



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 109 OF 2018**

**ALLAN MURUIKI GIKENDI.....PETITIONER**

**-VERSUS-**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**INSURANCE REGULATORY AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**KENYA MOTOR REPAIRER ASSOCIATION....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. Through the petition dated 27<sup>th</sup> March, 2018 and supported by his affidavit sworn on the same date, the Petitioner, Allan Muriuki Gikendi, seeks the following orders:

**a) A declaration that the insurers' conduct or adoption of unconscionable scheme of sourcing for motor vehicle repair parts independently and in the exclusion of repairers, motorists, consumers and or insureds is inconsistent with the Consumer Protection Act, the Competition Act and the Constitution of Kenya 2010.**

**b) A declaration that the insurers' conduct and or adoption of unconscionable scheme of causing assessment to be done independently without the involvement of the repairers, motorists, consumers and or insureds and subjecting the said process of tendering is inconsistent and a breach of the Consumer Protection Act, Competition Act and the Constitution of Kenya, 2010.**

**c) An order of certiorari to bring to this court and quash the various decisions made by insurers to directly source for motor vehicle repair parts in the exclusion of repairers and insureds and decisions to assess vehicle in a process akin to tendering for the lowest bidder.**

**d) Any other relief or order this honourable court may deem fit to grant.**

2. The Petitioner contends that the failure by the 2<sup>nd</sup> Respondent, Insurance Regulatory Authority (IRA), to regulate the insurance companies from enforcing direct sourcing of repair materials to the exclusion of repairers or motorists violate the provisions of Article 46 of the Constitution of Kenya, Section 5 of the Consumer Protection Act No. 46 of 2012 (CPA) and the Competition Act No. 12 of 2010 (CA). Furthermore, it is contended that the 2<sup>nd</sup> Respondent's failure to regulate the insurers has resulted in manipulation of the repair process and caused unfair competition to the detriment of the consumers all in utter breach and violation of the cited constitutional and statutory provisions. The Petitioner further contends that the insurers have failed and refused to engage all stakeholders in the process of formulation of a scheme for sourcing of parts by the insurers thereby compromising consumer interests in the repair process as substandard parts are procured by the insurers. In the Petitioner's view, the cumulative effect of the 2<sup>nd</sup> Respondent's conduct is to cause the general public to be in danger of the risk of motor vehicle malfunction and accidents hence the instant petition.

3. In response, the 1<sup>st</sup> Respondent, the Attorney General, filed grounds of opposition dated 4<sup>th</sup> April, 2018. It is asserted that the petition does not raise any constitutional issue for deliberation by this Court as envisaged under Article 46 of the Constitution nor does it meet the threshold for constitutional petitions. Further, they contend that the Petitioner has failed to meet the parameters required for the grant of the order of injunction and that the petition is an abuse of the court process. They therefore urge the court to dismiss the petition with costs.

4. On its part the 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 12<sup>th</sup> September, 2018 by its Acting Commissioner of Insurance and the Chief Executive Officer, Godfrey K. Kiptum. Mr. Kiptum deposes that the 2<sup>nd</sup> Respondent is a statutory government agency established

under the Insurance Act with its objects and functions provided under Section 3(A) therein. It is further his deposition that the 2<sup>nd</sup> Respondent in line with its statutory mandate developed a document titled “Guidelines on Claims Management for Insurance Industry June 2012” (Guidelines), to protect consumer rights and improve service delivery to the public. Be that as it may, he avers that by virtue of the mandate conferred to the 2<sup>nd</sup> Respondent by the Insurance Act, the Regulations and the Guidelines, the 2<sup>nd</sup> Respondent is not in any way involved in the running of motor vehicle repair services, sourcing of motor vehicle repair parts and/or assessment of damages to motor vehicles.

5. It was also the statement of Mr. Kiptum that pursuant to Clause 9.3 of the Guidelines, the insured has a right to choose a repairer of his choice subject to the repairer’s compliance with all statutory requirements of carrying out such business. According to Mr. Kiptum, such choice by the insured results in a contractual relationship between the insured and the motor vehicle repairer and the 2<sup>nd</sup> Respondent is not privy to the contract. Furthermore, he contends that the 2<sup>nd</sup> Respondent is not in any way involved in the process of formulating a scheme of sourcing of motor vehicle spare parts by the insurers or assessment akin to tendering process for the provision of motor vehicle repair services, which are business processes of an insurer that are not subject to regulation or supervision by the 2<sup>nd</sup> Respondent.

6. It is further contended that the impugned directives annexed and marked “AMG-2” and “AMG-3” in the Petitioner’s supporting affidavit were issued not by the 2<sup>nd</sup> Respondent but by only two insurance firms out of the fifty five registered insurance firms in Kenya to the garages in their panel and therefore do not apply to all the insurance industry players as a whole. It is therefore Mr. Kiptum’s position that the reliefs sought in the petition cannot be directed at the respondents but on the insurers who have not been enjoined to this petition. In his view, the petition is deficient as it does not disclose any justifiable cause to warrant the intervention of this Court and he therefore prays for the dismissal of the petition with costs.

7. The 3<sup>rd</sup> Respondent in response filed a replying affidavit sworn on 24<sup>th</sup> April, 2018 by its Chief Executive Officer, Martin Nyakundi O’Barimo. He deposes that the role of the 3<sup>rd</sup> Respondent in the motor repairs segment of the economy is to ensure that the highest standard of repair work is met by its member garages in order to ensure that all owners of the motor vehicles who require repair works get value for their money and enjoy the benefits of safety and reliability while using their vehicles. He avers that the 2<sup>nd</sup> Respondent is clothed with powers to license insurance companies, agents, brokers and assessors which by necessity must be independent and distinct entities to ensure accountability, quality and transparency in handling of claims. His deposition is that lately insurance companies had unilaterally and without the backing of any law taken over the supply of spare parts to garages, carrying out the assessors’ work without being licensed and limiting the extent and quality of repair works going on in the garages operated by the 3<sup>rd</sup> Respondent’s members.

8. In O’Barimo’s view, the decision of the insurance companies to supply spare parts to motor vehicle repairers for use in the repair of motor vehicles sent to repair centres by insurance companies is unconscionable and contravenes the law, poses a great danger to road users and motorists and further creates avenues for fraud and theft of motor vehicles to meet the demand for second hand spare parts being supplied by insurance companies. It is his averment that this will further lead to perennial delays in the repair of motor vehicles thereby jeopardizing turnaround time in serving the policy holders.

9. It is further the 3<sup>rd</sup> Respondent’s case that by yarding the accident vehicles, the motor accident claims are being settled on the basis of the lowest bidder other than on the basis of professional loss adjustments and in the long run, poorly repaired motor vehicles will depreciate in value over a short period of time as insurance companies are not in a position to handle the intricacies of the spare parts industry. Accordingly, the 3<sup>rd</sup> Respondent does not equally agree with the decision and actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents on their failure to reign in on the insurance companies. The 3<sup>rd</sup> Respondent therefore supports the petition.

10. Mr. Okoth appearing for the Petitioner adopted the written submissions dated 8<sup>th</sup> October, 2018 and asked the Court to enter judgement for the Petitioner. Counsel submits that the Petitioner is apprehensive that the illegal activities of the insurance companies and by extension the 2<sup>nd</sup> Respondent will reverberate to the consumers at large and accordingly cited Mativo, J in **James Kuria v Attorney General & 3 others [2018] eKLR** where he held that although issues of consumer rights affect only the parties, their impact and consequences are substantial, broad-based, transcending the litigation interest of the parties and leaning upon the public interest hence the need for parties to submit the necessary evidence to enable the Court to analyze the issues and arrive at a formidable determination that transcends the case at hand.

11. Counsel for the Petitioner cites the advisory opinion in the **Speaker of the Senate & another v The Attorney General (2013) eKLR** where the Supreme Court opined that Kenya’s Constitution is a transformative charter, unlike the conventional “liberal” constitutions of the earlier decades, whose goal is to institute social change and reform through values such and social justice, equality, devolution, human rights, rule of law, freedom and democracy. Accordingly, he submits that the decision and design by the insurance companies on spare parts was made unilaterally, devoid of public notice, public participation, inclusiveness, equality, good governance and accountability. In conclusion, he urges that in the interest of justice and public good, the petition should be allowed.

12. Ms. Mutindi appearing for the 1<sup>st</sup> and 2<sup>nd</sup> respondents adopted her written submissions dated 16<sup>th</sup> October, 2018. Counsel submits that the Petitioner has moved this Court alleging violation of his consumer rights as provided under Article 46 of the Constitution but has not met the requirements of Section 107(1) of the Evidence Act which provides that he who alleges must prove. Further, that this petition is no exception to the application of the principle of the threshold of a petition established in the case of **Anarita Karimi Njeru v Republic [1979] 1 KLR 154** and augmented by the Court of Appeal in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR**. It is also her submission that the instant petition is baseless, fallacious, laced with mere allegations and conjecture with no single shred of evidence against the 1<sup>st</sup> and 2<sup>nd</sup> respondents adduced and accordingly cites Section 109 of the Evidence Act which provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.

13. On the Petitioner’s assertion that the respondents have a duty to supervise and regulate procurement of repair parts and repair services by insurance companies, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that the same is misguided and refers the Court to Section 3A of the Insurance Act which provides for the objects and functions of the 2<sup>nd</sup> Respondent. It is further submitted that pursuant to Section 51(1), (2)

and (3) of the CPA, there is a warranty for vehicle repairs and therefore even if the insureds received substandard services as a result of the impugned acts of the insurers, there are recourse mechanisms provided for therein which can be claimed in the appropriate legal forum. Furthermore, that contrary to the Petitioner's assertions, insureds have a right to choose the repairers under Clause 9.3 of the Guidelines subject to a repairer's compliance with all statutory requirements of carrying out such business.

14. In conclusion, counsel submits that all allegations levelled against the 1<sup>st</sup> and 2<sup>nd</sup> respondents by the Petitioner are based on a breach, if at all, of statutory provisions which have nothing to do with the rights and fundamental freedoms under the Bill of Rights and which the insurers have been accused of and not the respondents herein. To buttress her argument, counsel cited the case of **Benard Murage v Fine Serve Africa Limited & 3 Others (2015) eKLR** where the Court held that not each and every violation of the law must be raised before the High Court as a constitutional issue and where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.

15. In her view, what is before the Court is a general pleading based on an alleged breach of a statutory provision capable of redress in a normal suit and not through a constitutional petition. This argument is buttressed by reference to the decision in the case of **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka, the Executive Director (secretary) of Kenya Bankers Association & another** (citation not provided) where the Court held that 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. She therefore urges the Court to dismiss the petition.

16. Mr. Koceyo appearing for the 3<sup>rd</sup> Respondent filed written submissions dated 8<sup>th</sup> August, 2018. On the issue whether this petition meets the threshold of a constitutional petition, counsel cited **Anarita Karimi** (supra) where the Court stated that a party seeking redress in a constitutional petition 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. Similarly, he cited the case of **Brian Makori v Kenya Examination Council Kisii Petition No. 17 of 2015** where Okwany, J held that when exercising the constitutional jurisdiction, the Court is concerned to uphold or vindicate the constitutional right which has been contravened. Accordingly, counsel submits that the petition has not met the threshold as against the 3<sup>rd</sup> Respondent but has met the threshold against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

17. On the issue whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents have breached consumer rights protected under Article 46 of the Constitution, counsel submits that the decision of the insurance companies to supply spare parts to motor vehicle repairers for use in the repair of the motor vehicles seconded to repair centres by insurance companies is unconscionable and contravenes the law and compromise on quality of repair as the insurance companies will favour those who offer cheap repairs with cheap second hand spare parts. Indeed, counsel submits that Article 46 of the Constitution, as well as Part VI of the CPA, protects consumer rights and cites Mativo J in **James Kuria** (supra) where the learned Judge observed that the onus on the Petitioner to establish violation of alleged consumer rights is not a mere formality, it is important. Counsel, nevertheless, observes that although Clause 9.3 of the Guidelines protect motorists from unfair practices by either the insurer or the repairer, the same is now being negated by the insurance companies. Counsel therefore argues that the same does not protect consumers.

18. On the issue whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents have breached the Petitioner's right to good governance in the form of transparency as protected under Article 10 of the Constitution, counsel cites Mwita J in **Katiba Institute v IEBC, Petition No. 19 of 2017** who cites the Supreme Court in **Advisory Opinion No. 2 of 2013, Speaker of the Senate & another v Attorney General & others** on the transformative nature of the Kenyan Constitution. In conclusion, counsel submits that the unilateral decision by the 1<sup>st</sup> and 2<sup>nd</sup> respondents is shrouded in secrecy contrary to the rules of transparency under Article 10 of the Constitution. He therefore urges this Court to allow the petition as against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

19. Having considered the petition, the responses thereto, submissions by counsel for the parties and authorities relied on, I am of the view that the only issue for the determination of the Court is whether the instant petition is properly before this Court and if so, whether it has merit.

20. The Petitioner contends that the 2<sup>nd</sup> Respondent's failure to regulate the insurance companies from enforcing direct sourcing of repair materials to the exclusion of repairers or motorists, violates the provisions of Article 46 of the Constitution of Kenya, Section 5 of the CPA and the CA. Furthermore, it is contended that the 2<sup>nd</sup> Respondent's failure to regulate the insurers has resulted in the manipulation of the repair process and caused unfair competition to the detriment of the consumers in utter breach and violation of Article 46 of the Constitution of Kenya, the CPA and the CA. The 3<sup>rd</sup> Respondent supports this position. However, the 1<sup>st</sup> and 2<sup>nd</sup> respondents argue that the objects and functions of the 2<sup>nd</sup> Respondent are clearly provided for under Section 3A of the Insurance Act.

21. My reading of Section 3A(c) of the Insurance Act is that the 2<sup>nd</sup> Respondent is mandated to license all persons involved in or connected with insurance business, including insurance and reinsurance companies, insurance and reinsurance intermediaries, loss adjusters and assessors, risk surveyors and valuers. They are not responsible for procuring spare parts for insurance companies as alleged by the Petitioner. Its mandate does not go beyond the issuance and enforcement of the Guidelines which are aimed at enhancing efficiency, transparency, disclosure of information to policy holders during claims processing and increasing consumer satisfaction. Secondly, an insurance contract is entered into by the insured and the insurer, which in my view, is a private contract between parties with the policy document detailing their terms of engagement.

22. In the case of **National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No. 95 of 1999; [2001] eKLR**, the Court of Appeal held as follows:-

**“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.**

As was stated by Shah JA in the case of *Fina Bank Limited vs. Spares & Industries Limited (Civil Appeal No. 51 of 2000)* (unreported).

**It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."**

23. In entering into a contract, the basis of any terms between parties who engage is trust that the other party will honour the terms of the bargain and such terms cannot be interfered with unless the contract was made under coercion, fraud or undue influence which must be pleaded and proved. In this case there is no suggestion of coercion, fraud, or undue influence in regard to the terms of the policy document, if at all. No evidence has been adduced to support such a suggestion. There is no consumer with a valid complain before this Court. The Petitioner does not say that he owns a motor vehicle or a repair shop and that he has suffered as a result of the insurers' impugned policy.

24. Be that as it may, whereas the Petitioner is alleging violation of consumer rights contrary to Article 46 of the Constitution, the Petitioner has not adduced any evidence proving the said violation save for the Guidelines issued by the 2<sup>nd</sup> Respondent to the insurance industry in June, 2012. The question therefore is whether this petition raises a constitutional issue. A constitutional question, in my view is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute. What constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & others v MEC for Education and Training, Eastern Cape & others [2002] 23 ILJ 81 (CC)* in which Justice O'Regan recalling the Constitutional Court's observations in *S v Boesak [2001] (1) SA 912 (CC)* noted 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 of .....the 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."**

25. This leads to the question whether or not the Petitioner proved to the required standard that the 2<sup>nd</sup> Respondent breached the provisions of Article 46 of the Constitution and the statutory provisions guaranteeing consumer rights. Ordinarily a consumer would be a person to whom particular goods or services are marketed in the ordinary course of business while a supplier would be a person who is in business of selling goods and services and includes an agent, in this case, an insured and an insurance company. Regarding consumer rights, Mativo J in *James Kuria* (supra) observed as follows:-

**"55. Although issues of consumer rights affect only the parties, 'their impacts and consequences are substantial, broad-based, transcending the litigation interests of the parties, and bearing upon the public interest, hence the need for the parties to submit the necessary evidence to enable the court to analyse the issues and arrive at a formidable determination that transcends the case at hand.**

**56. Consumer rights litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the expanded Bill of Rights in our transformative and progressive Constitution by establishing its meaning through contested cases.[35]**

**57. The general principle governing the determination of cases is that the party who alleges or, as it is sometimes stated, the party who makes the positive allegation, must prove.[36] Moreover, the onus on the Petitioner to establish violation of alleged consumer rights is not a mere formality; it is important."**

26. The Petitioner is challenging the move by insurance companies to source for spare parts for repair of motor vehicles but has not enjoined any of the insurance companies to this petition save for their regulator who is the 2<sup>nd</sup> Respondent. Be that as it may, what lies before this Court is a general pleading based on an alleged breach of Section 5 of the CPA which in my view is not within the 2<sup>nd</sup> Respondent's mandate but falls within the remit of the individual insurance providers. This Court has held severally that not each and every violation of the law must be raised as a constitutional issue and especially where there exists an alternative remedy through statutory law-see *Benard Murage* (supra).

27. I am therefore inclined to find that this petition is not merited. For the avoidance of doubt, this petition raises issues between an insurance company and an insured amounting to a private contract. It does not raise constitutional issues to be heard and determined by this Court. The Petitioner has not shown that the rights of a particular consumer have been violated in a manner that breaches the Constitution and statute. Indeed the claim that the insurance companies have taken over the sourcing of motor vehicle spare parts has not been established. The upshot is that the petition is without merit and it is dismissed.

28. This petition attempted to bring forth public interest issues. For that reason the Petitioner should not be punished with costs. Each party shall therefore meet own costs of the proceedings.

**Dated, signed and delivered at Nairobi through video conferencing/email this 28<sup>th</sup> day of May, 2020.**

**W. Korir,**

**Judge of the High Court**