interest on sums deposited in a client account under this section shall accrue to the benefit of the broker.*

*(11) The client account of a broker shall be audited annually by an auditor qualified under section 161 of the Companies Act, who shall issue a certificate to the Commissioner certifying whether or not the account is managed in accordance with the provisions of this Act.*

*(12) An auditor's certificate under subsection (11) shall be a mandatory requirement for the renewal of a broker's registration.*

**Held**

1. In examining the constitutionality of a statute, the assumption was that the legislature understood and appreciated the needs of the people and the laws it enacted were directed to problems that were made manifest by experience and the elected representatives assembled in a legislature enacted laws which they considered to be reasonable for the purpose for which they were enacted. The presumption was, therefore, in favour of the constitutionality of an enactment.
2. In interpreting the Constitution, the court ought to attach such meaning and interpretation that met the purpose of guaranteeing constitutionalism, non-discrimination, separation of powers and enjoyment of fundamental rights and freedoms.
3. Section 156 of the Insurance (Amendment) Act had three visible effects on the insurance industry;
    a. absolving the insurer from liability on risk claims that arose from premiums not directly received by them from the insured;
    b. removing intermediaries' powers to collect premiums on behalf of the insured;
    c. introducing criminal sanctions to any directors or officers of intermediaries who contravened the section.
4. The main intention of the amended section was to protect the insurer from assuming risks of insured persons by rogue intermediaries who failed to remit premiums and could therefore cause the possibility of bankruptcy and loss of business to the insurer.
5. As at December 31, 2017, members of the petitioner contributed up to 32% of the smaller share of long-term premiums and 42% of the general insurance business. The petitioner's member's contribution

was up to 33.5% of the insurance business. The petitioner's members had a vital role in ensuring the continuity and success of the insurance industry in Kenya. In light of that, the court discerned in the interpretation of the mischief, that there was political and social mischief interpretation.

6. The political mischief could be observed that following the passage of the 2018/2019 budget, the 1st respondent sought to introduce amendments to the Insurance Act and on June 19, 2018, the 1st respondent caused to be published the Insurance (Amendment) Bill, 2018 (the Bill), whose principal object was indicated as intended to amend the Insurance Act (the Act) to address the adverse selection and high costs of loss assessment related to traditional indemnity-based agricultural insurance by providing index-based insurance as an alternative with an intention to reduce moral hazard, adverse selection, underwriting and claim assessment costs while speeding up claim settlement. The Bill was also indicated as seeking to amend the Act by introducing a legal provision creating offences on insurance fraud including penalties intended to address the problem of insurance fraud.
7. Before the Act was amended, the petitioner, being insurance brokers, had the right to collect premiums on behalf of insurers and would proceed to pay themselves commissions and also were allowed to keep the interests on the premiums collected as seen in section 156(3), (9) and (10) of the Act. After the amendment, the insurer was absolved from liability on risk claims that arose from premiums not directly received by them from the insured**,** intermediaries' powers to collect premiums on behalf of the insured were removed and criminal sanctions were introduced to directors or officers of intermediaries who contravene the section, as seen in section 156(1-4) of the Act**.** The petitioner, being the brokers, was seriously and adversely affected by the amendments.
8. The political mischief arose in the manner in which the Bill was passed by Parliament into law. The Bill was presented to the President for assent on May 10, 2019. However, vide a memorandum dated May 23, 2019, pursuant to article 115(1) (b) of the Constitution, the President declined to assent to the Bill setting out reasons.
9. It was quite ironic that the President's reservations contained the original wording as initially expressed in the June 2018 Bill by the 1st respondent, who worked under him. That could be described as a different bill following recommendations for his own bill, and completely disregarding public participation as prescribed under article 10 of the Constitution.
10. The 5th respondent on the other hand, being the National Assembly, erred by failing to exercise discretion on the President's reservations as outlined under article 115(4) of the Constitution and proceeded to adopt the bill incorporating the President's reservations which was later assented into law on July 19, 2019, thereby completely disregarding the views of the petitioner and other insurance stakeholders.
11. The new insurance law would have the effect of discouraging insurance penetration, since the intermediaries, would be cut out from collecting premiums directly from brokers and also that the criminalization of handling of premiums by insurance brokers would lead to massive closures of insurance brokerage firms thereby jeopardizing the rights of the petitioner's members who were in excess of 5000 employees.
12. While intermediaries were the nexus between the insured and insurer, the amended law did not permit an intermediary to handle any premiums on behalf of the insured while it permitted the insurance companies to hold on to commissions payable to intermediaries for a period of 30 days, thereby creating a possibility of insurance companies unnecessarily withholding payment of commissions, thereby creating a discriminatory state of affairs in the insurance market in violation of article 27 of the Constitution. Further, while the insurance amendment law criminally sanctioned officers or directors of an intermediary who received premiums on behalf of an insurer, it did not in the same vein, criminally sanction officers or directors of an insurer who failed to pay an intermediary insurance commission within 30 days upon receipt of the premium.

13. The respondents contended that the purpose was to remedy the problem of outstanding premiums by enhancing the insurers' liquidity which would promote payment claims to policyholders. However, not all unpaid outstanding premiums were owed by the petitioner's members alone.
14. The social mischief interpretation impact of the Insurance (Amendment) Act was job losses, occasioned by the impediment on intermediaries, such as restricting the petitioner from collecting premiums and also, discrimination on the petitioner's members by criminally sanctioning their directors, officers or agents, if they collected premiums while failing to do the same to the directors or officers of insurers, if they failed or delayed to pay brokers the commissions they were legally entitled to.
15. The President having disregarded the petitioner's members' proposal in the final amendment, the impact of section 156 of the Insurance (Amendment) Act was a violation of article 27 of the Constitution. Section 156 (4) of the Insurance (Amendment) Act, 2019, introduced criminal sanctions on officers and/or directors of an intermediary, where they were liable to a fine not exceeding one hundred thousand shillings or imprisonment of up to three months or both, for receiving premiums on behalf of an insurer, however, no criminal sanctions had been introduced against the officers or directors of the insurer, who failed to pay commissions to an intermediary within 30 days of receiving premiums from the insured.
16. The amendment of section 156 of the Insurance Act was disproportionate for the purpose of achieving the intended objective of ensuring the continuity of the insurance business through curtailing the liberty of intermediaries to handle premiums having seen they contributed up to 33.5% of the insurance business in Kenya. The amendment was equally discriminative as the same provided no sanctions to insurance companies for failing to remit insurance commissions to intermediaries within the 30 days period.
17. To the extent that the law provided a penalty and criminalized receipt of premiums by an intermediary on behalf of an insurer, without due process and affording an opportunity to the petitioners, the same was arbitrary and contravened article 47 of the Constitution on the right to fair administrative action and article 50 of the Constitution on the right to a fair hearing.
18. Even though there was an instance where the insurer declined the claim that arose due to non-remittance of premium, that was one matter. All members of the petitioner could not be punished for the wrongdoings committed by a few errant persons.
19. The assertion that the petitioner's members owed the insurer Kshs. 14 billion worth of premiums could not be proved since the schedules attached by the respondents did not show how the alleged debt was accumulated. Also, the schedule listing insurance brokers contained substantial sums owed by parties who were not insurance brokers and the respondents only proceeded to name a few.
20. Some of the alleged outstanding premiums appeared to have been settled by the petitioner's members. There were acknowledgment letters from the insurers acknowledging having received premiums from the brokers and some insureds who had failed to remit premiums to brokers for their onward transmission to insurers. That meant that not all unpaid outstanding premiums could be attributed to the petitioner's members alone.
21. There was a lack of consideration given to the views of the public, particularly, insurance stakeholders such as the petitioner in passing the law contrary to articles 10 and 118 of the Constitution. Section 156 of the Insurance (Amendment) Act was unconstitutional.
22. Article 40 of the Constitution protected the right of every person to, either individually or in association with others, acquire and own property. Its' thrust was to protect proprietary rights under the law and which rights were grounded in the statutes and in the Constitution. Due process was paramount when dealing with proprietary rights. The requirement for due process was underpinned by several provisions of the Constitution. First, it was implicit in article 40(2)(a) of the Constitution which prohibited the legislature from passing legislation that arbitrarily deprived a person of any interest in or right over any property of any description.

23. The petitioner's members earned commissions from any premiums paid by them to the insurers, therefore, it was important to consider the difference between premiums and commissions. Whereas a commission was a fee paid to an agent or employee for a particular transaction, usually as a percentage of the money received from the transaction, premiums were a periodic payment required to keep an insurance policy in effect and was also termed as insurance premium.
24. Section 156 of the Insurance Act allowed the petitioner's members to collect more profit and bring more insurance business to the insurers by virtue of having a wider outreach and collecting premiums directly. The impugned amendment had the effect of depriving the petitioner of their property not in the form of premiums since that was money paid directly to the insurer but rather, in the form of commissions since the insured general public would no longer see the need for insurance brokers if premiums were paid directly to the insurers. They could also lose income from rogue insurers who delayed or refused to pay them their commission upon receiving premium payments by virtue of intermediaries' efforts. Thus, the amendment to the Insurance Act infringed on the petitioner's right to property contrary to article 40 of the Constitution.
25. The constitutional text in article 118(1) of the Constitution stated in plain language that Parliament had to conduct its business in an open manner, and its sittings and those of its committees ought to be open to the public and it had to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. Public participation as a national value was central to the legislative process.
26. The representative and participative elements of democracy ought not to be seen as being in tension with each other. What the constitutional scheme required was the achievement of a balanced relationship between representative and participatory elements in democracy. The public involvement provisions of the Constitution addressed that symbolic relationship, and they lay at the heart of the legislative function. The Constitution contemplated that the people would have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process.
27. Public participation had to include and be seen to include the dissemination of information, an invitation to participate in the process, and consultation on the legislation. That was, people had to be accorded an opportunity to participate in the legislative process and that was a question of fact to be proved by the party that was required to comply with the constitutional requirement that indeed there was compliance. Merely allowing public participation in the law-making process was not enough. More was required and measures needed to be taken to facilitate public participation in the law-making process.
28. The legislation was so important to the public that public participation was an important segment of the legislative process that could not be overlooked or ignored under any circumstances.
29. The President had power under article 115(2) of the Constitution to make reservations and recommendations on bills. That power was a protection mechanism against harmful policies and corruption that the President found objectionable on policy or substantive grounds. The President exercised his discretion under article 115(2) of the Constitution, the President ought to act in line with article 10 of the Constitution.
30. The president fell short of article 10 of the Constitution provision. When the Insurance (Amendment) Bill was presented to the President for assent, the President completely disregarded the input of the petitioner and other insurance stakeholders and made recommendations that were similar to the original Bill, which had amendments that came from his cabinet secretary, for National Treasury and Planning, which had not undergone public participation. That had not been controverted by the respondents. That was akin to the recommending new Bill for passing by Parliament not subjected to public participation and where required therefore to be subjected to public participation as it had not.

31. Even though the President was empowered under article 115(2) of the Constitution to make reservations on a Bill, making recommendations that were in the exact nature to the original Bill and not subject to public participation thereafter amounted to disregarding the input of the relevant public views and insurance stakeholders, thus amounting to failure to subject the bill to public participation by Parliament. Public participation ought not to be treated as a mere formality, or a cosmetic exercise, rather, it was a core constitutional principle that ought to be visibly reflected in legislation passed by the National Assembly as the same determined the legality and constitutionality of an action.
32. The legislature erred by disregarding the views of insurance stakeholders and the general public, and the 5th respondent equally failed to exercise its powers under article 115 (4) of the Constitution, where it would have overruled the recommendations by a two-thirds majority and passed the amendment that had included the views of the public.
33. The petition raised serious constitutional questions that required the interpretation and determination of the instant court. From the manner in which the Insurance (Amendment) Act was passed, such an amendment had impacted on petitioner's constitutional rights. The petition was therefore properly before the court.
34. On October 29, 2020, a three-Judge bench of the High Court issued a judgment where it declared various Acts passed by the National Assembly to be in contravention of articles 96, 109, 110, 111, 112, and 113 of the Constitution and therefore unconstitutional, null and void. The Insurance (Amendment) Act, 2019 was one such Act that was declared unconstitutional. The said decision had been appealed at the Court of Appeal in which a stay had been issued pending a hearing and determination of the appeal.

*Petition allowed.*

***Orders***

i. *Declaration issued that section 156 of the Insurance Act as amended by the Insurance (Amendment) Act, 2019 was unconstitutional and therefore null and void.*
ii. *An order of permanent injunction was issued permanently restraining and staying the operation and implementation of section 156 of the Insurance Act as amended by the Insurance (Amendment) Act, 2019.*
iii. *Costs to the petitioner ordered to be met by the respondents on a full indemnity basis.*

**Citations**

**Cases**

***Kenya***

1. *Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & Katiba Institute (Interested Parties)* Petition 476 of 2015; [2019] KEHC 10892 (KLR) - (Mentioned)
2. *Commission for the Implementation of the Constitution v National Assembly of Kenya, Senate of the Republic of Kenya & Attorney General* Constitutional Petition 496 of 2013; [2013] KEHC 6919 (KLR) - (Mentioned)
3. *Council of County Governors v Attorney General & another* Constitutional Petition 56 of 2017; [2017] KEHC 6395 (KLR) - (Explained)
4. *Disaranio Limited v Kenya National Highways Authority & another* Petition 13 of 2015; [2017] KEHC 7593 (KLR) - (Mentioned)
5. *Gakuru, Robert N & others v Governor Kiambu County & 3 others* Petitions 532 of 2013 ; 12, 35, 36, 42, & 72 of 2014 & Judicial Review Miscellaneous Application 61 of 2014; [2014] eKLR (Consolidated) - (Mentioned)
6. *Imanyara, Mugambi & another v Attorney General & 5 others* Constitutional Petition 399 of 2016; [2017] eKLR - (Mentioned)

7. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2014; [2015] eKLR, - (Mentioned)
8. *Insurance Regulatory Authority v Online Insurance Brokers Limited* Civil Appeal 312 of 2019; [2019] KEHC 4016 (KLR) - (Mentioned)
9. *Insurance Regulatory Authority v Online Insurance Brokers Limited* Civil Appeal 312 of 2019; [2019] KEHC 4016 (KLR) - (Applied)
10. *Kenya Human Rights Commission v Attorney General & another* Constitutional Petition 87 of 2017; [2018] KEHC 9656 (KLR) - (Explained)
11. *Kitheka, Simeon Kioko & 18 others v County Government of Machakos & 2 others* Petition 9 of 2018 ; [2018] eKLR - (Mentioned)
12. *Law Society of Kenya v Attorney General & 10 others* Constitutional Petition 3 of 2016; [2016] eKLR - (Mentioned)
13. *Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Application 29 of 2014; [2014] KESC 6 (KLR) - (Mentioned)
14. *Mboya, Apollo v Attorney General & 2 others* Petition 472 of 2017; [2018] KEHC 6933 (KLR) - (Mentioned)
15. *Okuta, Jacqueline & another v Attorney General & 2 others* Petition 397 of 2016; [2017] KEHC 8382 (KLR) - (Mentioned)
16. *Pevans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others* Petition 353 & 505 of 2017; [2017] eKLR - (Mentioned)
17. *Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others* Civil Appeal 11 of 2018; [2018] eKLR - (Mentioned)
18. *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 6 others (Interested Parties)* Petition 284 & 353 of 2019; [2020] KEHC 2263 (KLR) - (Applied)
19. *Transparency International (TI Kenya) v Attorney General & 2 others* Petition 388 of 2016; [2018] KEHC 8951 (KLR) - (Applied)
20. *Tripple One Motors Limited & 10 others v National Transport and Safety Authority* Petition 63 of 2020; [2021] KEHC 12575 (KLR) - (Explained)
21. *Were, Samwel & 14 Others v Attorney General & 2 others* Constitutional Petition 17 of 2017; [2017] KEHC 9433 (KLR) - (Explained)

***South Africa***

1. *Doctors for Life International v Speaker of the National Assembly and others* CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) - (Mentioned)
2. *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* (CCT 7 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) - (Mentioned)

***Canada***

*R v Big M Drug Mart Ltd* [1985] 1 SCR 295; 18 DLR (4th) 321 - (Mentioned)

**Texts**

Garner, BA., (Ed) (2004), *Black's Law Dictionary* St Paul's Minnesota: West Group 8th Edn pp 813, 3741

**Statutes**

***Kenya***

1. Banking Act (cap 488) In general - (Cited)
2. Companies Act (cap 486) In general - (Cited)
3. Constitution of Kenya articles 1, 10, 20, 21, 27, 40, 47, 50(1); 73; 94(1); 95; 96; 101; 109; 114; 115(1)(b)(2)(3); 118; 131(2)(a)(b); 259- (Interpreted)
4. Fair Administrative Action Act (cap 7L) In general- (Cited)

5. Insurance (Amendment) Act, 2019 (Act No 11 of 2019)section 156(2)(3)(5)(6)(9)(10) - (Interpreted)
6. Insurance Act (cap 487) section 156- (Interpreted)

**Advocates**

None mentioned

## JUDGMENT

1. The petitioner through a petition dated July 19, 2019, seeks the following orders :-

    a. A declaration do issue that section 156 of the *Insurance Act* as amended by the *Insurance (Amendment) Act, 2019* is unconstitutional and therefore null and void;

    b. An order of permanent injunction do issue permanently restraining and staying the operation and implementation of section 156 of the *Insurance Act* as amended by the *Insurance (Amendment) Act, 2019*;

    c. This honourable court be pleased to grant such other or further orders as it may deem just and appropriate in the circumstances;

    d. This honourable court be pleased to order that the respondent pay the costs of these proceedings on a full indemnity basis.

**Parties Respective Cases**

**The petitioner's case**

2. The petitioner in this petition seeks to challenge the constitutionality of section 156 of the *Insurance Act* as amended by the *(Amendment) Act 2019* in what the petitioner describes as the contentious law.

3. It is petitioner's contention that following the Insurance (Amendment) Bill, 2018, the 1st respondent introduced amendments to address adverse selection and high costs of loss assessment related to traditional indemnity-based agriculture insurance and also created offences on insurance fraud including penalties intended to address the problems of insurance fraud.

4. It is urged that the petitioner engaged the 1st respondent and the Commissioner for insurance during the bill's discussion in Parliament where they had several reservations among them. It is contended that the proposed amendment did not balance the rights of the industry players, being, the insured and the brokers and that the proposed new law as framed would frustrate current government policy of encouraging insurance penetration. It is stated further that the other major concern was the criminalization of handling premiums by insurance brokers that would lead to massive closures of insurance brokerage firms thereby jeopardizing the constitutional rights of the members of the petitioner.

5. The petitioner in addition averred that in a bid to include their views in the bill, they presented to the clerk of the National Assembly a proposed substituted bill addressing and resolving the challenges identified in the bill, which was amended by the 5th respondent accordingly and passed on the February 28, 2019.

6. Upon the bill passing, the 5th respondent presented the bill to the President for assent on the May 10, 2019 upon which the President declined to assent to the bill setting out reasons for refusal and making his recommendation on clauses 2, 3 and 11 of the bill, substituting and deleting some of the clauses so as to be in line with his recommendations.

7. It is stated that of the recommendations the President made, the bone of contention, was an amendment on section 156(1) of the Principal Act where the amendment was that no insurer would assume a risk in Kenya until the premium payable is received by the said insurer.

8. The petitioner's argument was that the repealed section already provided that the insurer would not assume risk until the premium was paid or guaranteed and therefore the President's recommendations aimed at reverting the bill to its original frame as expressed in the June 2018 bill.

9. It was the petitioner's position that the President exceeded the powers conferred and contemplated under article 115(1)(b) of the Constitution in directing the National Assembly on the wording of the bill.

10. The petitioner averred that the amended section 156 of the *Insurance Act* is repugnant to the constitutional right to access and benefit from the insurance and the business of insurance as pursued by members of the petitioner for the benefit of the insuring public.

11. The petitioner further argued that intermediaries are the nexus between the insured and insurer. That the contentious law does not permit an intermediary to handle any premiums on behalf of the insured while it permits the insurance companies to hold on to commissions payable to intermediaries for a period of (30) days, thereby allowing insurance companies to unnecessarily withhold payment of commissions, thereby creating a discriminatory state of affairs in the insurance market, in violation of article 27 of the Constitution.

12. It is petitioner averments that the contentious law criminally sanctions officers or directors of an intermediary, who receive premiums on behalf of an insurer, while not in the same vein criminally sanctioning officers or directors of an insurer, who fail to pay an intermediary insurance commission within thirty (30) days upon receipt of the premium.

13. The petitioner argued that they contribute long term premiums at 32% and general insurance business at 42% hence the contentious law adversely targets them.

14. The petitioner further urged that the contentious law contravenes the legitimate expectation of members of the petitioner and denies them the right to the protection of the law guaranteed under articles 10, 20, 21, 27, 40, 47 and 50(1) of the *Constitution* and by that reason is unconstitutional and should therefore be declared null and void.

**The 1st, 2nd and 3rd respondents' case**

15. The 1st , 2nd and 3rd respondents rely on two replying affidavits sworn on the July 25, 2019 and August 13, 2019, grounds of opposition dated July 28, 2019 and submissions dated November 22, 2019.

16. The 2nd respondent, responded to the petitioner's contentions, stating that the purpose of the amendment on the *Insurance Act* was well intended to effect a principle of cash and carry where, if an insured suffers loss and the premium has not been remitted to the insurer, the insured is not compensated.

17. The 1st to 3rd respondents argued further that the amended Section, does not take away the role of the brokers, rather, it provides mechanisms for payment of premiums to the risk carrier, who is the insurer and that it brings a balance by imposing a penalty of Kenya Shillings Five Million (KES 5,000,000) on the insurer (insurance company) which fails to remit the commission to an intermediary (broker) within thirty (30) days.

18. The 3rd respondent argued that the intention of the amendments was to enhance liquidity of an insurer and promote payment of claims, while eliminating the perennial problem of outstanding premiums, as reported by audited financial statements as at December 31, 2018, that stood at Kenya Shillings 43 Billion of which members of the petitioner owing Kenya Shillings 14 Billion of which the insurers wrote off Kenya Shillings 3 Billion as bad debt.

19. It was the 3rd respondent's argument that the mischief sought to be cured by the impugned amendment is the non-remittance of insurance premiums which in turn affect the operations of the insurers and the interest of the policy holders. The 3rd respondent proceeded to place reliance in the decision in Nairobi Civil Appeal No 312/2019 *Insurance Regulatory Authority v Online Insurance Brokers* where the insurer declined the claim that arose due to non-remittance of premium.

20. They argued further that the President's actions do not usurp the legislative powers of Parliament because under article 115(1)(b) the President has a constitutional mandate to act in the law-making process to safeguard public interest and that his memorandum for refusal to assent, elaborated his reasons which the National Assembly could agree or refuse, as provided in the Constitution.

21. It 1st to 3rd respondents position that the impugned section 156 of the *Insurance Act* proportionately balances the interests of insurers, the insuring public and intermediaries and was therefore constitutional. The 1st to 3rd respondents prayed the Petition be dismissed with costs.

**The 4th respondent's case**

22. The 4th respondent rely on its replying affidavit sworn on July 31, 2019 by TM Gichuhi and a further affidavit by the same deponent sworn on September 23, 2019 and also submissions thereafter.

23. On its first issue on whether section 156 deprived the petitioner's members their right to property, under article 40, the 4th respondent averred that, petitioner failed to distinguish that its members property rights were in the commissions and not premiums.

24. The 4th respondent further averred that before the amendment of the *Insurance Act*, under the previous insurance law, brokers withholding payment of premiums for more than thirty (30) days affected the margin solvency of insurers and risked the insurers being declared insolvent necessitating the amendment. They argued this amendment protects policy holders who are vulnerable consumers. They prayed that the petition be dismissed with costs.

**The 5Th respondent's case**

25. The 5th respondent opposed the petition vide its replying affidavit sworn by Michael Sialai on the October 14, 2019 and submissions dated March 5, 2020.

26. It was the 5th aespondents position that the petitioner's prayers threatened the legislative role of Parliament under articles 1(1), 94 and 95 of the *Constitution*.

27. The 5th respondent averred that the Insurance (Amendment) Bill 2018, was published on June 19, 2018 and underwent public participation *vide* an advertisement on Standard and Nation Newspapers on the July 6, 2018 and subsequently a stakeholders workshop on the March 9, 2018 where the petitioner's members were in attendance.

28. It was their position that upon sending the bill to the President after public participation, the President exercised powers conferred to him under article 115(1)(b) of the *Constitution* and made

several recommendations, some of which were approved and accommodated in the bill accordingly as provided under article 115(3) of the *Constitution* on the June 26, 2019.

29. The 5th respondents averred that the bill was subsequently re-submitted to the President and he assented to it on July 19, 2019.

30. The 5th respondent stated that the Parliament was mandated by article 115(2) to amend the bill as per the President's reservations, which it had discretion to consider or disregard but chose to consider the same.

31. It was the 5th respondents position that a statute cannot be unconstitutional merely because it does not meet the economic interest of the petitioner and that an order by this court would amount to a negation of the doctrine of separation of powers and would interfere with Parliament's constitutional powers by the Judiciary.

32. However, the 5th respondent in their oral submissions before this court, acknowledged that subsequent developments changed their arguments in opposing the petition.

33. The 5th respondent Counsel in his oral submissions stated that their position has changed because they took a different position in that the entire petition was basically more of a commercial dispute between the Association of Insurance Brokers (the petitioner's members) and the Association of the Insurance (the 4th respondent's members) as to who should collect insurance premiums.

34. The 5th respondent submitted that the Insurance Policy under the Insurance (Amendment) Act, is under the Cabinet Secretary for National Treasury and Planning and was approved by the 5th respondent.

35. Further it was submitted that the purpose and intention of the impugned legislation in section 156 of the *(Amendment) Act, 2019* has changed.

36. The 5th respondent urged the court to consider, the mischief, social and political circumstances prevailing before and after the amendment of the Act.

37. The 5th respondent submitted that section 156 of the impugned Act has outlived its purpose and asked the sourt in determination this matter to exercise its wisdom in the best interest of justice.

**The petitioner's response**

38. The petitioner *vide* a further affidavit sworn by Eliud Adiedo on the August 5, 2019 and filed on September 5, 2019 responded to the 3rd respondent's assertions and stated that the issue in the petition referred to the constitutionality of section 156 of the *Insurance Act* as amended by the *Insurance (Amendment) Act, 2019* (the "Contentious Law") by repealing the previous provision and replacing it with a new section.

39. The petitioner argued that the infringement of the right to property claimed by the petitioner is not with regards to the premiums, rather, it was more concerned with the rights of members of the petitioner to earn a living and carry on the insurance brokerage business which have been infringed by the contentious law, to the extent that their handling of premiums has been criminalized.

40. The petitioner stated that the assertion that the petitioner's members owe the insurer Kshs. 14 Billion worth of premiums could not be proved since, the schedules attached by the Respondents do not show how the alleged debt is made up and also that the schedule listing insurance brokers also contains substantial sums owed by parties who are not insurance brokers and proceeded to name a few.

41. Its averred by the petitioner that the alleged outstanding sums by some insurance brokers were false and went on to attach evidence of payments vide acknowledgment letters from the insurers themselves, acknowledging having received premiums from the brokers and some insured, who have failed to remit premiums to brokers for their onward transmission to insurers.

42. The petitioner proceeded to state further that the case of online insurance brokers is an isolated case and does not demonstrate a trend that required a total overhaul of the law, so as to fundamentally affect the rights of the law abiding members of the petitioner.

43. It was the petitioner's positions that majority of the insuring Kenyan public did not have direct access to insurance companies and have to rely on members of the petitioner as intermediaries, as a result, criminalizing the handling of premiums would hamper further penetration and uptake of insurance business particularly in the outer regions of the country where the insurance companies have no reach.

44. The petitioner sought that its petitioner be upheld.

**Parties Submissions**

**The petitioner's submissions**

45. The petitioner by way of its written submissions dated October 23, 2019, submits that the first issue for determination is whether the contentious law violates the principles under article 1 and 10 of the *Constitution*.

46. The petitioner averred that the contentious law, was a replica of the original bill as presented by the 1st respondent and one of insurers stakeholders and that the actions of the President in assenting to the bill without taking into account the stakeholders view and recommendations by the National Assembly failed to satisfy the Constitutional requirement of public participation.

47. The petitioner proceeded to point out the similarities in the original bill and contentious law which appear to have been adopted verbatim.

48. The petitioner argued that public participation in legislation making process has been asserted by this court to the effect that it shouldn't be merely cosmetic, rather, the end product should reflect the views of the public. The petitioner cited the case of *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others*; *Transparency International (TI Kenya) v Attorney General & 2 others* [2018] eKLR, in support of their averments.

49. It was petitioners position that the powers donated to the President under article 115 of the *Constitution* is among the many checks and balances provided for and by disregarding the petitioner's reservations, the President and Parliament violated article 10 of the *Constitution* in passing the contentious law.

50. The second issue raised by the petitioner was whether the contentious law infringes on the Bill of Rights and therefore unconstitutional.

51. As regards this issue, the petitioner averred, that on the aspect of criminalizing collection of premiums by the members of the petitioner, article 40 of the *Constitution* on the right to property would be contravened, in that it would completely wipe out the role of intermediaries and lead to the death of the brokerage business by reason that insurance companies are not readily available to the general public and thereby depriving them off their right to property. Also, in crippling the brokerage business, it would lead to the loss of jobs and employment for approximately 5000 Kenyans employed in brokerage firms and related businesses.

52. To buttress the aforesaid the petitioner relied on case of *Mugambi Imanyara & another v Attorney General & 5 others* [2017] eKLR and *R v Big M Drug Mart Ltd*. [1985] 1 SCR 295.

53. The petitioner further submitted that the contentious law has the effect of punishing and visiting the failures of a few errant brokers at the expense of the entire membership of the Petitioner including compliant insurance brokers.

54. They averred that the contentious law offends the provisions of article 27 of the *Constitution* by criminally sanctioning officers or directors of an intermediary who receives premiums on behalf of an insurer while failing to provide similar criminal sanctions against the officers or directors of an insured who fails to pay insurance commissions to an intermediary within thirty (30) days upon receipt of a premium.

55. Reliance in support of the averments was placed in the case of *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR.

56. The petitioner submitted further that to the extent that the contentious law provides for a penalty and criminalizes receipt of premiums by an intermediary on behalf of an insurer without due process and affording opportunity to be heard, the same is arbitrary and therefore unconstitutional.

57. In addition the petitioner argued that the introduction of penal sanctions to an otherwise lawful activity infringes on the Petitioner's member's right to fair administrative action as guaranteed under article 47 of the *Constitution*, the *Fair Administrative Action Act* and the right to a fair hearing and natural justice under article 50 of the *Constitution*. The Reliance was placed in the case of *Disaranio Limited v Kenya National Highways Authority & Attorney General* [2017] eKLR.

58. The petitioner prayed that the petition be allowed.

**The 1st, 2nd and 3rd respondents' submissions**

59. The 1st, 2nd and 3rd respondents responded to the petitioner's submissions vide their submissions dated November 22, 2019 and filed on February 20, 2020.

60. On the first issue on whether the President in making reservations on the impugned law abused his powers under article 115 of the *Constitution*, they argued that the power to make reservations on a bill by the President is expressly provided for under article 115 of the *Constitution* and is not in any way inconsistent with the Doctrine of Separation of Powers. They relied on the case of *Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & another (Interested Parties)* [2019] eKLR; and *Apollo Mboya v Attorney General & 2 others* [2018] eKLR Petition 472 of 2018 in support of their assertions.

61. It was their position that under article 131(2)(a) and (b) of the Constitution, the President is under an obligation to respect, uphold and protect the Constitution, Human Rights and the Rule of Law and that by challenging the President's powers under article 115 of the *Constitution*, the Petitioner was challenging the validity and supremacy of the Constitution itself.

62. The 1st to 3rd respondents also averred that the Parliament is not bound by views expressed during public participation. In support thereto they cited the case of *Merafong Demarcation Forum and others v President of the Republic of South Africa and others* in support of their case.

63. As regards the second issue of whether section 156 of the *Insurance (Amendment) Act, 2019* is unconstitutional to the extent that it violates the petitioner's bill of rights, the respondents averred, the guiding principles on constitutional interpretation have been established under article 259 of the

*Constitution* and that every act of Parliament is constitutional and the burden of proving the contrary rests upon the person alleging otherwise.

64. The 1st to 3rd respondents averred that the Act was amended to implement the cash and carry principles, where if the insured suffers loss and the insurance premium has not been remitted to the insurer, the insured is not compensated. They averred that the outstanding premiums as at December 31, 2018 stood at Kshs 43 Billion with members of the petitioner owing Kshs 14 Billion, with Kshs. 3 Billion being written off as bad debts. They averred that sanctions provided by the repealed Act proved insufficient to the insurers necessitating the amendments on the *Insurance Act* to cure this mischief.

65. Reliance was placed in the case of *Nairobi Civil Appeal No 312/2019 Insurance Regulatory Authority v Online Insurance Brokers*,in support of their position.

66. It is the 1st to 3rd respondents contention that there is no infringement on the right to property under article 40 of the *Constitution* for the Petitioners on grounds, that a broker's definition under the *Insurance Act* does not envision an intermediary is legally entitled to handle Insurance Premiums or hold the premiums as its property. They however acknowledge that intermediaries are entitled to commissions which form property capable of being legally enforced.

67. With respect to the petitioner's contention, that the impugned law is discriminatory, the respondents averred that the provisions of section 156(5) of the *Insurance (Amendment) Act, 2019,* preserves the petitioner's right to earn a living as they are guaranteed of their commission while section 156 (6) of the Act imposes penalties upon insurers, who fail to remit commissions to intermediaries within the stipulated time period, the amended law therefore it is urged protects the interest of all parties involved and is not discriminatory.

68. The 1st to 3rd respondents therefore prayed that the petition be dismissed.

**The 4th respondent's submissions**

69. The 4th respondent rely on its replying affidavit sworn on July 31, 2019 by T.M Gichuhi and a further affidavit by the same deponent sworn on September 23, 2019 and also submissions thereafter.

70. The 4th respondent further averred that before the amendment of the *Insurance Act*, under the previous insurance law, brokers withholding payment of premiums for more than thirty (30) days affected the margin solvency of insurers and risked the insurers being declared insolvent necessitating the amendment. They argued this amendment protects policy holders who are vulnerable consumers.

71. The 4th respondents filed submissions dated September 24, 2019 and further submission dated December 18, 2019 which the 4th respondent relies on. It is submitted by the 4th respondent that that the purpose of Section 156 (2) of the Insurance (Amendment) Act 2019, was to remedy the current problem of outstanding premiums by enhancing the insurer's liquidity which would promote payment claims to policy holders.

72. In addition the 4th respondent argued that following the doctrine of privity of contract, only parties to the contract are able to enforce rights and that premiums paid by the insurer to the insured as consideration are in no way property of the Petitioner herein.

73. The 4th respondent in addition submitted that article 40(6) of the *Constitution* limits the right to property against illegally acquired property.

74. The 4th respondent stated that proper procedure was followed in enacting the Insurance (Amendment) Bill, 2018, in that it does not limit fundamental rights and freedoms but rather, introduced provisions

to create offences on insurance fraud, including penalties intended to address the insurance fraud problem.

75. It is 4th respondent's argument that the President discharged his responsibility as a leader in refusing to assent to the Insurance (Amendment) Act, 2018 and gave his recommendations as a good public trustee acting in the best public interest as per article 73 of the *Constitution*.

76. The 4th respondent's position is that the Presidential powers under article 115 of the Constitution are a protection mechanism against harmful policies and corruption that the President finds objectionable on policy or substantive grounds.

77. On the issue on the infringement of the bill of rights, particularly article 27 of the *Constitution*, the 4th respondent averred that non-discrimination does not mean equality in treatment and mere differentiation per se does not amount to discrimination. It is argued that the premium is not the property of the intermediary, hence, the same should be handled directly by the insurer.

78. To buttress its arguments the 4th respondent relied on the cases of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 other* [2013] eKLR; *Were Samuel & 14 others v Attorney General & 2 others* [2017] e KLR; P*evans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others* [2017] eKLR; *Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & another (Interested Parties)* [2019] eKLR.

79. The 4th respondent prayed that the petition be dismissed with costs.

**The 5th respondent's submissions**

80. The 5th respondent relied on its submissions dated March 5, 2020, in support of its replying affidavit sworn by Michael Sialai on the October 14, 2019.

81. On the first issue as raised by the petitioner on whether the National Assembly exercised its legislative authority as required by the Constitution in enacting the Insurance (Amendment) Bill, 2018, the 5th respondent averred that Parliament has a constitutional obligation to take legislative and policy measures to ensure progressive realization of every constitutional right.

82. It is further averred that the Parliament in exercising its legislative powers under articles 94(1) and article 109 of the *Constitution* enacted the impugned legislation.

83. With regards to the second issue on whether there was public participation during the enactment of the Insurance (Amendment) Bill, 2018, the respondent averred that it invited the public through print media by placing an advertisement in both Standard and *Daily Nation* newspaper asking for memoranda from stakeholders and received submissions from various, institutions, individuals including the petitioner. The 5th respondent contend that it therefore shifted the burden of proving otherwise to the petitioner.

84. Reliance was placed in the cases of *Robert N Gakuru & others v Governor Kiambu County & 3 others* (2014) eKLR; and *Doctors for Life International vs Speaker of the National Assembly and others*; *Law Society of Kenya vs The Attorney General and 10 others* Petition No 3 of 2016; *Commission for Implementation of constitution the Constitution v Senate of Kenya & 2 others* [2013] eKLR, in support of their position.

85. The 5th respondent argued that the fact that the outcome of the public participation did not result in what the petitioners wanted does not negate public participation and that proposals by the President

fall within the parameters of what had been subjected to public participation when the Insurance Bill was committed to the National Assembly Committee on Finance and National Planning.

86. On the issue of whether the National Assembly violated article 114 of the *Constitution*, the 5th respondent stated the procedure it followed in enacting the amended insurance law, from the bill stage to the publishing stage and stated that a bill may be moved during the committee stage and/or after reservations by the President and that to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process.

87. It is the 5th respondent's position that Parliament's amendments do not necessarily have to agree with the views expressed by the people who have been heard, as long as the views have been taken into account.

88. Reliance was placed in the cases of *Institute of Social Accountability & another v National Assembly & 4 others* [2015] e KLR and *Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR, in support of the 5th respondents aforesaid averments.

89. The 5th respondent further argued that the amendments moved after reservations by the President was within the parameters of what had been subjected to public participation when the Insurance (Amendment) Bill, 2018 was committed to the National Assembly Committee on Finance and National Planning and Trade, and the same was therefore passed in accordance to article 114 of the *Constitution*.

90. The 5th respondent Counsel orally submitted to court that subsequent development has changed the 5th respondents arguments in application to the petition. It is urged that the National Assembly was not a party initially but joined later as it was thought the petition was challenging the legislation mandate of the National Assembly under article 95 and 101 of the *Constitution* but the matter took different development as what turned out to be in issue was not legislation but a fight between petitioners and 4th respondent as to who should collect the Insurance Premium

91. The counsel submitted the policy in this suit is one by Cabinet Secretary, the 1st respondent. On the interpretation of the law the counsel requested the court to look at the purpose and intention of the impugned legislation in respect of section 156 of the *Insurance (Amendment) Act 2019* and consider the mischief, social and political circumstances prevails before and after. It was further urged that it was clear that section 156 of the I*nsurance (Amendment) Act 2019* might have outlined its purpose. The counsel thereafter urged the court to exercise its wisdom in the best interest of justice.

92. The 5th respondent urged any order as to costs should not affect he 5th respondent.

**Analysis and Determination**

93. Having carefully considered the petition dated July 19, 2019, the respondents' responses, the parties rival submissions and rival authorities, I find the following issues arise for determination:-

    a. Whether section 156 of the *Insurance (Amendment) Act, 2019* is unconstitutional;

    b. Whether the petitioner's right to property has been violated contrary to article 40 of the *Constitution*;

    c. Whether the Insurance (Amendment) Act contravened article 10 of the *Constitution* with regards to Public Participation.

**A. Whether section 156 of The Insurance (Amendment) Act, 2019 is Unconstitutional;**

94. The entire petition herein revolves around the issue of the constitutionality of section 156 of the Insurance (Amendment) Act, 2019, therefore this is the issue of utmost importance, whose outcome may result in determination of the entire Petition.

95. In the case of *Council of County Governors v Attorney General & another* [2017] eKLR, the court stated;

> " Under article 259 of the *Constitution*, the court is enjoined to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under article 159(2)(e) of the *Constitution* to protect and promote the purposes and principles of the Constitution."

Further, the court noted;

> " In determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself. Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Constitution should be given a purposive, liberal interpretation and that the provisions of the Constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other. [8] It is important to bear in mind that the spirit of the Constitution must, preside and permeate the process of judicial interpretation and judicial discretion.[9]"
>
> "Discussing the presumption of Constitutionality of a statute, the Supreme Court of India in the case of *Hamdarddawa Khana vs Union of India Air*[15] stated that:-
>
> > " In examining the Constitutionality of a statute it must be assumed that the legislature understand and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment."

96. It is therefore trite that, in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

97. On this issue, the petitioner vide their petition gave a long history of how the impugned Act came to force. The petitioner averred that it had all began when the 1st respondent introduced amendments to the *Insurance Act*, following proposals in the 2018/19 budget by the Insurance (Amendment) Bill, 2018.

98. The principle objective of the Bill was indicated as intended to;

> " amend the *Insurance Act* to address the adverse selection and high costs of loss assessment related to traditional indemnity-based agriculture insurance by providing index based

insurance as an alternative with an intention to reduce moral hazard, adverse selection, underwriting and claim assessment costs while speeding up claim settlements."

99. The bill also sought to amend the Act by introducing a legal provision creating offences on insurance fraud including penalties intended to address the problem of insurance fraud.

100. The petitioner averred that they engaged the 1st respondent and the commissioner for insurance where they raised several issues among them that the proposed amendment did not balance the rights of the industry players being insurers, insured and the brokers; they also averred that the proposed new law would frustrate the current government policy of encouraging insurance penetration and that the criminalization of handling of premiums by insurance brokers would lead to massive closures of insurance brokerage firms thereby jeopardizing the rights of the Petitioner's members who were in excess of 5000 employees.

101. The petitioner stated further that by a Memorandum dated May 23, 2019, pursuant to article 115 (1) (b) of the *Constitution* (President's Memorandum), the President refused to assent to the bill setting out reasons for refusal and making the following recommendations which were subsequently adopted by the National Assembly in the Insurance (Amendment) Act 2019;

a. That clause 2 of the Bill be amended by deleting the proposed new definitions of "independent agent"; "tied agent"; "broker"; and "intermediary";

b. That clause 3 of the Bill be amended by deleting the clause and substituting it with the following clause;

The principal Act is amended by inserting the following new section immediately after section 5—

Powers of the Commissioner on member of the group to provide any 5A

(1) The Commissioner may direct any supervision. information necessary for effective group wide supervision.

(2) In the event of any breach or failure to comply with the directives of the Commissioner or safeguard the interests of the policyholders, the Commissioner shall impose any of the sanctions provided in the Act on the holding company or any member of the group.

c. That clause 11 of the Bill be amended by deleting the Clause and substituting therefore the following new clause;

The principal Act is amended by repealing section 156 and replacing it with the following new section— 156. (1) No insurer shall assume a risk in payment of Kenya in respect of insurance business unless and until the premium payable thereon is received by the insurer.

(2) An intermediary shall not receive any premiums on behalf of an insurer.

(3) An intermediary who contravenes subsection (2) shall be liable to a penalty equivalent to twenty percent of the unremitted premium on each contravention, payable to the Policyholders Compensation Fund.

(4) Any officer or director of an intermediary who contravenes subsection (2) shall be guilty of an offence, and upon conviction shall be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term of three months, or to both.

(5) An insurer shall pay an intermediary insurance commission due within thirty days upon receipt of premium.

(6) An insurer who contravenes subsection (5) shall be liable to a penalty of five million shillings on each contravention, payable to the Policyholders Compensation Fund.

102. The court has therefore to consider then, what was the law before this amendment? According to the *Insurance Act* of 2015, the position of section 156 of the previous law was as follows;

" Advance Payment of premiums

1. No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed, or unless and until a deposit of a prescribed amount, is made in advance in the prescribed manner.

2. Deleted by No 9 of 2007,s 61

3. No agent shall collect the premium of a policy of insurance canvassed or solicited by him, and no agent shall signify acceptance of the risk on a policy of insurance canvassed or solicited by him, except in so far as to the extent that he has been authorized by an insurer to collect the premium or to issue cover notes, as the case may be; but nothing in this section shall prohibit an agent from collecting and transmitting to an insurer a cheque drawn in favour of an insurer. (Emphasis mine)

4. A premium collected by an agent or a cheque received by him shall be deposited with, or dispatched and received by the insurer before the commencement of the insurance cover.

5. The requirements of this section may be relaxed by regulations in respect of particular categories of the policies. (6) A broker shall prepare, as at 30th June and 31st December of each financial year, a statement in the prescribed form showing the premium due to insurers from the broker for the prescribed durations and shall furnish each statement, duly signed in the prescribed manner, to the Commissioner within two months after the end of the period to which it relates.

(7) Deleted by No 10 of 2010...s 60 [No 12 of 1994,s 28]

(8) All moneys received by a broker from a client or an insurer shall be deposited in a separate client account in a bank licensed under the *Banking Act*, which shall be held in trust and under no circumstances be mixed with moneys or working capital belonging to a broker: Provided that the broker may draw money from the client account for the purpose of remitting premium payments to insurers or payments to insurers or payment of claim money received from an insurer on behalf of his client.

(9) In effecting the premium payments under subsection (8), the broker may deduct the brokerage commission due to him under the specific risks in respect of which the payment is made and shall prepare a statement showing such details with respect to the remittance, as the Commissioner may prescribe. (Emphasis added)

(10) Any moneys earned by way of interest on sums deposited in a client account under this section shall accrue to the benefit of the broker. (Emphasis added)

(11) The client account of a broker shall be audited annually by an auditor qualified under section 161 of the *Companies Act*, who shall issue a certificate to the Commissioner certifying whether or not the account is managed in accordance with the provisions of this Act.

(12) An auditor's certificate under subsection (11) shall be a mandatory requirement for the renewal of a broker's registration.

103. It was the petitioner's position that the President exceeded the powers conferred and contemplated under article 115 (1) (b) of the *Constitution* in directing the National Assembly on the wording of the bill.

104. The petitioner contended that the amended section 156 of the *Insurance Act* is repugnant to the constitutional right to access and benefit from the insurance and the business of insurance as pursued by members of the Petitioner for the benefit of the insuring public.

105. The petitioner argued that while intermediaries are the nexus between the insured and insurer, the contentious law, does not permit an intermediary to handle any premiums on behalf of the insured, while it permits the insurance companies to hold on to commissions payable to intermediaries for a period of (30) days, thereby allowing insurance companies to unnecessarily withhold payment of commissions, thereby creating a discriminatory state of affairs in the insurance market in violation of article 27 of the *Constitution*.

106. In addition it is argued by the petitioner that the contentious law, criminally sanctions officers or directors of an intermediary who receive premiums on behalf of an insurer, while not in the same vein criminally sanctioning officers or directors of an insurer who fail to pay an intermediary insurance commission within thirty (30) days upon receipt of the premium.

107. Having examined section 156 of the *Insurance Act*, there are three visible effects of this section to the insurance industry;

i. Absolving the insurer from liability on risk claims that arise from premiums not directly received by them from the insured (section 156 (1) ); of the Act.

ii. Removing intermediaries powers to collect premiums on behalf of the insured (section 156 (2) ); of the Act.

iii. Introducing criminal sanctions to only directors or officers of intermediaries who contravene the said Section. (section 156(4) of the Act.

108. Therefore the question raised is should this honourable court declare the said section unconstitutional?

109. The 1st, 2nd and 3rd respondents in their submissions averred that the guiding principles on constitutional interpretation have been established under article 259 of the *Constitution* and that every act of Parliament is constitutional and the burden of proving the contrary rests upon the person alleging otherwise.

110. The 1st to 3rd respondent also stated that the Act was amended to implement the cash and carry principles, where if the insured suffers loss and the insurance premium has not been remitted to the insurer, the insured is not compensated. It is averred that the outstanding premiums as at December 31, 2018 stood at Kshs 43 Billion with members of the petitioner owing Kshs 14 Billion, with Kshs. 3 Billion being written off as bad debts. The respondents averred that sanctions provided by the repealed Act proved insufficient to the insurers necessitating the amendments on the *Insurance Act* to cure this mischief.

111. The 4th respondent averred that the purpose of section 156(2) of the *Insurance (Amendment) Act 2019,* was to remedy the current problem of outstanding premiums by enhancing the insurer's liquidity which would promote payment claims to policy holders.

112. The 4th respondent also stated that the Presidential powers under article 115 of the *Constitution* are a protection mechanism against harmful policies and corruption that the President finds objectionable on policy or substantive grounds.

113. The 5th respondent on their part argued, that Parliament has a constitutional obligation to take legislative and policy measures to ensure progressive realization of every constitutional right.=

114. The 5th respondent also averred that the Parliament in exercising its legislative powers under articles 94(1) and article 109 of the *Constitution* enacted the impugned legislation in accordance to the Constitution.

115. It is the 5th respondent's position that Parliament's amendments do not necessarily have to agree with the views expressed by the people who have been heard, as long as the views have been taken into account.

116. Further the 5th respondent argued that the amendments moved after reservations by the President was within the parameters of what had been subjected to public participation when the Insurance (Amendment) Bill, 2018 was committed to the National Assembly Committee on Finance and National Planning and Trade, and the same was therefore passed in accordance to article 114 of the *Constitution*.

117. The parameters of determining the constitutional validity of a statute were well adumbrated by this court in the case of *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR, where the court stated;

> " 47. There is a general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provision is constitutionally invalid. This is because it is assumed that the legislature as peoples' representative understands the problems people they represent face and, therefore enact legislations intended to solve those problems. In *Ndynabo v Attorney General of Tanzania* [2001] EA 495 it was held that an Act of Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the country.
>
> 48. Another key principle of determining constitutional validity of a statute is by examining its purpose or effect. The purpose of enacting a legislation or the effect of implementing the legislation so enacted may lead to nullification of the statute or its provision if found to be inconsistent with the Constitution. In *Olum and another v Attorney General* [2002] EA, it stated that;
>
> > "To determine the constitutionality of a section of a statute or Act of parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by

the Constitution, the impugned statute or section thereof shall be declared unconstitutional."

49. *In The Queen v Big M Drug mart Ltd, 1986 LRC* (Const) 332, the Supreme Court of Canada stated that;

> "'Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity."

50. And in the case of *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR; the court observed that in determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned Act and this can be discerned from the intention expressed in the Act itself."

118. It is clearly noted that; from the submissions of the respondents, that the main intention of the amended section is to protect the insurer from assuming risks of insured persons by rogue intermediaries who fail to remit premiums and could therefore cause the possibility of bankruptcy and loss of business to the insurer.

119. I have, however to consider whether this is a reasonable and sufficient to justify the abovementioned amendment and what is its effect for that matter?

120. Upon perusal of the petition, the petitioner has pleaded in paragraph 40 and 41, that according to the Annual Report by the 3rd respondent as at December 31, 2017 (Annexure AIB-11), members of the petitioner contribute up to 32% of the smaller share of long term premiums and 42% of the general insurance business.

121. Looking keenly at the petitioner's (annexure AIB-11), it is clear that, the petitioner's member's contribution is up to 33.5% of the insurance business which is a very huge percentage. This therefore means that the petitioner's members have a vital role in ensuring the continuity and success of the insurance industry in the Republic of Kenya.

122. In light of the above, I find it can be summarized in the interpretation of the mischief in the above findings as follows;

**Political Mischief Interpretation**

123. The political mischief from the above finding is that, it can be observed that following the passage of the 2018/2019 budget, the 1st respondent sought to introduce amendments to the *Insurance Act* and

on June 19, 2018, and the 1st respondent caused to be published the Insurance (Amendment) Bill, 2018 ("the Bill"), whose principal object was indicated as intended to:

> " amend the *Insurance Act* to Address the adverse selection and high costs of loss assessment related to traditional indemnity-based agricultural insurance by providing index based insurance as an alternative with an intention to reduce moral hazard, adverse selection, underwriting and claim assessment costs while speeding up claim settlement."
>
> The Bill was also indicated as seeking to:
>
> "Amend the Act by Introducing a legal provision creating offences on insurance fraud including penalties intended to address the problem of insurance fraud..."

124. Looking at the purpose of the amendment, it is clear that before the *Insurance Act* was amended, the petitioner (Insurance Brokers) had the right to collect premiums on behalf of insurers (section 156(3)) and would proceed to pay themselves commissions (section 156(9)) and also were allowed to keep the interests on the premiums collected (section 156(10)) of the Act.

125. After the amendment, the following impact was effected to the Petitioners; The Insurer was absolved from liability on risk claims that arise from premiums not directly received by them from the insured (section 156 (1)); Intermediaries powers to collect premiums on behalf of the insured were removed (section 156 (2)); Criminal sanctions were introduced to directors or officers of intermediaries who contravene the said section. (section 156(4) of the Act.

126. Considering the above amendments, it is clear that the petitioner being the brokers were seriously and adversely affected by these amendments. The political mischief would arise in the manner in which the bill was passed by Parliament into law.

127. The bill was presented to the President for assent on May 10, 2019, however, vide a memorandum dated May 23, 2019, pursuant to article 115(1)(b) of the *Constitution*, the President declined to assent to the Bill setting out reasons (Annexure AIB-8 at page 113 of the petition).

128. It is quite ironical that the President's reservations contained the original wording as initially expressed in the June 2018 Bill by the 1st respondent, who worked under him. This can be described as a different bill following a recommendations for his own bill, and completely disregarding public participation as prescribed under article 10 of the Constitution.

129. The 5th respondent on the other hand being the National Assembly, erred by failing to exercise discretion on the President's reservations as outlined under article 115(4) and proceeded to adopt the bill incorporating the President's reservations which was later assented into law on July 19, 2019, thereby completely disregarding the views of the petitioner and other insurance stake holders.

**Social Mischief Interpretation**

130. The social mischief interpretation of the law before the amendment and after amendment can be described as follows;

131. It is noted that the position of the law before amendment was that, the petitioner (Insurance Brokers) had the right to collect Premiums on behalf of insurers (section 156(3)) and would proceed to pay themselves commissions (section 156(9)) and also were allowed to keep the interests on the premiums collected (section 156(10)) of the Act.

132. It is observed that after the amendment, the following impact was effected to the petitioners; The Insurer was absolved from liability on risk claims that arise from premiums not directly received by

them from the insured (section 156 (1)); Intermediaries powers to collect premiums on behalf of the insured were removed (section 156 (2)); Criminal sanctions were introduced to directors or officers of intermediaries who contravene the said section. (section 156(4) of the Act.

133. Looking at the petition, according to the Annual Report by the 3rd respondent as at December 31, 2017 (Annexure AIB-11), members of the petitioner contributed up to 32% of the smaller share of long term Premiums and 42% of the general insurance business.

134. Further, looking at the petitioner's (annexure AIB-11), it is clear, the petitioner's member's contribution is up to 33.5% of the insurance business which is a very huge percentage. This therefore means that the petitioner's members have a vital role in ensuring the continuity and success of the insurance industry.

135. The new Insurance Law would have the effect of discouraging insurance penetration, since the intermediaries, will be cut out from collecting premiums directly from brokers and also that the criminalization of handling of premiums by insurance brokers would lead to massive closures of insurance brokerage firms thereby jeopardizing the rights of the petitioner's members who were in excess of 5000 employees.

136. It is quite intriguing that while intermediaries are the nexus between the insured and insurer, the amended law does not permit an intermediary to handle any Premiums on behalf of the insured while it permits the insurance companies to hold on to commissions payable to intermediaries for a period of (30) days, thereby creating a possibility of insurance companies unnecessarily withholding payment of commissions, thereby creating a discriminatory state of affairs in the insurance market in violation of article 27 of the *Constitution*.

137. Further it is worth observing that while the insurance amendment law criminally sanctions officers or directors of an intermediary who receive premiums on behalf of an insurer, it does not in the same vein criminally sanction officers or directors of an insurer who fail to pay an intermediary insurance commission within thirty (30) days upon receipt of the Premium.

138. The respondents urged that it cannot be ignored that the Act was amended to implement the cash and carry principles, where if the insured suffers loss and the insurance premium has not been remitted to the insurer, the insured is not compensated. It should also be noted that the respondents stated that the outstanding premiums as at December 31, 2018stood at Kshs. 43 Billion with members of the Petitioner owing Kshs. 14 Billion, with Kshs. 3 Billion being written off as bad debts necessitating the amendments on the *Insurance Act* to cure this mischief.

139. The respondents averments are appreciated as regards the purpose of section 156 (2) of the Insurance (Amendment) Act 2019, was to remedy the current problem of outstanding premiums by enhancing the insurer's liquidity which would promote payment claims to policy holders.

140. However, having examined the Petitioner's evidence (Annexures AIB-21 and 22 of the petitioner's in the further affidavit dated August 5, 2019) it is clear that not all unpaid outstanding Premiums are owed by the petitioner's members alone.

141. Having considered parties submission I find that the social mischief interpretation impact of the Insurance (Amendment) Act is job losses, occasioned by the impediment on intermediaries, such as restricting the petitioner herein from collecting premiums and also, discrimination on the petitioner's members by criminally sanctioning their directors, officers or agent, should they collecting Premiums while failing to do the same to the directors or officers of insurers, if they fail or delay to pay brokers their legally entitled commissions.

142. With respect to the petitioner's members' proposal having been disregarded by the President, in the final amendment, what is the impact of section156 of the *Insurance (Amendment) Act* on the petitioner? I do agree with the petitioner on the violation of article 27 of the *Constitution* by the respondents.

143. Article 27 of the *Constitution* provides;

"Equality and freedom from discrimination

(2) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(3) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(4) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(5) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(6) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(7) To give full effect to the realisation of the rights guaranteed under this article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(8) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

144. It is noted that section 156(4) of the *Insurance (Amendment) Act, 2019*, introduces criminal sanctions on officers and/or directors of an intermediary, where they are liable to a fine not exceeding one hundred thousand shillings or imprisonment of up to three months or both, for receiving Premiums on behalf of an insurer, however no criminal sanctions have been introduced against the officers or directors of the insurer, who fail to pay commissions to an intermediary within thirty days of receiving Premiums from the insured.

145. In the case of *Jacqueline Okuta & another v Attorney General & 2 others*[2017] eKLR, this court stated;

> "Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of other persons. Thus, it is absolutely unnecessary to criminalize defamatory statements. Consequently, I am satisfied that criminal defamation is not reasonably justifiable in a democratic society within the contemplation of article 24 of *the Constitution*. In my view, it is inconsistent with the freedom of expression guaranteed by 33 of that *Constitution*."

146. Going by above case law, I find that the amendment of section 156 of the *Insurance Act*, is disproportionate for achieving the intended objective of ensuring the continuity of the insurance business through curtailing the liberty of intermediaries to handle premiums having seen they contribute up to 33.5% of the insurance business in Kenya. The amendment is equally discriminative

as the same provides no sanctions to insurance companies for failing to remit insurance commissions to intermediaries within the 30 days period.

147. Further, to the extent that the law provides a penalty and criminalizes receipt of premiums by an intermediary on behalf of an insurer, without due process and affording an opportunity to the Petitioners, the same is arbitrary and contravenes article 47 of the *Constitution* on the right to fair administrative action and article 50 of the *Constitution* on the right to fair hearing.

148. I note that the respondents have raised the issue on the case of Nairobi Civil Appeal No 312/2019 *Insurance Regulatory Authority v Online Insurance Brokers* where the insurer declined the claim that arose due to non-remittance of premium, however, this is one matter and it begs the question, should all the members of the petitioner be punished for the wrongdoings committed by a few errant persons? The answer to this question I find should be no.

149. Also noteworthy is that the assertion that the Petitioner's members owe the insurer Kshs 14 Billion worth of Premiums could not be proved since, the schedules attached by the respondents (Annexure GKK1 and 2) do not show how the alleged debt is made up and also that the schedule listing insurance brokers also contains substantial sums owed by parties who are not insurance brokers and the Respondents only proceeded to name a few.

150. Upon careful examination of the evidence of the alleged outstanding sums by some insurance brokers, it is clear that some of the alleged outstanding Premiums appear to have been settled by the petitioner's members (Annexure AIB-21 and 22) of the petitioner's further affidavit dated August 5, 2019, exhibits acknowledgment letters from the insurers, themselves acknowledging having received premiums from the brokers and some insured who have failed to remit premiums to brokers for their onward transmission to insurers. I find that this therefore means that not all unpaid outstanding premiums can be attributed to the petitioner's members alone.

151. Further, on examining the manner in which the amendment came into effect, there was lack of consideration on the views of the public, particularly, insurance stakeholders such as the Petitioner herein, in passing the law contrary to articles 10 and 118 of the *Constitution*.

152. Having examined the mischief, intention and purpose of the enactment of the *Insurance (Amendment) Act, 2019*, I hold the view that section 156 of the Insurance (Amendment) Act is unconstitutional.

**Whether the petitioner's right to property has been violated contrary to article 40 of the Constitution;**

153. The petitioner averred in their petition and submissions that the long term effect of the implementation of the contentious law, is that it will result in the crippling of the brokerage business and closure of businesses, leading to the loss of jobs and employment of approximately 5000 Kenyans employed in the brokerage firms and related businesses thereby violating their right to property as per article 40 of the *Constitution*.

154. The 1st , 2nd and 3rd respondents submitted, that there is no infringement on the right to property under article 40 of the *Constitution* for the Petitioner on grounds that a broker's definition under the *Insurance Act* does not envision an intermediary is legally entitled to handle Insurance Premiums or hold the Premiums as its property. The 1st to 3rd respondents, however acknowledge that intermediaries are entitled to commissions which form property capable of being legally enforced.

155. The 1st to 3rd respondents stated further that the amended section does not take away the role of the brokers, rather, it provides mechanisms for payment of premiums to the risk carrier, who is the insurer and that it brings a balance by imposing a penalty of Kenya Shillings Five Million (KES 5,000,000)

on the Insurer (Insurance Company) which fails to remit the commission to an intermediary (broker) within thirty (30) days.

156. The 4th respondent on the other end averred that petitioner failed to distinguish, that its members property rights were in the commissions and not premiums. It was their position that the purpose of section 156 (2) of the *Insurance (Amendment) Act 2019*, was to remedy the current problem of outstanding premiums by enhancing the insurer's liquidity which would promote payment claims to policy holders.

157. Further the 4th respondent averred that article 40 (6) of the *Constitution* limits the right to property against illegally acquired property and that proper procedure was followed in enacting the Insurance (Amendment) Bill, 2018, in that it does not limit fundamental rights and freedoms but rather, introduced provisions to create offences on insurance fraud, including penalties intended to address the insurance fraud problem.

158. This therefore necessitates this honourable court to make a determination on whether there is an infringement of this right on the part of the respondents.

159. Article 40 of the *Constitution* provides in part;

" Protection of right to property"

(1) Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law."

160. This court in the case of *Tripple One Motors Limited & 10 others v National Transport & Safety Authority* [2021] eKLR, set out the parameters in determining infringements on the right to property, the court stated;

> " Article 40 of the *Constitution* protects the right of every person to, either individually or in association with others, to acquire and own property. The thrust of article 40 is to protect proprietary rights under the law and which rights are grounded in the statutes and in the Constitution. Due process is paramount when dealing with proprietary rights. This proposition was brought out clearly by Justice DS Majanja in *Everlyn College of Design Ltd v Director of Children's Department & another* [2013] eKLR where he stated:-
>
> > " Likewise, if the land has been illegally acquired, then the State must use due process to recover it. The requirement of due process is underpinned by several provisions of the *Constitution*. First, it is implicit in article 40(2)(a) which prohibits the legislature from passing legislation that arbitrarily deprives a person of any interest in or right over any property of any description."

161. In the instant Petition the petitioner's bone of contention is that the amendment in section 156 of the *Insurance Act* has curtailed the petitioner from collecting Premiums as had been the case before, the amendment of the said section. The previous Insurance Law, even allowed the petitioner to keep the interest accrued as a result of collecting Premiums, therefore, what really consists of the petitioner's property?

162. The petitioner's members, earn commissions from any premiums paid by them to the insurers, therefore, it is important to consider the difference between Premiums and Commissions.

163. According to the "*Black's Law Dictionary*, 8th Edition by Bryan Garner, on page 813", a commission has been defined as a fee paid to an agent or employee for a particular transaction, usually as a percentage of the money received from the transaction; such as Cases of: Brokers.

164. Further, premiums have been defined by the "*Black's Law Dictionary*, 8th Edition on page 3741, "as periodic payment required to keep an insurance policy in effect and is also termed as insurance premium".

165. The impugned *Insurance Act*, defines a premium under the definition section as including the consideration for the granting of an annuity.

166. The petitioner averred in their petition that while intermediaries contribute to about 78 to 88 percent of the business of insurance companies through provision of job opportunities for tens of thousands of Kenyans, the said provision has the effect of depriving intermediaries of employment and business.

167. I find that the previous section 156 of the *Insurance Act*, allowed the petitioner's members to collect more profit and bring more insurance business to the insurers by virtue of having a wider outreach and collecting premiums directly. It is clear that the impugned Section has the effect of depriving the Petitioner off their property not in the form of premiums, since this is money paid directly to the insurer but rather, in the form of commissions, since the insured general public will no longer see the need for insurance brokers if Premiums are paid directly to the insurers and also they will lose income from rogue insurers who delay or refuse to pay them their commission upon receiving Premium payments by virtue of intermediaries efforts.

168. It is therefore my view that the amendment on the *Insurance Act* infringes on the petitioner's right to property contrary to article 40 of the *Constitution*.

**Whether the Insurance (Amendment) Act Contravened article 10 of the Constitution With Regards to Public Participation.**

169. This issue mainly concerns public participation. The petitioner averred that the President exceeded the veto power by arbitrary imposing his subjective opinion on what constitutes the best Insurance Industry Policy and Practice and ignored the input of the sector stakeholders, whose recommendations were aimed at resolving the challenges identified in the original bill and which contained an alignment with the existing law and the insurance sector best practice.

170. The respondents on the other end argued, that the amendments moved after reservations by the President was within the parameters of what had been subjected to public participation when the Insurance (Amendment) Bill, 2018 was committed to the National Assembly Committee on Finance and National Planning and Trade, and the same was therefore passed in accordance to article 114 of the *Constitution*.

171. The Constitutional text in article 118(1) of the *Constitution* under the sub title "public Participation" states in plain language that Parliament should conduct its business in an open manner, and its sittings and those of its committees should be open to the public and it should "facilitate public participation and involvement in the legislative and other business of parliament and its committees."

172. In the case of *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR, the court weighed on similar issue as follows;

> " 37. Public participation as a national value was central in the legislative process. The respondentapart from merely stating and orally so, that there was public participation and that the court has to look at the entire legislative process, and that the Act was published on July 22, 2016, has not done anything or adduced any other material evidence to demonstrate that indeed article 118(1)(b) of the *Constitution* was complied with during the enactment of the impugned Act. Publication of the Act alone could not and did not amount to Public Participation in terms of article 118(1)(b).
>
> 38. In the South African case of *Matatiele Municipality & others v The President of South Africa & Others (2)* (CCT 73/05 A [2006] ZACC 12; 2007 (1) BCLR 47 (CC), the Constitutional Court stated that;
>
> > " The representative and participative element of our democracy should not be seen as being in tension with each other...What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy." The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process"
>
> 39. Further in *Minister for Health vs New Chicks South Africa Pty Ltd* CCT 59/04, the same court observed that the forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation

and that what matters is that at the end of the day a reasonable opportunity is offered to the members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.

40. Similarly in *Robert N Gakuru & others v Kiambu County Government & 3 others* [2014] eKLR the court observed;

> " [Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates. It is my view that it behooves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough, in my view, to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that."

41. On appeal against the above decision, the court of Appeal affirmed the decision in *Kiambu County Governent & 3 others v Robert N Gakuru & others* [2017] eKLR stating;

> " [20] ...The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation,.."

42. The court went on to state that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation. That is, people must be accorded an opportunity to participate in the legislative process and this is a question of fact to be proved by the party that was required to comply with this constitutional requirement that indeed there was compliance.

43. In the words of Ngcobo, J in *Doctors for Life International v Speaker of the National Assembly & Others* (CCT 12/05) [2006] ZACC 11, 2006(12) BCLR 1399(CC), 2006 (6) SA 416 (CC)) merely allowing public participation in the law-making process is not enough. More is required and measures need to be taken to facilitate public participation in the law-making process.

44. And in the case of *Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others* [20016] ZAACC22 the court observed with regard to the standard of public participation;

> "The standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament's conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament's conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public."

173. Upon consideration the above authorities, the facts of this case herein and applying the above legal principle to this petition, I have no doubt that the legislation was so important to the public and that public participation was an important segment of the legislative process which could not be overlooked nor ignored under any circumstances.

174. There is no dispute on the President's power under article 115(2) of the *Constitution* to make reservations and recommendations on bills, I actually do agree with the Respondents that the President indeed has power under article 115 of the *Constitution* as a protection mechanism against harmful policies and corruption, that the President finds objectionable on policy or substantive grounds.

175. This was clearly pronounced in the case of *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR, where the Court of Appeal stated;

> "With respect, we agree with the above reasoning of the High Court, which accords with the ruling of the Speaker of the National Assembly dated July 28, 2015and headed "Consideration and Scope of Presidential Reservations". In the pertinent part, the Speaker stated:
>
> "I will now focus on the second subject, which is the procedure for consideration of presidential reservations. In seeking to answer the question raised by Hon Gumbo as to whether a reservation or recommendation by the President should be subjected to a process similar to that obtaining in the consideration of a Bill, one needs to be fully alive to the express provisions of the Constitution...
>
> Secondly, the provisions of article 115 seem to be self-contained as regards the procedures to be adopted by Parliament in considering the President's reservations. To this extent, the provisions of article 115(3) and (4) do not contemplate Parliament going back to the

entire process of enactment, but only contemplates Parliament passing the Bill a second time. This second passage does not in any way negate the fact that the Bill was passed by the House a first time after going through the entire sequence that culminates in passage, namely publication, First Reading, Second Reading and Third reading. The resubmission of a Bill by the President under article 115 does not in any way negate these stages, unless the President decided to submit a totally new Bill outside the scope of what the House has passed, which would be uncharacteristic of the conventional legislative limits."

We do not find any evidence either, that the President usurped the role of the National Assembly or that the Assembly abdicated its responsibility, in the enactment of the Finance Act, as contended by the appellants. Article 115 of the *Constitution* (1) requires the President, where he has not assented to a Bill, to return it to Parliament for reconsideration together with his comments or reservations. Article 153(2) empowers the Parliament to amend the Bill to accommodate the President's concern or to pass the Bill a second time without accommodating the President's concern. The Standing Orders of the National Assembly are to the same effect and in particular Standing Order No 154(3) provides thus:

> " The Assembly may, in considering the Bill a second time, propose amendments in light of the President's reservation either fully accommodating the President's reservations, or not fully accommodating the President reservations."

176. However, it worth noting that as the President exercises his discretion under article 115(2) of the *Constitution*, the President ought to act in line with article 10 of the *Constitution*.

177. Article 10 of the *Constitution* provides;

> " (1) The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them—
>
> (a) applies or interprets this Constitution;
>
> (b) enacts, applies or interprets any law; or
>
> (c) makes or implements public policy decisions.
>
> (2) The national values and principles of governance include—
>
> (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
>
> (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
>
> (c) good governance, integrity, transparency and accountability; and
>
> (d) sustainable development."

178. Considering article 10 of the *Constitution* going by the above principle, it is noted from the petition how the president fell short of this provision. This connotes that when the Insurance (Amendment) bill was presented to the President for assent, it is pleaded that the President completely disregarded the input of the petitioner and other insurance stakeholders and made recommendations that were similar to the original bill, that had amendments that came from his Cabinet Secretary, for National Treasury and Planning, which had not undergone public participation as exhibited in (Annexure AIB-8) of the

petition. I find this has not been controverted by the respondents. This with all due respect was akin to the recommending new bill for passing by Parliament not subjected to public participation and where required therefore to be subjected to public participation as it had not.

179. The court makes an inference that even though the President is empowered under article 115(2) of the *Constitution* to make reservations on a bill, making recommendations that are in the exact nature to the original bill and not subjected to public participation thereafter amounts to disregarding the input of the relevant public views and insurance stakeholders, thus amounting to failure to subject the Bill to public participation by Parliament.

180. Reliance on the above proposition is placed in the case of *Robert N Gakuru* [2013] eKLR where it was stated that public participation ought not to be treated as a mere formality, or a cosmetic exercise, rather, it is a core constitutional principle that should be visibly reflected in a legislation passed by the National Assembly as the same determines the legality and constitutionality of an action.

181. I opine that indeed the legislation erred by disregarding the views of insurance stakeholders and general public and the 5th respondent being the Parliament equally failed to exercise its powers under article 115(4) of the *Constitution*, where it would have overruled the recommendations by a two-thirds majority and passed the amendment that had included the views of the public.

182. It is my view that the *Insurance (Amendment) Act, 2019* contravened article 10 of the *Constitution* on national values and principles of governance with regards to public participation.

183. I find from the submissions by the 5th respondent that the dispute herein is not a commercial dispute between the petitioner's members and 4th respondent's members as to who should collect Premiums is wrong, as it is clear from the analysis of the issues, that this petition raises serious constitutional questions, that require the interpretation and determination of this court. From the manner in which the Insurance (Amendment) Act was passed, I find such amendment has had, with respect, impacted on petitioner's constitutional rights. This petition is therefore proper before this honourable court.

184. The petitioner *vide* the supplementary affidavit of Eliud Adiedo, sworn on the 2nd of June, 2021 in paragraph 8 averred that the High Court on the October 29, 2020 in a three-Judge bench issued a Judgment in Petition 284 of 2019 (Consolidated with 353 of 2019 *The Senate & others v The Speaker of the National Assembly & others* where it declared various Acts passed by the National Assembly were in contravention of articles 96, 109, 110, 111, 112 and 113 of the *Constitution* and therefore unconstitutional, null and void. The *Insurance (Amendment) Act, 2019* is one of such Acts which was declared unconstitutional.

185. Having examined the said decision, I have confirmed that prayer (no vii) of the Judgment declares the *Insurance (Amendment) Act, 2019* as unconstitutional and the said decision has been appealed at the Court of Appeal in which stay has been issued pending hearing and determination of the Appeal.

186. It is my finding that this petition is meritorious. I therefore proceed to grant the following orders:-

a. A declaration be and is hereby issued that section 156 of the *Insurance Act* as amended by the Insurance (Amendment) Act, 2019 is unconstitutional and therefore null and void.

b. An order of Permanent injunction be and is Herbeyissued permanently restraining and staying the operation and implementation of section 156 of the *Insurance Act* as amended by the Insurance (Amendment) Act, 2019.

c. Costs to the petitioner to be met by the respondents on a full indemnity basis.

**DATE, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JULY, 2021.**

.....

**J. A. MAKAU**

**JUDGE OF THE HIGH COURT OF KENYA**