



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. E 023 OF 2021

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 22, 23, 27, 28, 40, 43,
47, 48, 165, 258, AND 259 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE ALLEGED THREAT, INFRINGEMENT AND/OR
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLE 27, 28, 40, 43 AND 47 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: THE INSURANCE ACT, CAP 487

AND

IN THE MATTER OF: THE INSURANCE (MOTOR VEHICLE THIRD PARTY RISK) ACT, CAP 405

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPENTATIONS

BETWEEN

DAVID OWUOR ONGORO.....PETITIONER

AND

AFRICA MERCHANT ASSURANCE

COMPANY LIMITED & 40 OTHERS.....RESPONDENTS

RULING

1. Before me for determination is an Application via a Notice of Motion dated the 26/04/2021 brought under the provisions of Article 22 and 23 of the Constitution and under the Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013. In the application, the Petitioner has sought among others the following orders: -

i. Spent

ii. That pending the hearing and determination of the application inter partes, the Honourable court be pleased to grant a conservatory order restraining the Plaintiffs (Judgment creditors in Civil suit No. KALOLENI- SRMCC 185 OF 2018, SRMCC 188 OF 2018, SRMCC NO. 189 OF 2018, SRMCC NO.200 OF 2018, SRMCC NO. 201 OF 2018 filed by Messrs Kariuki Gathuthi & Co. Advocates and KWALE –CMCC 327 OF 2018, CMCC 388 OF 2018, CMCC 327 OF 2018, RMCC 391 OF 2018, RMCC 340 OF 2018, RMCC 300 OF 2018 , RMCC 328 OF 2018, RMCC 337 OF 2018 and RMCC 338 OF 2018 filed by Messrs Sherman Nyongesa & Mutubia Advocate from enforcing in any manner the judgment sum or damages against the Petitioner herein.

iii. That pending the hearing and determination of the application inter partes, the Honourable court be pleased to issue an order of injunction restraining the 2nd to 40th Respondents from execution of the judgment that have already been delivered and those that are yet to be delivered against the Petitioner's property in satisfaction of the said judgment sums or recovery of damages arising from the accident that occurred on 7th January, 2018 involving motor vehicle KBV 259R and covered under Insurance policy number AM2/080/1/1939.

iv. That pending the hearing and determination of the Petition inter partes, the Honourable court be pleased to issue an order of injunction restraining the Plaintiffs (Judgment creditors in Civil suit No. KALOLENI- SRMCC 185 OF 2018, SRMCC 188 OF 2018, SRMCC NO. 189 OF 2018, SRMCC NO.200 OF 2018, SRMCC NO. 201 OF 2018 filed by Messrs Kariuki Gathuthi & Co. Advocates and KWALE –CMCC 327 OF 2018, CMCC 388 OF 2018, CMCC 327 OF 2018, RMCC 391 OF 2018, RMCC 340 OF 2018, RMCC 300 OF 2018, RMCC 328 OF 2018, RMCC 337 OF 2018 and RMCC 338 OF 2018 filed by Messrs Sherman Nyongesa & Mutubia Advocate from demanding for, attaching for sale, auction or in any other manner undertaking enforcement action the assets belonging to the Petitioner in satisfaction of the judgment sum or recovery of damages.

v. That the court grant any other relief if deems fit and just in the matter.

vi. That the costs of the application abide the outcome of the Petition.

2. The Petitioner's application is brought on the grounds set out in the body thereof and in the affidavit of the Petitioner sworn on 26/04/2021. The facts giving rise to this petition and the application under consideration are as follows. The Petitioner was at all material times registered as the owner of motor vehicle number KBV 259R (hereinafter, "the subject motor vehicle"), which was at all material times used as a hearse and plying different routes within Kenya, and had been comprehensively insured under Insurance policy number AM2/080/1/1939 with the 1st Respondent and was valid until 19/07/2018. On 7/01/2017, the subject motor vehicle was involved in an accident along Mombasa–Nairobi road at Taru whereof a total of 40 people sustained various injuries. The 1st Respondent was duly notified of the accident and the details of the injured persons through its Mombasa office and with express instructions from the 1st Respondent, the subject motor vehicle was duly assessed and the 1st Respondent settled the repair charges in full.

3. The Petitioner avers that he was subsequently served with summons to enter appearance in respect of the said accident. As per the policy agreement, the Petitioner forwarded the said summons and pleadings to the 1st Respondent for the 1st Respondent to take up the claims on the Petitioner's behalf. However, in breach of the insurance policy, the 1st Respondent ignored and or refused to appoint an advocate to defend the claims on behalf of the Petitioner and the decision was arrived without notice and advice to the Petitioner, and the Petitioner only learnt of the failure to act on the claims when he made a follow up at the Mombasa Office.

4. The Petitioner avers that after noting the reluctance with the 1st Respondent was handling his case, the Petitioner instructed his advocate who wrote to the Respondent vide letter dated 15/08/2021, but the said letter did not elicit any response. However, after some prodding, the 1st Respondent instructed the Messrs Mburu Nyamboye Advocate who only entered appearance and never took any step to defend the causes. The petitioner further avers that even a letter to the Insurance Regulatory Authority did not elicit any response.

5. The Petitioner avers that most of the matters against him have been concluded and judgments entered against him and despite forwarding letters to the 1st Respondent informing it of the delivery of judgments and tabulating the decretal sums payable, the Respondent has neglected to settle the claims.

6. It is the Petitioner's case that the 1st Respondent decision not to defend and settle the claims against petitioner violates his legitimate expectation since he will be personally held liable for claims arising out of the accident yet he has dutifully paid his premiums to the 1st Respondent and his insurance policy was valid. Further, the 1st Respondent is in violation of the Petitioner's right to property guaranteed under Article 40 of the Constitution; the Petitioner's family right to human dignity and decent housing guaranteed under Articles 28 and 43 of the Constitution; the Petitioner's rights guaranteed under Insurance Act Cap 487 and the Insurance (Third Party Motor Vehicle Risks) Act Cap 405 and the Petitioner's legitimate expectation, since he will be personally held liable for claims arising out of the accident yet he has dutifully paid his premiums to the 1st Respondent and his insurance policy was valid.

7. The Petitioner avers that he stands to suffer at the hands of the 1st Respondent unless the court intervenes and grants the prayers sought.

The Response

8. The 2nd to 34th Respondents opposed the application vide Grounds of Opposition dated 13/05/2021 as follows:

a) That the application is misconceived, frivolous, vexatious, fatally defective, bad in law and an abuse of the court process.

b) That the dispute between the 1st Respondent and the Petitioner is purely a private dispute based on interpretation and enforcement of contractual obligations and does not raise any Constitutional issue.

c) That the Petitioner's remedy against The 1st Respondent lies under the Insurance (Third Party Motor Vehicle Risks) Act Cap 405

d) That the judgments obtained by the 2nd – 34th Respondents cannot be injected in the manner sought by the Petitioner since the said judgment remain valid and enforceable against the Petitioner.

e) That the 2nd – 34th Respondent are not party to the insurance contract and as such, the 2nd -34th Respondent cannot be joined in any suit seeking the enforcement of the contract and or insurance policy between the Petitioner and the 1st Respondent.

9. The 1st Respondent did not file any response to the petition and on 27/07/2021, Mr. Kanyonge learned counsel for the 1st Respondent indicated to this court that they were in support of the application and the 1st Respondent would not file any submissions.

Submissions

10. On this Court's directions, the Application was dispensed with by way of written submissions. **Ms. Gichira** learned counsel for the Petitioner filed submissions on 17/06/2021 while **Mr. Mutubia** Learned counsel for the 2nd -34th Respondent filed submissions on 6/08/2021.

The Determination

11. I have considered the application, the Grounds of Opposition, the Petition in general, the rival written submissions, the cited authorities, and the relevant provisions of law. In my view, the issues to be determined by the Court are as follows:

1. ***Whether this Court has jurisdiction to hear and determine the application herein.***
2. ***Whether the Petitioner has met the threshold of grant of an injunction against the Respondent.***

12. **Mr. Mutubia** learned counsel for the 2nd to 34th Respondent submitted that the instant application did not raise any Constitutional infringement by the 2nd-34th Respondents who are private citizens and all the Respondents being private individuals, then they cannot be responsible for violation of the Petitioner's Constitutional rights since the dispute between the Petitioner and the 1st Respondent is purely an issue of interpretation and enforcement of an insurance contract. To buttress his submission, counsel cited **Mwai Waigwa v Insurance Regulatory Authority & 2 Others; Peter Githaiga Ngatia (Interested Party) [2021] Eklr** where the court held that where there is an alternative remedy of filling a suit in the ordinary civil courts, a party ought not to invoke the jurisdiction of the Constitutional court.

13. **Ms. Gichira** learned counsel for the Petitioner submitted that there has been a violation of the Petitioner's rights guaranteed under Article 27, 28, 40, 43, 47, 48 of the Constitution and the same has been demonstrated by the Petitioner to the court. Therefore, the Petitioner has established to the satisfaction of this court that there has been threats of violation and violations of his fundamental rights and the fact that breach of contractual issues are raised in the petition is not a bar to granting the orders sought.

14. I am guided by the decision in **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1** when dealing with the issue raised about this Court's jurisdiction. Nyarangi JA (as he then was) held as follows in this regard:

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"

15. I have perused the Application and petition filed by the Petitioner with a view of answering the question of jurisdiction raised by the 2nd - 34th Respondents through its Grounds of Opposition. I am satisfied that the grounds by the 2nd-34th Respondent to the effect that the instant petition is purely a private civil dispute between private persons which raises no specific Constitutional obligation and/or violation raises a point of law which in my view meets the threshold of what constitutes a preliminary objection as was established in the case of **Mukisa Biscuit Manufacturing Co Ltd -vs- West End Distributors Ltd (1969) EA 696**. In the case **Sir Charles Newbold, P** expressed himself as follows:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop"

16. In the case of **Godfrey Paul Okutoyi & others -vs- Habil Olaka & Another (2018) eKLR** Chacha, J on the issue of there being an alternative remedy in lieu of Constitutional remedies at paragraph 65 stated: -

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

17. In the case of **Patrick Mbau Karanja -vs- Kenyatta University [2012] eKLR Lenaola, J** (as he then was) expressed himself as follows in regard to when the Constitutional interpretative mandate of the Court may be invoked: -

“I should only say this as I conclude; in Francis Waitaha -vs- Kenyatta University Petition No. 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further the Court also cited with approval, the decision in Teitinnang -vs- Ariong (1987) LRC (const.) 517 where it was held as follows:-

“Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individual, are regulated by private laws. The Constitution, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by the Constitution under the fundamental rights provisions are owned by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold”.

18. Lenaola, J went on to observe as follows after citing the above case: -

“I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights”.

19. I fully agree with the views expressed by Judges Chacha and Lenaola in the cases mentioned above and I agree that matters that do not call for the Court’s Constitutional interpretative mandate under the Bill of Rights provisions of the Constitution should not be disguised as Constitutional Petitions seeking enforcement of the Bill of Rights. There should be a clear distinction between Constitutional issues and ordinary civil proceedings. In this case, the Petitioner has based his petition on an insurance policy no. AM2/080/1/1939, which he avers that the 1st Respondent violated. In my view, this was a commercial transaction between an insurer and the insured both being private parties. The enforcement of contract terms cannot inspire the invocation of Constitutional provisions mandating enforcement via a Constitutional Petition. There are sufficient statutory regimes that control the enforcement of private commercial transactions, in this case alleged breach of an insurance policy, and the Petitioner should have invoked the jurisdiction of the ordinary Civil Court.

20. The rights and duties of individuals, in this case the Petitioner and the Respondents, are regulated by private laws. Therefore, the 1st Respondent cannot owe a duty to Petitioner under the fundamental rights provisions of the Constitution, giving rise to an action against the 1st Respondent in a Constitutional petition. And since no responsibility can be due by 1st Respondent to the Petitioner under the Constitution’s fundamental rights provisions, no action for a declaration of breach of duty under the provisions of the Constitution can lie or be sustained against the 1st Respondent.

21. In the circumstances, I am persuaded that there was no breach and/or infringement of any Constitutional provisions under the Bill of Rights that would warrant the Petitioner invoking this Court’s Constitutional jurisdiction against the Respondents who are private persons. Consequently, the instant application and Constitutional petition is unsustainable and a misuse of the Court’s process. Both the application and the petition herein are struck out. Parties to bear own costs

Dated, Signed & Delivered at Mombasa this 29th day of September, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Gichira for Applicant

Ms. Chaka for 2nd-34th Respondents

Ms. Peris Court Assistant