REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. E006 OF 2021

BILLOW HUSSEIN.....PETITIONER/APPLICANT

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

MONARCH INSURANCE CO. LIMITED.....2ND RESPONDENT

BEATRICE KANANA (Sued as the Administratix and/or

Personal Representative of the Estate of MOSES KOBIA (Deceased)).....3RD RESPONDENT

CHIEF MAGISTRATE MAUA LAW COURTS.....4TH RESPONDENT

JUDGMENT

1. The Petitioner was a policy holder with the 2nd Respondent which insured his motor vehicle registration number KBU 403X Toyota Land Cruiser. On 27th August 2018, he was involved in a fatal accident with Moses Kobia (deceased), a rider of a motor cycle registration number KMCY 461L. The estate of the said deceased rider, represented by the 3rd Respondent filed a suit for recovery of damages against the Petitioner.

2. Although he was represented in the suit, the Petitioner claims that he was never informed of the pendency of the case and that he never issued any instructions to the 2nd Respondent to represent him in the said suit. He claims that he only came to know of the case at the point of execution of the Ksh 8,968,795/= that the Court had awarded the 3rd Respondent. He claims that the 2nd Respondent did not pay to the 3rd Respondent the damages awarded by the Court and the 3rd Respondent has now resulted to demanding compensation from him.

3. The petitioner further claims that the 2nd Respondent's failure and/or refusal to pay the 3rd Respondent the total amount awarded is unconstitutional. It is his case that the 2nd Respondent is constitutionally bound to pay all the monies that are due to the 3rd Respondent.

4. By his Petition dated 23rd March 2021, the Petitioner seeks the following orders: -

i) A declaration that Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 of the Laws of Kenya is unconstitutional.

ii) An order of certiorari be issued quashing the proceedings and all the subsequent/consequential orders thereto in Maua CMCC Case No. 13 of 2019.

iii) In the alternative and without prejudice to prayer (ii), an order of mandamus/mandatory injunction be issued compelling the 2nd Respondent to pay the decretal amount in Maua CMCC Case No. 13 of 2019 and all costs and interest arising thereto.

iv) An order of permanent injunction restraining the 3rd Respondent by herself, her agents, auctioneers, employees, relatives and/or through anybody else whomsoever acting on her behalf from attaching, selling, charging, impounding, alienating, leasing, auctioning and/or otherwise howsoever interfering with the Petitioner's property.

v) Costs and interests of the Petition.

Petitioner's Case

5. The Petitioner's case is supported by his affidavit in support of the Petition sworn on 23rd March 2021, his further supporting affidavit sworn on 24th March 2021 and by the supplementary affidavit sworn on 7th May 2021. He also filed submissions dated 7th May 2021. Pursuant to leave of Court granted on 30th June 2021, he filed further submissions dated 16th July 2021.

6. The Petitioner submits that he instituted these proceedings against the backdrop of warrants of sale of property in execution of decree for money issued to Beeline Kenya Auctioneers in purported satisfaction of the Judgement decree issued in Maua Civil Case No. 13 of 2019. He contends that he was never served with a demand as well as summons to enter appearance and that he never appointed the firm of Simiyu, Opondo, Kiranga & Co. Advocates to represent him and neither did he give them instructions to enter into consent on liability in the matter. He urges that he was never made aware of the proceedings and that he was never called as a witness in the matter and/or to cross-examine the Plaintiff and that his witness statement was not taken.

7. With respect to the threshold of a constitutional petition as set out in the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR*, he urges that he has particularized the elements of collusion, conspiracy and unconstitutionality committed against him. He submits that he has itemized the violations of his rights to property and consumer rights to goods and services of reasonable quality. He urges that he has pleaded his case with precision to enable the Court to set out his case and the reliefs sought. He urges that Article 22 of the Constitution gives him the locus to institute this Petition. He urges that in determining whether or not a Petition meets the constitutional threshold, the Court should always be informed by the need to do justice. He relies on the case of *Ms Priscilla Nyokabi Kanyua vs Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010.*

8. He urges that despite being an insured person under the 2nd Respondent's insurance policy cover, which was valid at all material times, the application for execution, warrants of attachment and warrants of sale were personally issued against him in enforcement of the Judgement. He urges that the purpose of third party insurance covers as per the *ratio decidendi* in the case of *Justus Mutiga & 2 Others vs Law Society of Kenya & Another (2018)* is to mitigate economic risk to the insured person. It is his case that under an insurance policy, the economic risks that come with any damages, material or otherwise that might face an insured due to an accident are transferred to the insurer. He cites Section 10 of the Insurance Act on the duty of an insurer to satisfy judgements against persons insured.

9. On the unconstitutionality of Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act, he urges that even though an insurer is allowed to mitigate risks by negotiating compensations on behalf of their insured, they should not be allowed to negotiate compensation beyond the so called policy limits. He urges that where the insurer goes ahead to enter into a negotiation beyond the limit of their compensation limits on behalf of the insured, he urges that the insurer must be held to account and pay for even the amount that is beyond the policy limit. He urges that it would be unfair to condemn an insured person who is not involved in litigation or negotiations that lead to a consent on liability to pay the decretal sum while all along the insurer acted as an agent without authority from the insured person. He urges that regrettably, the 2nd Respondent negotiated a consent that it was not ready to fulfil and at all material times, keeping the Petitioner in the darkness.

10. He further urges that the impugned Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act violates his rights to access insurance services of the highest quality against Article 46 of the Constitution and that further, the impugned Section discriminates against the well-earning third parties who are young and are therefore likely to get high compensation for general damages. He urges that by limiting the amount of compensation a third-party insurance policy cover is liable to pay, the said provision exposes a young person earning high income to a situation where the Claimant cannot recover the fruits of the Judgement that is in excess of Ksh 3,000,000/= as the Claimant may have a Judgement that they cannot recover from the insured person as contrasted with a Claimant who is a fairly elderly person who has a moderate income and is more likely to enjoy the full fruits of a Judgement that might fall within the limits of Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act.

11. He further urges that unless the 2nd Respondent obtains a declaration from the Court avoiding making payments on his behalf in fulfillment of the Judgement and the decretal sum awarded, the 2nd Respondent is contractually under an obligation to always make payments on his behalf.

12. He urges that upon delivery of Judgement, the trial Court became *functus officio* and he therefore had no chance of raising the issues he currently raises.

13. He urges that he was not served with summons for the case at the trial Court and that the burden of proof with respect to service lies with the 3rd Respondent. He urges that in view of his challenge to the affidavit of service, it was imperative for the 3rd Respondent to lead further evidence from the process server. He urges that the affidavit of service, which does not contain the Court stamp was drafted by a person without a valid certificate to effect service as the certificate attached was for the year 2017/2018 yet the purported service took place in 2019 proving that the process server, Japhet M. Mukiira was not licensed to effect service either to him or to the 2nd Respondent.

14. The Petitioner further urges that the firm of Simiyu, Kiranga, Opondo & Co. Advocates that represented him in the trial Court is a stranger to him and that there is no evidence to the effect that he had instructed the said firm. He submits that it is the 2nd Respondent who instructed the said firm of Advocates and not him. He urges that the demand letter with respect to the claim was addressed to the 2nd Respondent and a copy thereof was never served upon him and this points to the fact that he was treated as a peripheral figure in the litigation despite being the only defendant. He urges that the law requires the 3rd Respondent to address the demand letter to him and issue a notice to the 2nd Respondent. He urges that this was in violation of his right to fair administrative action.

15. He further urges that the summons, if any were not served in accordance with Order 5 Rule 8 of the Civil Procedure Rules 2010 and that the same was not filed in Court. With respect to the issue of setting aside Judgement, it is contended that Order 10 Rule 11 of the Civil Procedure Rules 2010 speaks only to instances where a defendant has been served but fails to enter appearance and/or file a defence unlike in

his case where he was never served and was thus not required to enter appearance. He urges that the provisions of Order 10 Rule 11 are therefore inapplicable. He urges that the Court can set aside consents adopted by the Court where it can be shown that the consent was entered into by collusion between Counsels and such collusion has led to a miscarriage of justice pursuant to its supervisory jurisdiction under Article 165 (6) (7) of the Constitution. He also urges that the Court has discretion to order for the proceedings before the trial Court to be quashed together with all the consequential orders thereto as the same was a miscarriage of justice.

16. He further submits that once the trial Court delivered its judgement, it became *functus officio* and it is therefore not possible for the Court to set aside the consent judgment and that not having participated in the proceedings in the trial Court, he cannot be expected to engage a Court whose proceedings he challenges. He further urges that a trial Court can only set aside its judgement in form of review for which grounds would have required him to have participated in the proceedings he seeks to review.

17. With respect to the doctrine of exhaustion of remedies, and the argument by the 1st, 3rd and 4th Respondents that he ought to have appealed or sought to review the Judgement, the Petitioner urges that there are exceptions to the doctrine. He relies on the case of *R vs Independent Electoral and Boundaries Commission (IEBC) & Others ex parte The National Super Alliance Kenya (NASA) & 6 Others, 2017 eKLR* for the proposition that given the nature of the case, he rightfully filed this Petition as the purported decree holder threatened to attach and sell his properties despite knowledge that the Petitioner was an insured person at the time of the accident and thereby violating his right to property as guaranteed under Article 40 of the Constitution. He further urges that the 3rd Respondent has not attempted to institute a declaratory suit against the 2nd Respondent and this confirms collusion on the part of the 2nd and 3rd Respondents. He urges that the present facts and circumstances of the case warrant an exception to the constitutional avoidance doctrine. He urges that he has demonstrated a case of denial of his right to fair administrative action, right to property, right as a consumer of court services and right to a fair trial.

18. On the issue of whether court decisions are administrative actions, he submits that there is no bar to subjecting court proceedings to scrutiny if they amount to violation of rights guaranteed under the Bill of Rights. He further denies that the 2nd Respondent was acting as his agent and that there is no proof of this averment. He urges that he provided evidence of service of this Petition to the 2nd Respondent who has failed to enter appearance. He claims that having disputed ever giving instructions to the firm of Simiyu, Opondo, Kiranga & Co. Advocates, any acts carried out by the said firm purportedly on his behalf must be declared a nullity.

19. He urges that the affidavit of service filed as proof of service on him was an afterthought and that the officer referred to therein, Inspector Abudo Godana who pointed out the Petitioner has not sworn any affidavit to that effect. He urges that the said affidavit remains unreliable and he urges the Court to have disregard it.

20. On the issue of costs, he submits that on the principle that costs follow the event and that he should be awarded costs citing *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai 7 4 Others (2014) eKLR.*

1st and 4th Respondent's Case

21. The 1st and 4th Respondents opposed the Petition by way of grounds of opposition dated 4th May 2021 raising the following grounds: -

> ***i) That the Petitioner has not demonstrated with sufficient clarity how the actions of the 4th Respondent has infringed on his right to property, consumer rights and fair administrative actions in exercise of its statutory and constitutional powers and functions.***
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> ***ii) That the Petition is a non-starter and not properly grounded in law as the said decision of the 4th Respondent is appealable or in the alternative, subject to an application for review.***
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> ***iii) That the entire process in so far as it relates to the 4th Respondent was carried out in good faith taking into account the totality of the proceedings.***
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> ***iv) That the formal legal options available to the Petitioner are to either file an appeal on the matter or review on the Judgement.***
>
> ***v) That the Petition is fatally defective and devoid of substance.***
>
> ***vi) That the Petition is vexatious, frivolous and scandalous and an abuse of Court process.***

22. They also filed submissions dated 25th June 2021 wherein they urge that the Petitioner has not proved infringement of his right to property, consumer rights and fair administrative action. They rely on the case of *Anarita Karimi Njeru v Republic (1979) eKLR* and *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR*. They further urge that the proceedings in the trial Court was carried out in good faith and that the Petitioner was represented by Counsel for the 2nd Respondent and that the proceedings and judgment show that the Plaintiff presented her case and produced evidence in support. They urge that the defendant in the suit was also given an opportunity to respond through their Counsel and by consent, liability was agreed at 80:20 and after assessment of damages, judgement was entered for the Plaintiff in the sum of Ksh 8,416,000/=.

23. They urge that the Petition is not properly grounded and citing the provisions of law on appeals and review, i.e Section 65 of the Civil Procedure Act and Section 80 of the Civil Procedure Act, they urge that the proper formal legal option available to the Petitioner is to either file an appeal or a seek for review of the Judgement of the trial Court. They urge that the Petition is not properly grounded in law under the statutory provisions available as other alternatives are available. They urge that the Petition lacks a proper factual basis upon which the Court can deduce actual prejudice against the Petitioner and the Petition is an abuse of Court process.

3rd Respondent's Case

24. The 3rd Respondent opposed the Petition by way of her replying affidavit sworn on 30th March 2021. She also filed submissions dated 4th June 2021. It is her case that summons to enter appearance were duly served upon the Petitioner and that he entered appearance and filed a defence through the firm of Simiyu, Opondo, Kiranga & Co. Advocates and that there was annexed an affidavit of service sworn by Japhet Mukira to support the assertion of service.

25. The 3rd Respondent relies on the cases of *Rich Productions Limited v Kenya Pipeline Co. & Another (2014) eKLR; Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille (2017) eKLR;* and *Charles Apundo Obare & Another v Clerk, County Assembly of Siaya & Another (2020) eKLR* for the proposition that where the Constitution or an Act of Parliament establishes a mechanism for the resolution of disputes, that mechanism ought to be strictly followed and that the Court cannot exercise jurisdiction in circumstances where the parties before it seek to avoid the mechanisms and processes provided for by law and convert the issue in dispute into a constitutional issue when it is not.

26. She urges that in the present case, the Petitioner complains of non-service of summons to enter appearance and of not being consulted when a consent judgement on liability was entered in the trial Court. She urges that Order 10 Rule 11 of the Civil Procedure Rules, 2010 provides for the procedure of setting aside a judgement where the Defendant had not been served with summons. She urges that a consent judgement can be set aside where it is shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of the Court. She relies on the case of *Board of Trustees National Social Security Fund v Michael Mwalo (2015) eKLR.* It is her case that the Petitioner should have filed an application to set aside the Judgement and should not have filed a Constitutional Petition as he has done and that the Petition is premature and in breach of the exhaustion doctrine. She further urges that the issue of how the Petitioner's defence at the trial Court was conducted is not a constitutional issue but one between Advocate and client which should be addressed by the Advocates Disciplinary Committee.

27. With respect to the unconstitutionality or otherwise of Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act, she urges that this is not a novel issue and that the Courts have on several occasions pronounced itself on the issue including in the case of *Nairobi Constitutional Petition No. 148 of 2014 Law Society of Kenya vs the AG & 3 Others* and the Court of Appeal case of *Justus Mutiga & 2 Others vs Law Society of Kenya & Another, Civil Appeal No. 141 of 2016 (2018) eKLR* where the impugned Section was found to be constitutional. She urges that the other paragraphs to wit paragraphs 33, 34 and 35 of the Justus Mutiga case to which the Petitioner places reliance were thus *obiter dicta* and are not binding and that it is only *ratio decidendi* which is binding on the Court. He relies on the case of *Ekuru Aukot vs Independent Electoral and Boundaries Commission & 3 Others (2017) eKLR* for this latter proposition.

28. Relying on the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR*, she urges that the Petitioner has not met the threshold of constitutional petitions requiring a Petitioner to frame issues with precision such that it is not clear from the proceedings what provisions of the Constitution are violated and the manner in which they have been violated. She urges however that the Petitioner has cited Articles 47, 50 and 40 of the Constitution. With respect to Article 47, she urges that court decisions are not administrative actions as contemplated under Section 2 of the Fair Administrative Action Act. She urges that with respect to Article 50 of the Constitution, the allegation that the Petitioner was not served with the summons and was therefore not aware of the matter is not true and is calculated to evade satisfying her Judgement which has never been challenged to date and this explains how the firm of Simiyu, Kiranga, Opondo & Co. Advocates came on record on his behalf. She relies on the case of *Akamba Public Road Services & Another vs Abdikadir Adan Galgalo (2016) eKLR* for the proposition that it is not uncommon in insurance practice for an insurer to appoint legal counsel for its insured once its insured is served with summons to enter appearance so as to control the process from inception and mitigate its losses. She urges that no material has been placed before the Court to substantiate the allegations of fraud and that the standard of proof of fraud is higher than proof on a balance of probabilities as was held in the case of *Kuria Kiarie & 2 Others vs Sammy Magera (2018) eKLR*. She urges that the Petitioner has not shown how execution of a valid court judgement would violate his right to property under Article 40 of the Constitution. She also urges that her rights to realize the benefits of her judgement are also proprietary rights that are equally protected by the Constitution.

Issues for Determination

29. The Petition before the Court is multi-faceted. A substantial portion of the parties' respective cases touch on jurisdiction of the Court to entertain the Petition, some touch on the factual occurrences in the matter and others on the constitutionality of the actions and the section of the statute in issue. The issues arising can be summarized in the following questions: -

> ***i) Whether or not the Petition offends the doctrine of exhaustion of remedies and if so, whether the Court will entertain the Petition?***
>
> ***ii) Whether or not the Petition as drafted meets the threshold of particularity required in bringing Constitutional Petitions.***
>
> ***iii) Whether Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act is unconstitutional.***
>
> ***iv) Whether the petitioner is entitled to the reliefs sought.***

DETERMINATION

Whether or not the Petition offends the doctrine of exhaustion of remedies and if so, should the Court entertain the Petition?

30. A key question touching on the jurisdiction of this Court to entertain this Petition is on the doctrine of exhaustion of remedies. The Petitioner was admittedly prompted to file this Petition by the fact of the pending execution process, seeking to attach his property in execution of Judgement of the trial Court awarding the 3rd Respondent a total of Ksh 8,968,795/=. In his Petition, he seeks among other the

quashing of the proceedings and Judgement that culminated in this execution process.

31. The 1st, 3rd and 4th Respondents' object to this Court's assumption of jurisdiction over the Petition on the ground that there are other alternative avenues which the Petitioner should have utilized at the first instance as opposed to coming to the Constitutional Court. For the 1st and 4th Respondent's this is the avenue of appeal or seeking of review of Judgement and for the 3rd Respondent, this is the avenue of making an application to set aside the impugned judgement, which application ought to have been made at the trial Court.

32. The principle of exhaustion of alternative remedies was dealt with in the case of ***Speaker of National Assembly vs Njenga Karume Civil Application No. NAI 92 of 1992 eKLR*** and which has been followed in many decisions including ***Geoffrey Muthinja Kabiru & 2 Others Samuel Munga Henry & 176 Others,*** where the Court held as follows: -

> ***"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."***

33. The Petitioner himself made reference to the doctrine of constitutional avoidance which this Court finds to serve similar objectives as those of the doctrine of exhaustion of remedies. The Petitioner urges that in the peculiar circumstances of his case, the Court ought to exempt his case from the doctrine of constitutional avoidance.

34. In Nairobi Petition No. 223 of 2011, ***Hon Gedion Mbuvi Kioko Alias Sonko v. The Hon. Attorney General & Ano.*** (2017) eKLR, this Court considered constitutional avoidance to be akin to the principle in the ***Speaker of National Assembly v. Karume*** and held as follows:

> *46. This accords with the doctrine of constitutional avoidance under the United States constitutional law where courts refuse to rule on a constitutional issue if the case can be resolved on a non-constitutional basis. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936)" - The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."*
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> *47. The constitutional avoidance principle has been adopted in Kenya both by the Supreme Court and the Court of Appeal. In **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others** [2014] eKLR, the Supreme Court said:*
>
> > ***"[256]** The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in **S v. Mhlungu**, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:*
> >
> > ***"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue,that is the course which should be followed."***
> >
> > ***[257]** Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (**Ashwander v. Tennessee Valley Authority**, 297 U.S. 288, 347 (1936)).*
> >
> > ***[258]**From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rdrespondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court."*
>
> *48. Similarly, the five – judge of the High Court (Lenaola, M. Ngugi, Ong'undi, Chemitei and Onguto, JJ.) in the **Security Law Amendment** case, [Pet. No. 260 of 2015 **C.O.R.D. v. The Republic &Ors**.] held that –*
>
> > ***"**The doctrine of constitutional avoidance requires courts to resolve disputes on a constitutional basis **only** when a remedy depends on the constitution."***
>
> *49. I consider that the matter of the claim for personal injury herein which is based on alleged breach of rights and fundamental freedoms may properly and fully be redressed without resort to the Constitution by a suit in negligence."*

35. The Court of Appeal in the case of ***Royal Media Services Limited vs Attorney General, Civil Appeal No. 45 of 2012 (2018) eKLR,*** (P. N. Waki, R. N. Nambuye and A. Makhandia JJA) cited the Supreme Court in the ***CCK*** case and held as follows with respect to the doctrine of constitutional avoidance: -

> ***"A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done. In the case of Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition No. 14, 14A, B & C of 2014, the Supreme Court delivered itself thus on the issue….***

We reiterate that this was not a proper case where the infringement of constitutional rights should have been involved. It was a simple

case of breach of contract whose remedy lay elsewhere."

36. When a party is dissatisfied with the outcome of a Judgement, he ought to challenge the same by the options suggested by the 1st and 4th Respondents and the 3rd Respondents i.e lodging an appeal, seeking a review or seeking to set aside the Judgement. In cases of execution of a decree, the aggrieved Judgement-Debtor would alongside pursuing the avenues afore-stated seek an order for stay of execution pending hearing and determination of the application or the appeal as the case may be. In his application, he would have adequate opportunity to raise the issues of non-service as well as the fact that the decree-holder was yet to file a declaratory suit seeking payment by the insurer. Indeed, although the issue of non-service of summons or demand letter has a constitutional bearing on the right to hearing, the trial Court has jurisdiction to entertain this as an ordinary civil matter as provided for in the Civil Procedure Rules.

37. This Court thus agrees that based on the facts upon which the Petition is grounded, being purported non-service of summons and non-participation in the proceedings, the Petitioner ought to have raised these issues in an application for setting aside of the impugned Judgment at the trial Court. As the Petitioner correctly points out, the provisions of setting aside Judgement under Order 10 Rule 11 of the Civil Procedure Rules apply in cases of setting aside Judgements on account of non-appearance following proper service of summons and/or omission to file a defence following proper service of a Plaint. It does not expressly apply to instances where there has been failure to serve summons.

38. There is however provision under common law for setting aside of a Judgement, under the inherent jurisdiction of the court as of right where a party was not served with summons. Despite urging that it did not participate in the proceedings, the Petitioner was indeed a party in the proceedings and he therefore had all locus to pursue the avenues aforementioned once it came to his attention that a supposed irregular Judgement had been entered against him.

39. In ***Craig v. Kanssen*** [1943] 1 KB 256, [1943] 1 All ER 108, where there had been a failure to serve process where service of process was required with the result was that the order made based upon that process was irregular, ***Lord Greene, M.R., after considering several decisions, held:-***

> ***"Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debitio justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order: and that an appeal from the order is not necessary."***

40. In circumstances not dissimilar to this case in KBT HCCA No. 15 of 2019, ***John Mugo Mathai v. John Kibichi,*** on an application for stay of execution pending appeal from a decision of the trial court alleged to have been passed without actual service on the defendant insured, the court in granting the stay found an arguable case in the allegation of non service as follows:

> ***"Arguable case***
>
> *18. I consider that the appellant/applicant has an arguable case whether his right to be heard was infringed by want of service of Summons on him as the defendant. Section 20 of the Civil Procedure Act requires service of the suit on the defendant as follows:*
>
> *"20. Where a suit has been duly instituted* ***the defendant shall be served*** *in manner prescribed to enter appearance and answer the claim".*
>
> *If the appellant as defendant was not served with the suit papers and, therefore, could not defend the suit, his right to be heard enshrined in the Constitution under Article 50 (1) of the Constitution shall have been infringed. Courts have held that orders made without hearing a party must be set aside* ***ex debito justitiae."***

41. Indeed, Section 20 of the Civil Procedure Act sets out above requires service of the suit papers on the defendant and, where this is not done, Order 5 rule 16 of the Civil Procedure Rules contemplates an inquiry thereon as follows:

> ***"16. Examination of serving officer [Order 5, rule 16.]***
>
> ***On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks."***

42. It was always the position even before Order 10 Rule 11 of the Civil Procedure Rules 2010, that a judgment entered without service of the summons could be set aside as shown I ***Waweru v. Ndiga*** (1983) KLR 236 (Potter, Kneller and Hancox, JJA.) held:

> *"An application, to set aside an ex parte judgment made by a defendant may be allowed if the court is satisfied that the summons to enter appearance were not duly served or that he was prevented by any sufficient cause from appearing when the suit was called for hearing."*

And since the 1976 Court of Appeal decision in ***Karatina Garments Ltd. v. Nyanarua*** (1976-80) KLR 114 (Wambuzi, P., Mustafa & Musoke, JJA it has been established that-

> ***"Where one party to proceedings denies having been served with a relevant document, it is proper for the Court to look into the matter;*** *if the Court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be*

examined on oath in order to establish the truth."

43. This court dealt with the principles of setting aside a Judgement for want of service of an appeal in the case of ***Meru HCCA No. 5 of 2019 Francis Kithinji Mbogori vs Joyce Karambu Ringera and*** held as follows:

> ***"an order for setting aside can be done by the same Court that gave the decision."***

44. In the case, the court cited the Court of Appeal decision in ***James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another, Civil Appeal No. 6 of 2015 (2016) eKLR*** where Makhandia, Ouko (as he then was) & M'Inoti, JJ.A held as follows: -

> ***"In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion."***

Clearly, the petitioner in this case has a remedy in setting aside of the judgment which he claims was entered without service on summons to enter appearance on him as the defendant in the suit. For the purpose of entertaining an application for setting aside Judgement on account of non-service of summons or for an application or review of Judgement, a Court is not ***functus officio*** upon delivery of Judgement.

Collusion and fraud

45. With respect to the allegations of collusion to enter into a consent on liability, this Court finds that this is also a ground to set aside a consent judgement. The principles for setting aside of consent orders have been well established. In the Court of Appeal case of ***Kuwinda Rurinja Co. Limited v Kuwinda Holdings Limited & 13 others, Civil Appeal No. 8 of 2003 (2019) eKLR,*** Warsame, Murgor & Odek JJA reiterated these principles with respect to consent into by counsel as follows: -

> ***"Ideally, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud, collusion or by an arrangement contrary to the policy of the court or if it was given without sufficient material facts or in misapprehension or ignorance of such material facts, or in general for a reason which would enable the court to set aside an agreement.(See Isaac Kinyanjui Njoroge vs. National Industrial Credit Bank Limited (2018) eKLR).***

In Hirani vs. Kassam (1952) 19 EACA 131, relying on a passage from Seton on Judgments and Orders, 7th Edition, Vol. 1 at page 124, it was expressed:

> ***"…. Although an advocate has ostensible authority to compromise his client's case, employing such authority cannot be upheld where counsel consents to orders which are diametrically opposed to the express instructions which a client has given him… And if it is shown to the court that the client was not even aware of the application that gave rise to those consent orders leave alone having consented to the recording of the orders, in the absence of any satisfactory explanation … a court of law would be entitled to conclude that there was fraud or collusion involved and will not uphold the consent order issued."***

46. The Petitioner claims that there was collusion between the 2nd and 3rd Respondents to get into the impugned consent and he has particularized the elements of collusion. The Petitioner ought to therefore have made his application seeking to set aside consent, and the Judgement, entered on the basis of the consent in the trial Court without invoking the jurisdiction of the Constitutional Court. This Court is thus inclined to find that the Petitioner's application, to the extent that it seeks to set aside the consent order and the Judgment of the trial Court for reasons of non-service and collusion, offends the principles of exhaustion of remedies and constitutional avoidance.

47. Having found so, it is not be necessary to go into the merits of the application for setting aside including the question of whether service of summons and demand letter was indeed effected upon the Petitioner prior to the filing of the case, as this would in fact embarrass the trial court when, if at all, an application for setting aside is preferred. The prayers seeking to set aside the Judgement must fail on grounds of lack of jurisdiction. This Court must however point out that in view of the Petitioner's contestation to his representation by the law firm of Simiyu, Opondo, Kiranga & Co. Advocates, it would have been prudent for him to enjoin the firm to confirm whether or not they received instructions.

48. Despite finding that the Petition offends the doctrine of exhaustion of remedies and constitutional avoidance, with regard to the setting aside of the judgment for non service and fraud, the Petitioner has raised another purely constitutional issue, which is on the constitutionality or otherwise of Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act. In this Court's view, the facts upon which this issue is grounded, being the existence of a Judgement awarding sums to the 3rd Respondent and the purported refusal by the 2nd Respondent to settle the decretal amount, and the pending execution process against the Petitioner are separate from the facts of non-service upon which the prayer for quashing of the proceedings of the trial Court was sought. This Court will therefore address this issue of the Petition as a matter of constitutional interpretation.

Whether or not the Petition as drafted meets the threshold required in bringing Constitutional Petitions.

49. Before addressing the constitutionality of the impugned Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act, another key issue touching on jurisdiction of the Court is the assertion by the 1st and 4th Respondents and the 3rd Respondent that the Petition as drafted does not meet the threshold for constitutional petitions requiring a Petitioner to frame issues with precision so that it is clear from the proceedings what provisions of the Constitution are violated and the manner in which they have been violated.

50. In the case of ***Anarita Karimi Njeru v The Republic (No.1) (1979) eKLR***, Trevelyan & Hancox JJ held as follows: -

> ***"If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complaints, the provisions said to be infringed, and the manner in which they are alleged to be infringed."***

51. In the latter case of ***Trusted Society of Human Rights Alliance vs. Attorney General and 2 Others [2012] eKLR***, the multiple bench of the High Court () re-affirmed the holding in the Anarita Karimi Njeru case and stated that: -

> ***"We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. <u>However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.</u>***
>
> ***The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. <u>The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."</u>***

52. To similar effect, in ***Bryson Mangla v. Attorney General & Others, Nairobi HC Petition No. 284 of 2016,*** this court set out its understanding of the matter as follows: -

> ***"<u>Particularity of pleading constitutional cases</u>***
>
> ***The requirement of setting out with specificity the particulars of the petitioner's complaint under the Bill of Rights and other constitutional litigation (and indeed any pleading before the court) is a requirement of common sense that a claimant's case should be clear and elaborate to enable the respondent know the case it has to meet and the court the question it will be asked to determine. Pleadings should not leave the Court guessing the case before it, as the court in Anerita Karimi Njeru, supra, did or the respondent the case he has to answer.***
>
> ***The context of the oft-cited holding of the High Court (Travelyan J. and Hancox, JJ.) in Anerita Karimi Njeru v. Republic (No. 1) (1979) KLR 154, 156 gives the background and motivation of the directions for precision in pleading constitutional infringement cases, which is applicable to all litigation:***
>
> ***"On the morning of the commencement of the hearing before this Court Mr Muttu representing the Republic raised a preliminary objection. After hearing it, we then invited Mr Mwirichia to give us further and better particulars of precisely that which he is alleging under the second head of his complaint, that is to say that the applicant was not given facilities to procure the attendance of witnesses other than Mr Mase. In the event he did not do so; and in our opinion he could not validly do so, for he is on record as having said to the magistrate, after he had returned to conduct the applicant's defence, that the only evidence the defence wished to call was that of Mr Mase. Accordingly, in our view, the only complaint that can lie of an alleged refusal to afford the defence such facilities (and we accept that this means "reasonable facilities" under section 77(2) (e) of the Constitution) is as respects Mr Mase. We mention that we also sought to be enlightened as to which of the paragraphs of section 77 of the Constitution were thereby alleged to have been infringed, and Mr Mwirichia referred to his list of authorities (filed on to the day preceding the hearing) which mentioned both paragraphs (c) and (e) of subsection (2) of that section. This was a rather curious manner of bringing a statutory provision to the notice of a court of law, but, at all events, we were prepared to permit Mr Mwirichia to develop his arguments under both paragraphs. In the event, on the second day of the hearing before us, Mr Mwirichia abandoned the position he had previously taken up under paragraph (c). <u>We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."</u>***"

53. Proceeding from the above, it is this Court's view that what matters on the test of particularity in constitutional litigation is whether the parties and the Court understand the claim clothed in the Petition for purposes, respectively, of effectively responding thereto in exercise of their right to fair trial or hearing and fashioning an ***appropriate relief*** as required of the Court by Article 23 of the Constitution on the issues raised in the Petition.

54. In the present case, the Petitioner has raised as an issue the Constitutionality or otherwise of Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act. Of concern however is that in his entire Petition, the Petitioner failed to spell out the Articles in the Constitution that he is expressing to have been violated. This was a serious omission and strictly speaking, it may not make much of a difference that he outlined these articles in his submissions. As this Court has previously held, submissions are not a substitute for pleadings.

55. He urges however at paragraph 28 of his Petition in a rather covert as opposed to the expected overt manner that the impugned Section 5 (b) (iv) of the Insurances (Motor Vehicles Third Party Risks) Act infringes on his rights to property and right to goods and services of the highest quality. He further urges at paragraph 29 of his Petition that the section is discriminatory against younger (deceased) persons who would be awarded higher amounts in general damages possibly exceeding the Ksh 3,000,000/= cap as contrasted with elderly (deceased) persons earning a moderate income who may be adequately compensated within the limits set by the said Section. He urges that the former are denied the security of having their judgments settled in full by the insurers who are more financially secure and more likely to pay

damages as opposed to the insureds.

56. For the reasons of his assertions afore-stated, as outlined at paragraphs 28 and 29 of his Petition, the Court finds that the respondents are not wholly embarrassed in their response to the claim and the court is able to frame the issues and fashion an appropriate remedy, as appropriate.

Whether Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act is unconstitutional.

57. Put simply, the petitioner's argument on the constitutionality of section 5(b) (iv) of the Act is two-fold: that it deprives the insured his right to property and consumer right by permitting recovery of sums in excess of Ksh.3,000,000/- from the insured and that it is discriminative against decree-holders who have to pursue their portions of the award of damages from the insured. The latter is an argument for the decree-holders but in public interest the court shall consider it.

58. Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act provides as follows: -

> ***5. Requirements in respect on insurance policies***
>
> ***In order to comply with the requirements of section 4, the policy of insurance must be a policy which:-***
>
> ***(a) Is issued by a company which is required under the Insurance Act, 1984 (Cap. 487) to carry on motor vehicle insurance business; and***
>
> ***(b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road;***
>
> ***Provided that a policy in terms of this section shall not be required to cover: -***
>
> ***(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or***
>
> ***(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or***
>
> ***(iii) any contractual liability;***
>
> ***(iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.***

59. As correctly pointed out by the 3rd Respondent, the constitutionality of the impugned Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act is not a novel issue as it has been, or aspects of it have been, the subject of litigation before. In the case of ***Law Society of Kenya vs Attorney General & 3 Others, Petition 148 of 2014 (2016) eKLR,*** Onguto J. pronounced himself as follows: -

> ***"71. On the issue of access to justice and fair hearing, the State through the courts has ensured that all persons are able to ventilate their dispute. Fair hearing entails such disputes being determined by an impartial arbiter.***
>
> ***72. I am of the considered view that, where a dispute has been lodged in court, and the facts of the case have been presented before the court, nothing stops the court from coming up with an adequate remedy. In any event, the courts are in the business of dispute resolution. Where the court, awards damages to a party, it is with regards to the facts of a case and what the justice of the case demands. Therefore, I am of the view that, the judgments being rendered by the court are not in any way being legislated by Section 5(b)(iv) of the Principal Act.***
>
> ***73. What the Principal Act has done is cap the amount of money that the insurer pays to the injured person. Nothing in the Principal Act stops a litigant or the injured person from pursuing a claim against the insured individual where an award in excess of the amount recoverable from the insurer is made.***
>
> ***74. I hasten to add that the provision as to the mandatory insurance cover of the amount of Kshs. 3,000,000/= does not in any way prohibit any insured who may be minded to source and seek a higher cover from agreeing with the insurer on such cover, subject of course to a higher premium and other agreement on the terms of the policy.***
>
> ***75. I consequently find nothing unconstitutional with the provisions of Section 5(b) of the Insurance (Motor Vehicles Third Party Risks) Act (Cap 405)."***
>
> ***81. On the issue of right to property, the Constitution under Article 40, makes provision for the protection of right to property. Article 260 of the Constitution defines property to include any vested or contingent right to, or interest in or arising from inter***

alia money or choses in action. It is not in dispute that choses in action amount to property. <u>However, I disagree with the Petitioner that curtailing the amount payable by the insurers to Kshs. 3,000,000/= under the Principal Act is an infringement of the right to property for reasons that, any award in excess of the amount of Kshs. 3,000,000/= issued by the court in its judgment can be claimed by the injured person directly from the insured. Thus, the argument that the right to property has been infringed fails.</u>

60. The Court in the said case did not find the section unconstitutional. On appeal to the Court of Appeal challenging part of the Judgement in the said case the Court of Appeal agreed with he High Court in ***Justus Mutiga & 3 Others vs Laws Society of Kenya & Another in Civil Appeal No. 141 of 2016*** as follows:

> "30. We do not understand the schedule to curtail the court's duty and mandate to assess the evidence before it and award whatever amount of damages which in the court's view suffices to compensate the victim of the accident. What in our considered view is anticipated by the amendment is to put a ceiling or cap to the amount recoverable from the insurance company, but it does not fetter the court from awarding more than Ksh.3 million. What this would mean is that any compensation awarded by the court in excess of Ksh.3 million would be recoverable from the insured and not from the insurance company. ***<u>To that extent, this would not amount to usurpation of the court's judicial independence, authority and discretion. We consequently agree with the learned Judge on that point and uphold his finding that section 5(b) of the Act is not unconstitutional</u>***. Nevertheless, the question then arises as to what should happen post judgment. Does the court become *functus officio?* Who computes the percentages and how; will the costs awarded by the court and the interest be calculated on the basis of the amount awarded by the Court, on the maximum limit of 3 million or on the amount to be based on the schedule? Would it be left to the Registrar of the court to compute?"

61. **.** The said appeal however only related to Section 6 of the Amendment Act and the schedule thereto but it did not seek to challenge the High Court's finding on the constitutionality of Section 5 (b) (iv) of the Principal Act. The Articles of the Constitution upon which the claim for unconstitutionality were founded upon in that case included Articles 48 on access to justice, Article 50 on right to fair hearing and Article 40 on right to property. To be sure, the two courts did not deal with the question of constitutionality raised by the petitioner herein but which is really one for judgment creditors or decree-holders rather than the judgment debtor insured who is called upon to pay the portion of decretal sum in excess of the policy limit of Ksh.3,000,000/-.

Fair hearing

62. The argument propounded in the High Court in the Petition No. 148 of 2014 case, which was determined in the negative was that by prescribing the maximum amount payable to victims of motor vehicle accidents, the provisions remain oblivious to the actual situation and unique circumstances of the victim, thereby depriving him of the opportunity of securing a tailor-made determination of quantum of damages through a fair trial. The Court, however, in finding that the right to a fair trial was not curtailed by the Section held that the said provision only comes into effect post-judgment and it thus does not prevent the Court from exercising its jurisdiction to award damages as it deems fit, even beyond the Ksh 3,000,000/= limit payable by the insurer to an individual. I respectfully agree.

63. In the instant Petition, however, the Petitioner's assertion that his right to fair hearing and fair administrative action was being curtailed was hinged on issue of non-service of summons and not the operation of the section. The Court has already determined above that the matter of service of summons is not properly before the Court.

Right to property

64. The Court in the Petition No. 148 of 2014 case, in finding that the right to property was not curtailed by the section clarified that the section only limited the maximum amount payable to the victim by the insured but the victim had the liberty of pursuing the balance after payment by the insurer from the insured himself.

65. In this case, bearing in mind that the Petitioner is the insured and is also the judgment-debtor, this Court finds that it is in fact the decree-holder's (3rd Respondent's) right to property which is an issue. In executing the Judgement in his favour, decree-holder is merely asserting his said right to property.

66. There cannot be a denial of the right ot property by execution of valid court judgments, whether in damages for personal injury, injury to property or other decree s and orders of the court. Article 10 of the Constitution on principles on national values and governance recognize the rule of law, of which enforcement of court decisions is core. This Court does not therefore find that the Petitioner's right to property has been infringed. The execution process against the Petitioner is a natural consequence of the Judgement entered against him which has not been set aside and is thus valid and due for enforcement.

Consumer Protection

67. The Petitioner has raised another argument that the section curtails his consumer rights to goods and services of reasonable quality as per Article 46 of the Constitution. The Petitioner highlights as has been previously held that the purpose of an insurance cover is to mitigate economic risk. He urges that if an insurer negotiates compensation beyond the policy limit, the insurer must pay for the full amount negotiated.

68. This Court considers that besides statutory regulation, such insurance agreements between an insurer and an insured are contractual in nature and are regulated by an insurance contract setting out the terms and conditions of the policy. Ordinarily, such policy would include all information necessary to enable parties come into an understanding of the scope of the policy. In this Court's view, this information must include any such terms limiting the amount payable by the insurer to an individual victim. This indeed is what would give effect to the provisions of Article 46 (1) (a) and (b) of the Constitution which provides as follows: -

Consumer Rights

46. (1) Consumers have the right-

(a) To goods and services of reasonable quality;

(b) To the information necessary for them to gain full benefit from goods and services;

69. It is clear that the true extent of the right to consumer protection is for goods and services of reasonable quality and to information necessary to gain full benefit for goods and services. It is not a right to the maximum quality or the full benefit of goods or services but to information to enable successful pursuit of the *'full benefit'*. The impossibility of policing the achievement of the best or maximum of *'full benefit'* of goods and services of varied nature and type may have informed the adoption of the standard of goods and services of ***reasonable quality***. In the provision under review the information necessary for consumers to gain full benefit for the service of third party insurance cover is in the section itself which provides that the cover need not be one for more than Ksh.3,000,000/- and could be for more than that value.

70. The duty to disclose has also been discussed in the text ***Law of Insurance 2008 by J. V. N. Jaiswal*** where the following was established at page 75 with respect to insurance law in India: -

The principle of good faith applies to both parties to insurance contract. The Supreme Court in M. K. J. Corporation case further observed that it is the duty of the insurer and their agents to disclose all material facts within their knowledge since obligation of good faith applies to them equally with the assured. The Supreme Court reiterated this view in Modern Insulators Limited v. Oriental Insurance Co. Ltd where it was observed:

"It is the fundamental principle of insurance law that utmost good faith must be observed by the contracting parties from non-disclosure of the facts which the parties know. The insured has a duty to disclose and similarly it is the duty of the insurance company and its agents to disclose all material facts in their knowledge since obligation of good faith applies to both equally…."

71. This Court finds that it would be unfair to ignore the fact that the insurance cover is regulated only to a minimum by the statute and parties may enhance the cover by a contract. The section also gives other information by stipulating in the proviso the extent of the cover and the possibility of enhancement by contract of the parties as to enable the insured achieve full benefit of insurances. Indeed, the very statute contemplates the fact that the relationship between an insurer and insured one is a contractual one. The Petitioner has remained silent on the contents of the insurance contract that it entered into with the 2nd Respondent. This Court is thus not able to ascertain whether or not such information on the limits of the policy was not disclosed at the point of entering into the contract, notwithstanding that the statute already provides for this limit. However, on the evidence before the court, on a balance of probabilities, it is safe to conclude the information was indeed disclosed in the contract.

72. This Court finds that in the absence of adequate information as to the contract between the Petitioner and his insurer, detailing the limits of the policy, to which he consented to by entering into the insurance contract, the Petitioner's rights to consumer protection cannot be said to have been infringed.

Prerogative to negotiate a higher compensation

73. As correctly pointed out by the Onguto J. in the aforementioned Petition 148 of 2014, nothing prevents an insured from agreeing with his insurer on a cover whose compensation would go beyond the Ksh 3,000,000/= limit set by the Act. Indeed, the said section makes use of the terms *'shall not be required'* as follows: -

Provided that a policy in terms of this section shall not be required to cover: -

(iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.

74. Indeed, the section provides for the possibility of parties agreeing to a compensation cover beyond the Ksh 3,000,000/= limit only that this would not be a mandatory requirement. This Court does not therefore find that the Section 5 (b) (v) of the Act contravenes the provisions of Article 46 of the Constitution on consumer rights.

Whether Section 5 (b) (iv) of the Act is discriminatory

Locus of the insured in Decree-holder petition

75. It does not lie in the mouth of the judgment debtor petitioner in this case to urge the argument on unconstitutionality on the ground of discrimination of youthful well earning victims of personal injury for reason of their consequent failure to recover from the insurer amount of money over and above the stipulated cover limit of 3,000,000/-. The insured judgment debtor cannot be the one making argument on behalf of the judgment creditor or Decree-holder so as to avoid paying the amount of the award above the policy limit. That is an argument for a decree holder such as the 3rd Respondent in this case to make and not for the Petitioner. However, because of the public interest element of the issue, this Court would consider the argument on the basis of a petition by ***"a person acting in the public interest"*** under Article 22 (1) (c) of the Constitution.

Equality and Freedom from discrimination

76. The argument raised by the Petitioner is that the section is discriminatory in the sense that the estates of deceased elderly people earning a moderate income and supposedly nearing their age of retirement would be secured of payment of the full decretal amount awarded while the estates of deceased younger people may not have such similar security. This Court holds the view that it is not always the case that the Courts would award higher compensation for all deceased younger people. The principles on quantum of damages for fatal accidents are always considered on a case to case basis and the awards cannot be generalized based on assumptions that people of younger ages would be earning more. In fact, in the case of very young persons whose future could not possibly be projected, Courts have resorted to awarding a global figure of Ksh 2,500,000/= as opposed to guessing what the deceased's earning life would have turned out to be.

77. Further, this Court does not find that the section is discriminatory because the same is a law that applies to all Kenyans irrespective of age. There is no form of ***differentiation***, let alone ***differentiation on illegitimate grounds*** (See Iain Currie & Johan de Waal, ***The Bill of Rights Handbook,*** 5th ed. (2005) at p.243 et seq.) which are set out in Article 27(4) of the Constitution. To amount to discrimination, the treatment of persons of youthful ***age***, as one of the grounds under section 27(4) of the Constitution, would have to be treated differently or with differentiation. Every litigant of all ages are in terms of Article 27(1) "equal before the law and has the right to equal protection and equal benefit of the law" as entitled to sue and to recover the awards of damages that they are awarded by the court. That the persons who win higher damages have to seek recovery of the judgment award from the insured in addition to the limit paid by the insurer does not make it discriminatory on ground of age because it is the very process of enforcement of an award that the older person who obtains an award above the policy limit would have to utilize to get his full award.

78. Although the Court cannot rule out the possibility of a younger victim in a fatal accident claim being awarded damages beyond the limit, this does not make the law discriminatory because it applies to all persons who would find themselves in similar situations. It would be discriminatory if the law purported provide for compensation on the basis of ***age***. Age of the victim affects the multiplier in years of loss of earnings but older people may earn more by raising the multiplicand of annual earnings. The provision of section 5(b) (iv) of the Act is not discriminatory.

Hardship in Recovery of Awards over the limit of Ksh 3,000,000/=

79. To this Court's mind, the issue of the limit of the amount that may be recovered from the insurer under Act raised, perhaps paradoxically by the Petitioner, is a real concern for the justice system, not as so much owing to the alleged discrimination, but because of the economic implications for a decree holder seeking to execute a Judgement which exceeds the Ksh.3,000,000/= limit as against an insured who sometimes may be impecunious owner of a motor vehicle/cycle who takes out the compulsory insurance to cover himself from loss arising from accidents in the course of use of the vehicle.

80. The petitioner urges this phenomenon as a breach of the right to protection of his consumer rights under section 46 of the Constitution. The petitioner seeks to rely on the powerful dicta of the Court of Appeal in ***Justus Mutiga*** appeal in which the court faulted the Respondent's submission of justification for the amendment capping the amount recoverable. To be sure, however, although the petitioner's counsel passes off the statement of the court of appeal as ***ratio decidendi,*** it was in fact obiter as the court had already upheld the High Court's finding on the constitutionality of section 5 (b) of the Act.

81. The full passage and context of the Court of Appeal is set out as follows:

> *"33. As to whether there was a clear justification for the limitation on compensation under the schedule; the appellant's counsel urged the court to draw parallels between the impugned schedule and the repealed Workmen's Compensation Act and the Work Injury Benefits Act and make a finding that statutory control of legislation is justifiable. It was the appellant's contention that by enforcing such regulation in the insurance sector, the system was effectively balancing the interests of all, whilst addressing the challenge of inability to settle claims by the increasingly insolvent insurance companies and demanding reasonable care from the insured.*
>
> *34. Looking at the record however, the argument pertaining to the two statutes should not arise as it does not appear to have been raised at trial. Not only that, according to a document titled 'The Proposals on the Insurance of Public Service Vehicles (PSV'S)' which was produced in evidence by the 2nd respondent, insolvency and want of duty of care were just some of reasons for the industry's failure to meet expectations. Poor corporate governance, widespread fraud, poor road infrastructure and imprudent investment of insurance funds were some of the other reasons cited for the collapse of PSV underwriters. The contention by the appellant that limiting compensation payable to innocent third parties will resolve all these issues, is a fallacy. This is more so given the lack of evidence supporting such an assertion.*
>
> *35. In addition, that limitation goes against the objective of compulsory third party motor vehicle insurance. Historically, the Principal Act was enacted in 1945 as the Motor Vehicles Insurance (Third Party Risks) Ordinance, No 12 of 1945. However, unlike the present system* ***section 10*** *of the Ordinance imposed a duty on the insurer to compensate fully an insurance claim as raised by the injured third party and as sanctioned by the courts. Where the amount was higher than what was covered by the insurance policy taken by the insured, the insurer was still obliged to fully compensate the injured third party but subsequently recover the excess from the insured. This is what was colloquially referred to as the principle of 'excess' in insurance in Kenya. That provision in our view, managed to protect the injured third party while also protecting the interests of the insurer by allowing the insurer to recover from the insured, any excess amount without capping the amount which the insurer could pay as compensation.*
>
> *36. Unfortunately, under the current system, the third party has been left at the mercy of not just the percentages imposed under the schedule, but should there be any excess recoverable, he must contend with pursuing the insured personally. For example, in the case of* ***Georgina Wangari Mwangi v. David Mwangi Muteti,*** *High Court of Kenya Civil Case No 40 of 2013; it was held that the insurance company is to pay a maximum of Ksh.3, 000, 000 with any excess being payable by the insured party. The plaintiff in that case was awarded damages of Kshs.14,612,540.20 out of which only Kshs. 3,000,000 was payable by the insurer, with the rest being recoverable from the insured.*

Though the appellant contends that the limitation is justified, no evidence was adduced to prove that justification. If anything, limiting the compensation payable by the underwriter who has received premiums; particularly in the face of an innocent third party who is armed with a court judgment, is unjustifiable. It offends the very essence of insurance; which is to ensure mitigation against risks that result in loss. In particular, it defeats the very objective of compulsory third party insurance cover, if an innocent victim is left to recover the bulk of his claim against the insured personally.

37. On the whole therefore, we find no reason to interfere with the reasoned judgment of the High Court. Our conclusion is that this appeal is devoid of merit, and the same is hereby dismissed with no order as to costs."

82. To answer the question of constitutionality of the section on the ground of breach of protection to consumer rights, this court considers that the insured is not denied consumer protection for enjoyment of the greatest benefit under the insurance policy because he is entitled to the cover the extent that he has insured himself, to the minimum statutory limit or to such other consensual unlimited amount as the parties to the insurance contract are permitted to contract. The insured gets the full benefit of everything that he has paid for, and no conceivable breach of consumer right is possible.

83. The Court has further considered that, even if there was a breach, the rights of a consumer under Article 46 of the Constitution is not among those which cannot be limited pursuant to the provisions of Article 25 of the Constitution. Article 24 of the Constitution anticipates the limitation of some of the rights in the Bill of Rights (including Article 46) and it sets out the parameters for limitation as follows: -

24. Limitation of rights and fundamental freedoms

1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

a) the nature of the right or fundamental freedom;

b) the importance of the purpose of the limitation;

c) the nature and extent of the limitation;

d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

84. It would thus be crucial for this Court to consider the rationale for capping the amount payable by the insurer to the said Ksh 3,000,000/= to determine whether the limitation on how much an insurer is to pay as per Section 5 b) iv) of the Act is justifiable.

85. The history of motor vehicle insurance was well elaborated in the Judgement of the Court by the late Onguto J. in the aforementioned Petition 148 of 2014. In the 1970s, public service vehicles in Kenya operated with minimal regulation and this saw a rise in the number of road accidents. It proved a challenge for victims to recover from the respective owners of the motor vehicles. This is what informed the provision of law making it compulsory for all motor vehicles to have a policy of insurance, as provided for under Section 4 of the Principal Act.

86. This notwithstanding, insurers were still reluctant to underwrite public service vehicles owing to the risky nature of the business. To curb this menace, insurance companies opted to form a voluntary pool to share risks associated with this class of business but this arrangement did not last long and there was a series of serial insolvency of underwriters engaged in this type of policies. To address this concern and as a measure of balancing the interests of all stakeholders being the insureds, the insurers and the third party victims of road traffic accidents, the government through an amendment bill of 2013, intervened through the amendments to Section 5 of the Act introducing the structured compensations scheme and maximum amount payable at Ksh 3,000,000/= to third parties under Section 5 b) iv) of the Act. These amendments were thus arrived at following careful public interest considerations and the intention was to safeguard interests of all stakeholders.

International Best practice

87. This Court also considers that the concept of placing a limit on the amount an insurer, would be liable for in road traffic accident claims is not unique to the Kenyan jurisdiction. Indeed, many other countries have adopted such a law including those in the Caribbean region. Section 4 of the Motor Vehicles Insurance (Third Party Risks) Act of Trinidad and Tobago has provisions that mirror those of Section 5 b) iv) of the Kenyan Act. The former provides as follows: -

4. Requirements in respect of policies

1) In order to comply with the requirements of this Act, a policy of insurance must be a policy which—

a) is issued by a person who is an insurer; and

b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which

may be incurred by him or them in respect of any death of or bodily injury to including emergency treatment therefore performed by a duly registered medical practitioner or damage to the property of any person caused by or arising out of the use of the motor vehicle or trailer mentioned in the policy on a public road.

2) In the case of death or of bodily injury, a policy of insurance shall not be required to cover—

a) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

b) any contractual liability;

c) liability in respect of any sum in excess of one million dollars arising out of any one claim by any one person which sum shall not be taken to include payment for emergency treatment not exceeding one thousand dollars in respect of each person;

d) liability in respect of any sum in excess of two million dollars arising out of the total claims for any one accident for each vehicle concerned.

88. Although the amount of limitation in these two statutes are starkly different, with the Trinidad and Tobago Act capping the figure at 1,000,000 dollars (about Ksh.100,000,000/) and the Kenyan Act at Ksh.3,000,000/= it is safe to conclude that the aspect of limitation of the amount of compensation payable to a third party by an insurer is not an outrageous strange concept.

89. Further, the above position is supported by jurisprudence from the Privy Council arising for the Caribbean jurisdiction of Trinidad and Tobago. In the case of ***Presidential Insurance Company v. Molly Hosein Stafford (Trinidad and Tobago)*** [1999] UKPC 14 the Privy Council while considering an issue whether costs of the suit were recoverable over and above the limit set by the section in ***pari materia*** with our section 5(b) of the Act, observed as follows: -

"The scheme of the statute is the same as that adopted by most other Caribbean countries. It requires drivers to have compulsory third party insurance to cover "in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to or damage to the property of any person caused by or arising out of the use of the motor vehicle on a public road" (section 4 (1). This obligation was however qualified by subsection (2) which provided that the policy is not required to cover (among other things) "liability in respect of any sum in excess of $50,000 arising out of any one claim by any one person."

90. Further, the issue raised by the Petitioner, captured as the need to protect both economic operations of the motor vehicle and insurance industries and the victims of motor vehicle accidents as well as to address the social economic realities arising therefrom in developing countries, has attracted the attention of the **United Nations Conference on Trade and Development (UNCTAD)**. The UNCTAD Secretariat was tasked with preparing a study on among others, third party liability automobile insurance and in their report titled ***Motor Insurance and Compensation of Motor Accident Victims in Developing Countries TD/B/C.3/209*** they recommended as follows at paragraphs 70, 71, 72 and 73 thereof: -

3. COVERAGE AMOUNTS

70. As mentioned earlier, some countries require the purchase of motor vehicle liability policies that provide for unlimited liability coverage. From a social viewpoint a requirement that policies have no maximum limit may seem desirable. However, a deeper analysis could reveal that doing so increases the propensity to sue for exaggerated amounts and forces many persons to purchase liability protection far out of proportion to their net worth or income potential. Providing "unlimited" coverage raises the cost of insurance to everyone.

71. Governments may wish to consider establishing a requirement that each motor vehicle operator must be covered by at least some stated minimum liability protection and permit the optional purchase of amount sin excess of the statutorily mandated minimum. This would lower liability premiums of the average person while permitting those who need very high coverage limits to purchase it. This is the approach followed successfully in many developing and developed countries.

72. The required minimum should be established to bear a reasonable relationship to the country's economic and social development and should be subject to periodic revision.

73. Claim payments on both compulsory and voluntary covers can be minimized by the judicious use of deductibles. This can avoid small claim payments, which, according to good risk management, should be absorbed by the insured anyway and can also avoid expenses that are disproportionate to their importance.

91. The above recommendation by the UNCTAD approving the limitation and creating room for contractual agreement for higher coverage is exactly what the Kenyan Act provides for. The rationale for the above is to protect all parties including the average policy holder, by safeguarding their ability to afford premiums while permitting those who can afford and need higher coverages to pursue the same. Indeed, the question of making premiums affordable was discussed in the case of ***Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others Civil Appeal 123 of 1985 [1986] eKLR*** **where Kneller, Hancox and Nyarangi, JJ.A. held as follows: -**

"And the judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums

for insurance of all sorts and that is to be avoided for the sake of everyone in the country. Lord Denning MR in Lim Poh Choo v Chamden and Islington Area Authority [1979] 2 All ER 910 (CA); Hancox JA Mariga v Musila (ibid)."

92. In my respectful view, therefore, the real issue may not be the capping of the amount payable by the insured, but rather the ***value*** of the said figure at which the cap is imposed bearing in mind the changing economic times. Indeed, the capping was necessitated by the rampant insolvency of insurance companies and leaving the compensation open ended would also not serve the interests of the public and business community in ensuring that insurance companies remain operational. The Petitioner in the association of other stakeholders may petition Parliament to amend the clause to a higher figure, say Ksh 5,000,000/= up from the Ksh 3,000,000/= in view of inflation and economic changes. The court respectfully suggests that having regard to the recent averages for award in fatal accidents involving victims of youthful age even multiplicand based on the minimum wages, (say a multiplicand of 15,000/- and a multiplier of 30 years in dependency ratio of 2/3 approximating Ksh.3,600,000/-) **the cap may be enhanced to a sum Ksh.5,000,000/- (still way below the 100,000,000/- in Trinidad and Tobago).** In its social duty for development of the law, the Court shall respectfully recommend this course to the Honourable Attorney General.

Duty to settle the Judgement

93. The Petitioner asks the Court to compel the 2nd Respondent to settle the entire decretal sum. The Petitioner does not contend that he has no means to pay the decretal sum and indeed, he has an attachable asset, the land cruiser which was involved in the accident and which is the subject of the pending warrants of attachment by the auctioneers. His contestation is that he should not be made to pay because this would negate the essence of an insurance cover which is to mitigate him against risk. There cannot be a negation, however, if the cover under the terms of the insurance contract was for the limited sum of the policy limit meaning that he was not called upon to pay for higher premium as he would be if the cover was limitless or for a higher value.

94. This Court has already found that there is an option for insureds and insurers to negotiate and agree on a higher compensation and further, that the limit set was not an ambush as it was already provided for in statute and most probably in the insurance contract, which this Court can rightfully conclude was in his full knowledge, in the absence of evidence to the contrary. It would be contrary to the terms of contract and policy for an insurer to be compelled to pay more than what they contracted to. The insurer however must settle the Ksh 3,000,000/= and it would only be orderly for the execution process to follow after recovery of this amount from the 2nd Respondent. This Court observes that the prayer of mandatory injunction is not properly founded in the circumstances of the case.

Public Interest

95. Ultimately, this Court is of the view that the issues raised in this Petition touching on the need to secure a decree-holder's ability to recover are indeed valid. The Petitioner's interests of consumer protection and expectation for full unlimited coverage must be balanced with the public interest aspect of protecting the insurance business whose survival is necessary for the very insureds and motor vehicle owners to benefit from. While taking out of a cover by motor vehicle owners is a mandatory requirement under Section 4 of the Act, the law cannot compel an insurance company to enter into contractual relationships with motor vehicle owners. It is thus to the Petitioner's advantage and any other insured for that matter that the limitation is permitted but he be allowed to negotiate with the insurer for a higher compensation in the peculiar arrangements of payment of higher premiums. It is also, to his advantage that the insurance companies be protected to ensure that they remain operational in business as the Petitioner and other insured needs them in view of the mandatory requirement to have a motor vehicle policy. See Section 4 of the Act.

96. This Court finds that that the public interest element in this case, being the need to protect insurance companies for the benefit of the public who consume insurance services from the very insurers, will call for a denial of the Petition. This notwithstanding, it is important for Parliament to consider an amendment to the impugned provision to a limit commensurate with the conventional awards made in rapidly changing economic times. An unlimitless policy cover would mean extremely high premiums for the cover as to lead to collapse of the mandatory third party insurance for the liability of the poor motor vehicle/cycle owners being unable to pay the necessary premiums. It cannot be the proper function of the court, to superintend over the collapse of the transport and insurance industry. The decoy case made by the petitioner in the argument of the decree-holder who is unable to recover the full amount form the insurer has a complete answer in the fact that the decree-holders in other claims other than the motor vehicle accidents subject of this case have to recover their awards from the judgment debtors where the judgment debtors have no insurance or where such insurance is limited or abrogated.

Conclusion

97. The Petitioner, a Judgment Debtor seeking to halt the execution process against him sought to have the Judgement and proceedings of the trial Court quashed. The facts upon which the prayer for an order of certiorari quashing the proceedings in ***Maua CMCC Case No. 13 of 2019*** is premised is that the Petitioner was not served with summons and neither was he served with a demand letter. He disputes having instructed the law firm of Simiyu, Opondo, Kiranga & Co. Advocates to represent him and he disputes having issued instructions for the recording of a consent order on liability. This Court does not find any of these issues sufficient to invoke this Court's jurisdiction in a constitutional petition as the matters could adequately be handled by the trial Court as ordinary civil issues. This Court does not agree that the trial Court was *functus officio* for purposes of setting aside a supposed irregular Judgement. This Court finds that these issues offend the principles of constitutional avoidance and the principle of exhaustion of remedies and will therefore not entertain the same.

98. As for the other issue on constitutionality of Section 5 (b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act, although the Petitioner failed to set out the exact Articles in the constitution that he was referring to, the Court could fashion the remedies sought in the Petition and it therefore finds it proper to determine the issue on merit. The High Court in the aforementioned case of Petition No. 148 of 2014 found that the said section was not unconstitutional. This Court agrees as much. The impugned section does not infringe on the right to a fair trial under Article 50 of the Constitution and neither does it infringe on the right to property under Article 40 of the Constitution because a decree-holder has a right to have his award settled and thereby execute his Judgement as against the judgement debtor.

99. Concerning his right to consumer protection, weighing this against the fact that the right is not among those which cannot be limited, and

further, that the relationship between him and the insurer is also a contractual one attracting the requirement of full discloser of all material facts including any limitation to compensation, this Court does not find that his consumer rights were infringed. Further, limitation on compensation payable is not entirely a foreign aspect and it is the recommendation made by the UNCTAD in view of the need to ensure affordability of premiums to the average person. Further, the impugned section allows for parties to an insurance contract to negotiate and settle on a higher amount based on their agreed premium amount. The right to equality and freedom from discrimination has also not been infringed.

100. Taking into consideration the history of the insurance industry in the country, involving rampant cases of insolvency and disruption in the industry, and consequently leading to the safeguard introduced by the impugned section, this Court finds that a weighing of the Petitioner's interests against the public interest element in the Petition would require this Court to decline the Petition.

ORDERS

101. Accordingly, for the reasons set out above, this Court makes the following orders:

i) The Petitioner's Petition dated 23rd March 2021 is dismissed.

ii) The declaration sought that Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 of the Laws of Kenya is unconstitutional is declined.

iii) The order of certiorari sought quashing the proceedings and all the subsequent/consequential orders thereto in Maua CMCC Case No. 13 of 2019 is declined.

iv) The order of mandamus/mandatory injunction sought compelling the 2nd Respondent to pay the decretal amount in Maua CMCC Case No. 13 of 2019 and all costs and interest arising thereto is declined.

v) For the avoidance of doubt, the order in iii) and iv) above does not affect the Petitioner's rights to seek for the 2nd Respondent to settle the Ksh.3,000,000/= compensation provided for by the Act.

vi) The order of permanent injunction sought restraining the 3rd Respondent by herself, her agents, auctioneers, employees, relatives and/or through anybody else whomsoever acting on her behalf from attaching, selling, charging, impounding, alienating, leasing, auctioning and/or otherwise howsoever interfering with the Petitioner's property is declined.

vii) The petitioner is at liberty to move the trial court for setting aside or review of the judgment, or to appeal therefrom and seek stay of execution pending appeal, as he may be advised by his legal advisors.

viii) The Court shall respectfully recommend to Parliament through the Honourable Attorney General that it considers an enhancement of the limit of the policy cover under section 5 (b) (iv) of the Act to Ksh.5,000,000/= in view of the current award averages made by the Courts and the current economic and inflationary trends. For that purpose, a copy of this decision shall be sent to the office of the Honourable Attorney General through the Counsel on record for the 1st and 4th Respondents.

ix) For reason of the public interest in the matter of the limit of insurance cover under the Act, there shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Ngunjiri Michael & Co. Advocates for the Petitioner

M/S Nkunja & Co. Advocates for the 3rd Respondent

The Attorney General for the 1st and 4th Respondents

N/A for the 2nd Respondent.