



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 175 OF 2019

IN THE MATTER OF :

**ARTICLES 22(1)& 165(3) (b) OF
THE CONSTITUTION KENYA;**

AND

IN THE MATTER OF :

**ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS PURSUANT TO
ARTICLE 40, 43, 46, 47 & 50(1) OF
THE CONSTITUTION OF KENYA;**

AND

IN THE MATTER OF:

**SECTIONS 3, 80 AND THE PREAMBLE OF
THE INSURANCE ACT, CAP 487 LAWS OF KENYA;**

AND

IN THE MATTER OF:

**SECTION 12 (M), 13 (2); 90 AND 94 OF
THE CONSUMER PROTECTION ACT (CPA) NO. 46 OF 2012;**

AND

IN THE MATTER OF

**SECTION 4(2) OF THE LIMITATION OF ACTIONS
ACT CAP. 22 LAWS OF KENYA**

AND

IN THE MATTER OF

THE PREAMBLE & SECTIONS 4, 5, & 10 OF

THE INSURANCE (MOTOR VEHICLES THIRD PARTY RISKS)

CAP 405 LAWS OF KENYA

AND

IN THE MATTER OF

THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

AND

IN THE MATTER OF

ENFORCEMENT OF THE CONSTITUTION PRACTICE

AND PROCEDURE RULES, 2013

BETWEEN-

MARTIN MUTHIKE NDAMBUKI.....APPLICANT/PETITIONER

VERSUS

DIRECTLINE ASSURANCE CO LTD.....1ST RESPONDENT

THE INSURANCE REGULATORY AUTHORITY (IRA)...2ND RESPONDENT

SARAH JERUTO BUSIENI.....3RD RESPONDENT

JUDGMENT

THE PETITION

1. The Petitioner through a petition dated 8th May, 2019, seeks the following orders :-

a) A declaration that the actions and omissions of both the 1st Respondent and 3rd Respondent excluding the Petitioner from the case violated his Constitutional right under Article 50(1) to be heard before a Court of law in a dispute concerning him where both Respondents had designs to visit the consequences of the proceedings upon him;

b) A declaration that seeking to involve the petitioner in a tort case whose cause of action accrued on 6th November, 2014, about 5 years ago is an indirect violation of the protection accorded under the Limitation of Actions Act Cap 22 Section 4(2);

c) An Order and Declaration that:

i) By dint of 1 above, the 1st and 2nd Respondents are precluded from claiming any contribution from the Petitioner in settling the decretal amount, costs, auctioneer's charges and any other expense relating to NAIROBI CMCC NO. 5226 OF 2017 and warrants issued against the Petitioner be and are hereby lifted.

ii) The 1st Respondent is liable to settle the entire decretal amount in respect of NAIROBI CMCC NO. 5226 OF 2017 and is estopped from involving the Petitioner;

d) A permanent injunction restraining the 3rd Respondent whether by herself or through her agents and or successors from continuing or carrying out any execution proceedings against the Petitioner for any amount due or outstanding on the decree in the case or any costs including auctioneer's fees and expenses incurred;

e) A declaration that the 2nd Respondent has failed in its statutory duty to protect the rights of the motor vehicle insured policyholders under Article 46 of The Constitution and the Honourable therefore be pleased to order as follows;

i) To ensure limits of liability under section 5, where applicable are indicated in the insurance certificates and the limits and options for wider cover are appropriately brought to the attention of insuring public before paying any premiums;

ii) That proposal forms are consistent with the policy document and in particular include the limits of liability;

iii) That the 2nd Respondent be ordered to review the limits set and established whether they are in line with the current economic situation and are adequate to realize the objectives of Cap. 405 Laws of Kenya.

iv) That there is a foolproof verifiable system confirming that the insured is aware of limits before paying premium.

f) Costs of the petition and any other order that this court may deem fit to grant;

THE PETITIONER'S CASE

2. The petitioner's case is that he is the 2nd defendant in **NAIROBI CMCC NO. 5226 OF 2017** (A Subordinate Court Case) which arose out of an accident involving his motor vehicle KBZ 522E on the 6th of November, 2014.

3. An award of Kshs. 5,857,897/= was made and warrants of attachment have been issued to execute the decretal amount in addition to auctioneer's costs.

4. The Petitioner avers he was unaware of the case until the auctioneers served him with warrants of attachment for a decree in favour of the 3rd respondent.

5. Subsequently, the Petitioner made inquiries from the insurer who is the 1st Respondent herein and the issue of limits of liability came out.

6. The Petitioner avers that he consulted his lawyer upon receiving the warrants and was informed that the suit had been defended and there was evidence of interaction between the 3rd party advocates lawyers, the 1st respondent and its lawyers.

7. The Petitioner avers that there was no service of a demand letter to him and that the demand letter that was served had been received by the 1st Respondent and not the Petitioner himself. The Petitioner further avers that the said demand letter indicates the accident date as 25th November, 2014 and not 6th November, 2014 as indicated in the plaint and also that no summons to enter appearance were served on the Petitioner.

8. The Petitioner contends that neither 1st Respondent nor its lawyers advised the Petitioner about the case but proceeded to record a liability of 20:80% against his wishes.

9. It is his position that judgment was entered in figures that are staggering Kshs. 6,806,854/=, less 20% and neither the 1st Respondent nor the plaintiff gave any notice of judgment to the Petitioner.

10. The Petitioner avers that on 5th of April, 2019, the legal counsel for the 1st Respondent wrote to the 3rd Party Advocates and only copied the 3rd defendant leaving him out and stating that the 1st Respondent would meet its statutory amount of Kshs. 3,000,000/= only.

11. The petitioner avers that his vehicle was at all times insured by the 1st respondent against third party risks and that the petitioner had reasons to believe that the cover was unlimited. He allegedly never got policy documents that show the limits.

12. He avers that his insurance was sold by the 1st respondent's agent who never disclosed the limits of third party liability and also collected his premium on behalf of the insurer.

13. The Petitioner averred that the 2nd Respondent being the regulator failed in its duty to regulate 1st Respondent and its agent by checking its limits of liability to consumers.

14. The Petitioner avers that he has been condemned unheard to personally meet an exorbitant decretal amount in total contravention to **Article 50(1) of the Constitution**. Being the principal judgment debtor and owing to the above-mentioned violations, the same necessitated the filing of the petition herein.

THE 1ST RESPONDENT'S RESPONSE

15. The 1st respondent filed grounds of opposition dated 4th of July, 2019, opposing the petition on grounds of res-judicata and that the same offended the principles of separation of powers.

16. It was also their position that the petitioner is seeking public law constitutional remedies for alleged contractual breaches which fall within private law remedies.

17. The 1st Respondent also relied on a replying affidavit sworn by Isabella Nyambura on the **4th of July, 2019** where they opposed the Petition further.

18. The 1st Respondent avers that the petitioner approached Kingsbull Insurance Brokers for a third party policy of insurance in respect to his

motor vehicle registration number KBZ 522E and was issued with Policy Number 00029472, where it was agreed the petitioner would be indemnified for one year beginning 30th May, 2014 to 29th May, 2015 for third party risks.

19. The 1st Respondent avers that sometime in 2014, the Petitioner reported to them that his vehicle was involved in an accident along Thika Road where several people had been injured.

20. The 1st Respondent conducted investigation and confirmed that the accident had indeed taken place. They then received a statutory notice dated 20th July, 2017 that the 3rd Respondent had filed a suit against the Petitioner being *Nairobi CMCC No. 5226 of 2017 (Sarah Jeruto – vs- Edward Muthike Gatembu & 2 others)* seeking compensation for injuries suffered in the above accident.

21. The 1st Respondent averred that upon evaluation of the matter it was their view that had the matter proceeded to full trial, the petitioner would be 100% liable and in good faith proceeded to enter a consent apportioning liability to **80:20%** in favour of the 3rd Respondent.

22. The 1st Respondent states further that the judgment was later delivered in favour of the 3rd respondent for a sum of **Kshs. 5,445,483.20/-** and that they had not foreseen that the judgment would be way past the limit of **Kshs. 3,000,000/-** but they nevertheless proceeded to honour their said limit of Kshs. 3,000,000/-.

23. The 1st Respondent argued that the insurance (*Motor Vehicle Third Party Risks*) Act places Kshs. 3,000,000/- limit and does not distinguish between comprehensive and third party covers.

24. The 1st Respondent also averred that the Insurance Policy issued to the petitioner had the limits clearly set out on page 176 and it was the Petitioner's duty to thoroughly read the insurance policy document.

25. It is 1st Respondent position with regards to the issue of constitutionality of third party injury and death limits, the said limits have not been found unconstitutional by any Constitutional Courts, further, The 1st Respondent argued that the Petitioner's position that he was never served with a demand letter prior to filing of Nairobi CCMCC No. 5226 of 2017, or summons to enter appearance after the filing of the said suit is a remedy which lies in an appeal of the judgment arising from the primary suit and not in this Petition.

26. It is 1st Respondent position that the Petitioner's venture in seeking a orders of a legislative nature amounted to usurping the role of the legislature. They prayed that the Petition be dismissed.

THE 2ND RESPONDENT'S CASE

27. The 2nd Respondent relied on their grounds of opposition dated **4th of October, 2019**, where they opposed the petition on grounds that the petitioner had failed to demonstrate to the honourable Court how their constitutional rights had been violated.

28. It is 2nd Respondent position that the petitioner ought to have appealed against the decision of the Chief Magistrate's court instead of filing this Petition. Further, they averred option for review was also available to the Petitioner on account that he was not afforded an opportunity to participate in the proceedings.

29. The 2nd Respondent prays that the Court to invoke the doctrine of constitutional avoidance and prayed for the Court to dismiss the Petition with costs.

THE 3RD RESPONDENT'S RESPONSE

30. The 3rd Respondent vide her Replying Affidavit sworn on the 21st of May, 2019, responded to the Petition that the on 17th March, 2017, her advocate on record sent a demand letter to the Petitioner among other defendants and the Petitioner's insurer confirmed receipt of the same.

31. The 3rd Respondent avers further that summons were effected to all defendants and that the firm of Ms. Kairu & Mc court entered appearance for all defendants in *CMCC 5226 of 2017*.

32. It is her position that the said firm having entered appearance on the petitioner's behalf is therefore estopped from denying knowledge of the suit and he is duty bound to settle the decretal sum in full.

33. It is 3rd Respondent position that the Petitioner ought to have applied for a stay of execution in the lower court if he was dissatisfied with the judgment.

34. The 3rd Respondent also averred the conditions to warrant the grant of an order for stay had not been met and that the Petitioner/Applicant sought to circumvent the course of justice by evading to fulfill his legal obligations to her by satisfying the decretal sum.

35. The 3rd Respondent prays that the Court dismiss the Petition.

THE PETITIONER'S RESPONSE TO THE 1ST RESPONDENT'S REPLY

36. In response to the 1st Respondent's response, the Petitioner vide his Replying Affidavit sworn on 24th July, 2019, stated, the 1st respondent falsified information by stating he approached the their insurance agent.

37. The Petitioner further reiterated the contents of his petition and averred that he was not given the policy document but the certificate of insurance which has no limits.

38. The Petitioner averred further that the 1st Respondent's advocate ought to have advised him that they were defending a suit on his behalf and that they ought to have informed him of limits they would pay which is only Kshs. 3,000,000/-.

THE PETITIONER'S RESPONSE TO THE 3RD RESPONDENT'S REPLY

39. The Petitioner averred that the memorandum to enter appearance had been filed by 1st respondent's lawyer and not himself.

40. The Petitioner also averred that this court has powers to deal with the constitutional issues raised.

THE PETITIONER'S SUBMISSIONS

41. The Petitioner vide their submissions dated 4th July, 2019 supported his Petition.

42. The Petitioner raised two issues for determination which can be summarized as follows;

43. The first issue interrogated the violations of the 1st Respondent that merit constitutional intervention as per **Article 165 (3) (b)**. On this, the Petitioner submitted there was misrepresentation with respect to his protection from liability by the 1st Respondent in its insurance policy. He argued that there was a violation of the right to full information in that the 1st Respondent should have disclosed that the Insurance Policy covers only up to Kshs. 3,000,000/=.

44. The Petitioner submitted that the 1st Respondent violated the provisions of the **Consumer Protection Act**.

45. It was his position that general principle is that the Court's has duty of protection of the economic interests of consumers and that under **Article 22** this Court has a mandate to consider the above violations.

46. It is averred further that an insurance company has the option of refusing to receive summons on behalf of the insured save for the statutory notice provided for under **Section 10(2) & (3) of Insurance (Motor Vehicles Third Party Risks) Act**.

47. It is Petitioner position that the 1st Respondent only intended to pay a limited amount and that the lawyers who defended the matter were agents of the party instructing them and instructions on consent judgment on liability is only binding on the instructing party.

48. On the 2nd issue of what the constitutional violations of the 2nd respondent are, the petitioner averred the 2nd respondent's mandate is to regulate and prescribe standards for the insurance industry in Kenya.

49. It is further Petitioners contention that the 2nd Respondent failed in its regulatory mandate by failing to check on the 1st Respondent limits on third party risks. He relied on the **Fair Administrative Actions Act** and the case of **Universal Marketing Insurance Agencies Ltd vs CFC Assurance Ltd & Another [2018] eKLR**, to support his proposition.

50. The Petitioner in respect cited **Constitutional Petition 148 of 2014**, where an insured could seek a higher cover agreeing with the insurer on such cover.

51. The Petitioner placed further reliance on the cases of **NBI HCC NO. 389 OF 2007 Thomas Muoka & Anor VS Insurance Co. of EA, Meru Petition 15 of 2018, Caroline Karimi vs IRA & 4 ors (3rd Parties), NBI HCC 213 of 2014 Charles Makenzi Wambua VS AMACO Assurance & Ors** in support of his case.

52. The Petitioner prayed that his Petition be allowed.

THE 1ST RESPONDENT'S SUBMISSIONS

53. The 1st Respondent vide their submissions dated 17th October, 2019 raised only one issue for determination which is whether a constitutional issue has been raised.

54. On this the 1st Respondent invoked the doctrine of subrogation where they stated that the petitioner approached them for an insurance cover of his motor vehicle and he was issued with a policy which the insurer would indemnify him where he is legally liable to pay.

55. It is the 1st Respondent position that by agreeing to indemnify the petitioner against such risks, the 1st respondent was entitled to be placed in the position of the insured and to succeed to all his rights and remedies against third parties in respect to the subject matter of insurance. Reliance was placed in the case of **Egypt Air Corporation vs Suffish International [1999] 1 EA 69** in support of their case.

56. It is 1st Respondents' contention that based on this, they stepped into the Petitioner's shoes and defended his suit on his behalf having acquired full rights to negotiate on his behalf and subsequently entered a consent.

57. The 1st Respondent cited the case **of Mumo Matemo vs Trusted Society of Human Rights Alliance [2014] eKLR** and stated that the petitioner had failed to prove how his constitutional rights had been violated.

58. It is further submitted by 1st Respondent that the petitioner's allegations are anchored on breaches of statutory provisions and not violations of fundamental rights and freedoms. They cited the case of **Godfrey Paul Okutoyi [2018] eKLR**, in support of their case.

59. The 1st Respondent additionally submits that the Petitioner's claim against the 1st Respondent flows from a contract which this honourable Court lacks jurisdiction to rewrite. It was their position that having fulfilled its contractual and statutory obligation, they could not be held liable for any other sums over and above its contractual statutory limit in light of the provisions of **Section 5 (b) of the Insurance (Motor Vehicles Third Party Risks) Act**.

60. The 1st Respondent further asserts that Petitioner's allegations that he was not informed of the Kshs. 3,000,000/= limits fails to hold water as he cannot claim ignorance of clear statutory provisions lawfully setting the said limits, further, the petitioner contracted insurance brokers Kingsbull Insurance Brokers to procure insurance on his behalf, the said intermediaries therefore had ostensible authority to act on his behalf including receiving of his insurance policy, the petitioner could not therefore feign ignorance of the insurance policy terms and conditions.

61. Reliance in support of the aforesaid proposition is placed in the cases of **Insurance Company of East Africa Limited –vs- Ndambuki Kisau [2004] eKLR**, and **Joseph Nguku –vs- AON Minet Insurance Brokers Ltd & Anor** in support of their case.

62. The 1st Respondent therefore prayed for the Petition to be dismissed with costs.

THE 2ND RESPONDENT'S SUBMISSIONS

63. The 2nd Respondent vide their submissions dated 1st of October, 2020 raised two main issues for determination.

64. The first issue was whether the 2nd Respondent had failed in its statutory duty to protect the rights of the motor vehicle insured policy holders under **Article 46 of the Constitution**.

65. On this, the respondent averred, that the Petitioner entered into a valid agreement with the 1st respondent and the assertion that he is semi-illiterate is an ignorance of the law that cannot be a defense.

66. Reliance was placed in the case of **Law Society of Kenya V. the Hon. Attorney General** in support of their case that **Section 5 (b) Insurance (Motor Vehicles Third Party Risks) Act** was found to be constitutional.

67. The 2nd Respondent further submitted that the petitioner's allegation that his right to be heard had been violated contrary to **Article 50(1) of the Constitution** has no basis, since the suit was defended by a firm of Advocates appointed by the 1st respondent on the Petitioner's behalf.

68. The 2nd Respondent relied on the cases of **Annarita Karimi Njeru vs Republic [1979] eKLR**, and **Mumo Matemo vs Trusted society of Human Rights Alliance [2014] eKLR** and **Godfrey Paul Okutoyi v Habil Olaka [2018] eKLR** in support of their case.

69. The second issue was whether this Petition has been filed in the appropriate forum.

70. On the said issue, the 2nd Respondent averred that the petition emanates from **CMCC No. 5226 of 2017; Sarah Jeruto Busieni vs Edward Muthike Gatembu & 2 others**, in which the Petitioner avers he was never served with a demand letter and only learnt about the matter when auctioneers served him with court documents informing him of pending liability.

71. The 2nd Respondent submitted that the right cause of action in such circumstances would be to appeal the said decision to a higher court instead of filing a new suit in the Constitutional Division.

72. The 2nd Respondent urged that Petitioner also had an option of filing a review in the same court on grounds that the matter had been heard and determined without affording him an opportunity to be heard. Reliance is placed in the case of **J M K v M W M & another [2015] eKLR**, in support of the prosecution herein.

73. The 2nd Respondent also urged the Court to invoke the doctrine of constitutional avoidance and prayed that the Petition be dismissed.

THE 3RD RESPONDENT'S SUBMISSIONS

74. The 3rd Respondent relied on her submissions dated 8th July, 2019 in which she has raised five issues for determination.

75. On the first issue it is contended that the Petitioner had knowledge of the subordinate Court's suit against him as he was legally

represented by a firm of Advocates, M/s Kairu & Mccourt Advocates who had properly entered appearance on the petitioner's behalf on the 26th September, 2017 and therefore it is stated the same could only be done with his instructions.

76. The 3rd Respondent further submitted that during the conduct of the subordinate Court's matter, the said firm prepared defence statements, lists of witnesses and list of documents, therefore the Petitioner could not feign ignorance regarding the suit.

77. The 3rd Respondent additionally asserted that if the Petitioner alleged that he never appointed the said advocates, the same would amount to a disciplinary issue that should be addressed to the Advocates Complaints Commission and not this Court.

78. The 3rd Respondent relied on the case of **Board of Trustees of African Independent Pentecostal Church of Africa VS Peter Mungai Kimani & 12 Others [2016] eKLR**, in support of her proposition.

79. On the second issue, the 3rd Respondent stated that only the state or a state organ can violate a right as per **Article 21(1) of the Constitution**.

80. The 3rd Respondent as regards the third issue regarding the appropriateness of this court to adjudicate the dispute herein, The 3rd Respondent urged that the Constitutional Court was being wrongly called upon to act as an Appellate Court in relation to judgment of a subordinate Court (**Nairobi CMCC No. 5226 of 2017**).

81. The 3rd Respondent position is that the Constitution would have expressly provided for the same, further the Petitioner would have applied for review or sought leave to appeal out of time.

82. On the fourth issue, the 3rd Respondent submitted that the Petitioner had filed the matter in an improper forum since the 3rd Respondent is entitled to enjoy the fruits of her litigation in the subordinate Court.

83. The 3rd Respondent prayed for the petition to be dismissed with costs in her favour.

ANALYSIS AND DETERMINATION

84. I have carefully considered the Petition dated **8th May, 2019**, the Respondents' Grounds of Opposition, Replying Affidavits, the Petitioner's and Respondent's submissions and all the Responses, and from the same the following issues arise for determination:

a) Whether the petition is properly before this honourable court;

b) Whether the 2nd Respondent should interfere with the regulations set out under section 5 (b) of the Insurance (Motor Vehicles Third Party Risks) Act in favour of the petitioner.

WHETHER THIS PETITION IS PROPERLY BEFORE THIS HONOURABLE COURT

85. The issue on whether this petition is properly before this court is key in the determination of the dispute herein. The petitioner vide his petition alleges that he is the 2nd defendant in **NAIROBI CMCC NO. 5226 OF 2017** (A Subordinate Court Case) which arose out of an accident involving his motor vehicle KBZ 522E on the 6th of November, 2014. He further states that an award of **Kshs. 5,857,897/=** was made and warrants have been issued to recover the decretal amount in addition to auctioneer's costs.

86. The Petitioner contention is that he was never issued with summons to enter appearance nor was he given an opportunity to defend the suit. It is Petitioner's claim that his right to be heard was violated by contravention of **Article 50(1) of the Constitution**, and therefore seeks the judgment of the subordinate court to be set aside on the grounds of this Constitutional violation.

87. The Respondents on the other end submitted that the issues raised by the Petitioner are issues that should be raised in an appeal and not in a Constitutional Petition as this one.

88. The Constitutional question is therefore of a vital role in the determination of the dispute herein.

89. The jurisdiction of the High Court is well established under **Article 165 of the Constitution of Kenya** which states;

“(1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

Sub article 3 states; Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;”

90. Further *Article 23(1) of the Constitution* states;

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

91. I note that from the aforementioned Articles, it is clear, that the jurisdiction of this Court is confined to interpretation of any constitutional question as well as redress for violations of constitutional rights.

92. Upon considering the Petition, it is clear that the Petitioner is dissatisfied with the judgment of the subordinate court in **NAIROBI CMCC NO. 5226 OF 2017**. The Petitioner in the Petition contends that he was not given an opportunity to be heard and further more a consent in the said judgment was entered into by the parties without his knowledge. There is no dispute that Judgment with which the Petitioner is dissatisfied with arose out of an accident claim. The question that arises is in light of the aforesaid, is whether this Court is the appropriate forum for the Petitioner to challenge the subordinate Court’s judgment?

93. On the issue I am guided by a decision in the case of **C N M v W M G [2018] eKLR**, where this Court weighed in on the constitutional question as follows;

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.”

The Court went on further to state;

“When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values. [17] The issues raised here will only require the Court to examine defamation law.

21. The question of what constitutes a constitutional question was ably illuminated in the South African case of Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others [18] in which Justice O’Regan recalling the Constitutional Court’s observations in S vs. Boesak [19] notes that:-

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.” [20]

22. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. [21] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.”

94. I am of the view that going by the above arguments and examining the dispute herein keenly, it is my view that the nature of the dispute herein is more of a civil appeal than a Constitutional Petition. The prayers the Petitioner seeks such as orders that the 1st and 2nd Respondents are precluded from claiming any contribution from the Petitioner in settling the decretal amount, costs, auctioneer’s charges and any other expense relating to **NAIROBI CMCC NO. 5226 OF 2017** and lifting of warrants issued against the Petitioner can effectively be addressed in a Civil Appeal, in the Civil Division of the High Court and not in the Constitutional and Human Rights Division, as this division cannot purport to sit on appeal from a decision of a subordinate Court dealing with a civil matter.

95. Further, it is observed that the Petitioner has also prayed for orders that a permanent injunction be issued restraining the 3rd Respondent whether by herself or through her agents and or successors from continuing or carrying out any execution proceedings against the Petitioner for any amount due or outstanding on the decree in the case or any costs including auctioneer's fees and expenses incurred. The prayers as drawn and filed I find that the same can only be issued by an Appellate Court through a Civil Appeal challenging the Lower Court's decision upon a thorough interrogation and findings of errors in law.

96. According to **Section 71A of the Civil Procedure Act**, the law provides;

“(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court from a decree passed by a subordinate court of the first class on an appeal from a subordinate court of the third class, on a question of law only.”

97. It is further expressly provided under **Order 42, Rule 6 of the Civil Procedure Rules** as follows:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

98. Upon consideration of the above provisions of the law, it is clear, that the orders sought by the Petitioner are orders which can only be issued in an appeal and not instant Constitutional Petition. The Petitioner prays for a permanent injunction restraining the 3rd Respondent from carrying out execution proceedings arising out of the decree of the Lower Court. This is a prayer that is akin to stay of execution of the Lower Court's decree as provided under **Order 42 Rule 6 of the Civil Procedure Rules** that can only arise where an appeal has been preferred and not through a Constitutional Petition.

99. It is also my view that if the petitioner was not heard in the Lower Court, his arguments would have been good grounds for him to apply for review of the Lower Court's judgment in the same Court rather than preferring this Petition.

100. In support of the above reliance is placed in a decision of the Court of Appeal in the case of **JMK v MWM & another [2015] eKLR**, where the court stated;

“In this appeal, the appellant was entitled to contend, as he did, that the judgment of the Industrial Court which directly affected him, was in breach, not only of the law, but also of the Constitution in so far as it condemned him without an opportunity to be heard and in breach of the right to a fair hearing guaranteed by Article 50(1). He was also entitled to contend that to the extent that the judgment found him guilty of sexual harassment without affording him an opportunity to be heard, that in itself constituted sufficient reason for review of the judgment.”

101. It is noteworthy to note the steps taken by the Petitioner after judgment was delivered, begs for answers if the Petitioner was not heard, as he herein passionately contends, why could he not apply for review in the same Court? Why did he choose to did he not seek to set aside the Judgment? Why rush to a constitutional court, when there is a court that could be best placed to resolve the issue in dispute?

102. Upon consideration of this suit, I am of the view that this is a proper suit for invoking. The doctrine of constitutional avoidance. This doctrine was best recapitulated by this Court in the persuasive case of **Matatu Welfare Association & another v Invesco Assurance Co. Ltd & 3 others [2019] eKLR**, where the court stated;

“The Principle of Constitutional Avoidance in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR was optioned in the following terms:

“[256]...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,

103. I find from the pleadings and submission as well as the case law, it is not sufficient that the Petitioner’s right to be heard was infringed to warrant him filing a Constitutional Petition. It is in my view not sufficient that summons were not issued to him. Similarly it is not sufficient that the 1st respondent defended a suit and entered into a consent without his knowledge. Additionally it is not sufficient that the cause of action in lower court arose past the time stipulated under the Limitations of Actions Act. I note that these are issues that could be best determined in a Civil Appeal rather than a Constitutional Petition.

104. I find no good reason not to agree with the respondents in that, if the petitioner did not instruct the 1st Respondent’s advocate to act on his behalf, this would amount to a disciplinary issue that should be taken to the Advocates Complaints’ Commission. Further, it is quite disturbing as alleged if a defence was filed with witness statements and list of documents without the petitioner having known on what was transpiring in the Lower Court.

105. Further even as alluded to in the Petition though a consent may have been entered into without the Petitioner’s knowledge, this would in my view be a good ground for appeal or for seeking a review.

106. In light of the foregoing, and in light of authorities referred to hereinabove, I find that this Court would not be the appropriate forum to hear and determine the dispute herein. The proper Court would be the High Court, Civil Division. On this limb I find that alone the Petition fails.

WHETHER THE 2ND RESPONDENT SHOULD INTERFERE WITH THE REGULATIONS SET OUT UNDER SECTION 5 (B) OF THE INSURANCE (MOTOR VEHICLES THIRD PARTY RISKS) ACT IN FAVOUR OF THE PETITIONER

107. The Petitioner has sought the interference of this Court to compel the 2nd Respondent to ensure the limits of liability under **Section 5 of Insurance (Motor Vehicles Third Party Risks) Act**, are in indicated in the insurance certificates and that the 2nd Respondent be ordered to review the limits set to be in line with the current economic situation in order to realize the objectives of **Insurance (Motor Vehicles Third Party Risks) Act**.

108. I find that from the above issue that, it is necessary to interrogate the constitutionality of the said provision.

109. **Section 5 part b (iv) of the Insurance (Motor Vehicles Third Party Risks) Act**, provides;

“Requirements in respect of insurance policies.

In order to comply with the requirements of [Section 4](#), the policy of insurance must be a policy which—

iv) Liability of any sum in excess of three million shillings, arising out of a claim by one person. [Act No. 46 of 1960, s. 48, Act No. 10 of 2006, s. 34.]”

110. The Petitioner avers that he was not aware of the said limits above and that the 1st Respondent conducted his suit without informing him of the said limits and therefore seeks the 2nd Respondent to review the said limits in terms of compensation of third party risks.

111. The issue of payable insurance limit was considered in the case of **Law Society of Kenya v Attorney General & 3 others [2016] eKLR**, where the Court held as follows:-

“...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).”

112. From the above decision it is clear the issue raised herein was subject of Court’s decision and the provision was found not to be unconstitutional and further it was held nothing precludes an insured from seeking for a high cover from the Insurer who equally has a right to charge higher premiums.

113. I find therefore the arrangement of premium payments and premium limits is a private arrangement that should be left between the Insured and the Insurer. The court and equally the 2nd Respondent has no business in interfering with a private contract between two persons. The Court cannot purport to rewrite the contract between parties in a private contract.

114. It is trite that a Court of law cannot purport to rewrite a contract voluntarily executed by parties. This was reiterated, in the case of *J N N, (a Minor) M N M, suing as next friend v Naisula Holdings Limited t/a N School [2018] eKLR*, where this Court held;

“5. It is not disputed that there exists a binding contract signed by the school, the minor and the parent. The terms are clear. The fees paid is not refundable upon expulsion as in this case. I agree with the Respondents counsel that a court of law cannot purport to re-write a contract voluntarily executed by parties. It cannot be denied that relationship between the parties in this case is governed by the contract in question. The Petitioner is now inviting this Court to rewrite the contract in question.”

115. From the above, I find that this honourable Court cannot purport to instruct the 2nd Respondent to otherwise, interfere with a lawful provision of the law, or a statute, that has not been declared unconstitutional and also, a provision that binds the parties to the contract and fits within the confines of a private contract between the Petitioner and the 1st Respondent.

116. ***The upshot is that the Petition is without merits. The Petition is dismissed with costs.***

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA