



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW & CONSTITUTION & HUMAN RIGHTS DIVISION

MILIMANI LAW COURTS

PETITION NO. 336 OF 2017

JAMES NGOCHI NGUGI (t/a)

NGUGI & COMPANY ADVOCATES.....1ST PETITIONER

LILIAN NYACHOMA MAOSA.....2ND PETITIONER

VERSUS

INSURANCE REGULATORY AUTHORITY.....1ST RESPONDENT

EXPLICO INSURANCE COMPANY LIMITED.....2ND RESPONDENT

AND

LILIAN NYACHOMA MAOSA.....INTERESTED PARTY

JUDGMENT

1. **James Ngochi Ngugi**, and **Lilian Nyachoma Maosa**, the Petitioners, filed this petition against **Insurance Regulatory Authority**, the **1st respondent**, a public body, and **Explico Insurance Company Ltd**, the **2nd respondent**, a limited liability company an insurance underwriting company. Again named in the petition as an interested party is **Lilian Nyachoma Maosa**.

2. The petitioners aver that on 10th February 2017 the 2nd petitioner obtained judgment in the sum of Kshs15,000,000 in **RMCC No.117 of 2015** from proceedings in relation to a road traffic accident that occurred on 4th March 2015, involving motor vehicle registration **No KAN 030Q**. The petitioners further aver that after delivery of the judgment, the 2nd respondent refused to honour its obligations under the judgment and decree as the insurer of the offending motor vehicle.

3. The petitioners state that on 25th May 2017, the 1st petitioner acting on behalf of the interested party, wrote to the 1st respondent in its capacity as the 2nd respondent's regulator drawing its attention to violation of the Constitution and the law by the 2nd respondent and sought its intervention on the recovery of the decretal sum.

4. It is the petitioners' case that as at the time of filling this petition, the 1st respondent had not responded to their request. The petitioners, therefore, accuses the 1st respondent for failing to properly regulate the 2nd respondent and, as a result, the interested party is unable to enjoy the fruits of her judgment. They filed this petition and sought the following reliefs.

a. A declaration that the respondent has infringed the interested party's constitutional rights as provided for under Articles 28, 46, 47 & 48 of the Constitution of Kenya 2010 for neglecting to properly regulate the 2nd respondent.

b. A declaration that the 1st respondent do ensure that the 2nd respondent is properly regulated to ensure enjoyment of Article 28, 46 and 47 of the constitution by the respondent and other members of the Public.

c. General damages to the petitioner for infringement of their fundamental rights by the 1st respondent.

d. Costs of this petition to be paid by the 1st respondent.

e. Any other remedy that may be available for the ends of justice to be achieved.

2nd Respondent's response

5. The 2nd respondent filed grounds of opposition dated 2nd October 2017 contending that the Court lacks jurisdiction to hear and determine this petition; that the petition does not raise with any degree of clarity, specificity and particularity constitutional rights infringed and violated by the 2nd respondent and that the petition is indirectly challenging the provisions of section 5(b)(iv) of the Insurance(Motor Vehicle Third Party) Risks Act (Cap 405) which issue was determined in *Law Society of Kenya v Attorney General & 3 others* (Petition No 148 of 2014).

6. The 2nd respondent further contends that the Petition raises no cause of action known to law or equity; is an abuse of the court processes and that the petition does not show which constitutional provisions have been violated or the rights infringed.

Petitioner's submissions

7. **Mr. Ngugi** who appeared for the petitioners informed the Court that the 2nd petitioner had inadvertently been named as an interested party. With regard to the petition, counsel submitted that the 2nd petitioner was involved in an accident on 3rd April 2015, that she then instituted Suit in RMCC No 117 of 2015 and after trial, she was awarded damages of **Ksh15 Million** but the amounts due to her by statute is **Kshs3 Million**.

8. Counsel submitted that the 2nd petitioner's advocates wrote to the 2nd respondent's advocates demanding payment of the decretal sum but no response was received. He also submitted that the advocates then wrote to the 1st respondent on 25th May 2017 seeking intervention in the matter so that the 2nd respondent could pay but again received no response.

9. Mr. Ngugi contended that one of the 1st respondent's mandates is to ensure effective administration, regulation and control of insurance business in the country. He therefore argued that because of the 1st respondent's inability to carry out its mandate, the petitioner's right to dignity has been violated. He also argued that despite Article 47(1) guaranteeing everyone the right to fair administrative action, the 1st respondent did not comply with this requirement for it failed to respond to their letter thus violated Article 48 which denied the 2nd petitioner the right of access to justice through accessing the fruits of her judgment.

1st Respondent's submissions

10. Mr. Wakwaya, learned counsel for the 1st respondent submitted, first, by way of a preliminary objection, that the Court has no jurisdiction and that the petitioner has no **locus standi** to institute this petition since Articles 23 and 258 provide for instances when a person can institute a petition on behalf of another.

11. Secondly, counsel submitted that this is not a proper constitutional petition as highlighted under the authority of *Anarita Karimi Njeru v Republic* [1979] KLR 154. According to counsel, other than the reliefs, nowhere in the petition have the petitioners particularized in detail the constitutional provisions that have been violated and the rights infringed or the manner of infringement. Counsel relied on the case of *Samson Otieno Bala t/a Missani Enterprises v Kenya Bureau of Standards & 4 others* [2015] eKLR.

12. Thirdly, counsel submitted that despite referring to documents in the affidavit in support of the petition, none were attached or produced and as such, the Court cannot make a determination of the issues based on evidences from the bar.

13. According to counsel, section 10 of the **Insurance (Motor Vehicle Third Party Risks) Act** and the **Civil Procedure Rules**, provide for the procedure for executing judgments, the procedure the petitioner should have followed. He contended that under sections 7 and 9 of the Fair Administrative Action Act, parties should exhaust other available remedies before turning to court.

2nd Respondent's submissions

14. Mr. Cohen, learned counsel for the 2nd respondent, submitted highlighting their written submissions, that the Court lacks jurisdiction to hear this petition in view of section 10(2)(a) of Cap 405 as read with Order 22 of the Civil Procedure Rules. He also contended that the petition as pleaded, is not a constitutional petition since it does not specify with any degree of clarity the constitutional provisions violated, the rights infringed and the manner of infringement, if any.

15. Regarding **locus standi**, counsel contended that the 1st petitioner could not institute this petition on behalf of or together with the 2nd petitioner since he acts as counsel for the 2nd petitioner. Reliance was placed on the case of *Elizabeth v President Court of Appeal* (2010) SLR 38, for the submission that, for a petition to disclose a cause of action it must show that the petitioner enjoyed a constitutional right, that the right has been violated and that the defendant is liable for the violation.

16. In counsel's view nowhere in the petition has the petitioners shown a constitutional right violation to summon Article 22 of the Constitution. He also submitted that the reliefs sought are in the form of declarations and hence the petition is a claim for general damages.

Determination

17. I have considered this petition, the responses and submissions by counsel for the parties. I have also considered the authorities relied on. The 1st petitioner is an advocate while the 2nd petitioner is his client. The 1st petitioner acted for the 2nd petitioner in a civil suit, **RMCC NO. 117 of 2015**, arising from a road traffic accident. The suit was decided in the 2nd petitioner's favour and an award of general damages made in the sum of **Kshs15 million**. The 1st petitioner then wrote to the 2nd respondent's advocates demanding payment but received no response. They again wrote to the 1st respondent asking for intervention to have the decretal sum paid. There was however no response received from the 1st respondent necessitating this petition.

18. The petitioners have argued that the 1st respondent has violated their right to dignity. They have contended that the 1st respondent has failed in its duties to properly regulate the 1st respondent and the industry and as a result, the 2nd petitioner's rights have been violated. The respondents have on their part contended that this Court has no jurisdiction, that the 1st petitioner has no **locus** and that this petition is not a proper constitutional petition.

19. The respondents have challenged the petition contending that this court has no jurisdiction to determine it. This, I think, is not an issue that should engage the Court. Whether or not the Court has jurisdiction is a question of law. Where the Court lacks jurisdiction, it has no business entertaining the matter before it.

20. The High Court is established under the Constitution. It has broad and general jurisdiction to hear all civil and criminal matters presented before it. It, however, has special jurisdiction to hear and determine questions relating to violation of rights and fundamental freedoms. This jurisdiction is granted by Article 165 (3) (b) as read with Article 23 of the Constitution. In that regard, therefore, the Court will hear any matter presented before it under the Constitution in exercise of this jurisdiction.

21. What is before this Court is a petition brought under various Articles of the Constitution, contending violation of human rights and fundamental freedoms. The question of lack of jurisdiction is not, in my view, founded on any sound legal principle. The respondents should distinguish between a proper constitutional petition and one that is not, as opposed to lack of jurisdiction. The respondents could perhaps argue that what the petitioners have instituted before this Court is not a proper constitutional petition and proceed to demonstrate how not, but cannot contend that the Court has no jurisdiction yet the petition alleges violation of rights and fundamental freedoms, an issue to be determined under Article 23 as read with Article 165 of the Constitution. That issue has no merit.

22. The second issue is that of *locus standi*. The respondents contend that the 1st petitioner could not properly institute a petition on behalf of the 2nd petitioner, his own client. In support of this argument they cite Articles 22 and 258 on who can properly institute a petition on behalf of another.

23. The issue of **locus standi** is no longer a novel one in this jurisdiction. The Constitution is now clear that any person can present a petition on behalf of another, pleading violation of the Constitution or rights and fundamental freedoms. That, however, does not mean everyone is free to file all manner of pleadings on behalf of everybody. In deciding whether or not there is **locus**, the Court will have to consider the circumstances of each case. Locus is not a licence given to all and sundry to move the Court. There must be a legitimate cause to pursue for one to institute the petition.

24. In the present petition as already pointed out, the 1st petitioner is counsel for the 2nd petitioner. It is, therefore, inconceivable that he could join himself in the petition pleading on behalf of his own client. That, in my respectful view, blurs the client- advocate relationship. The Court addressed itself to this issue in the case of **IwourNgoge t/a OP Ngoge & Associates Advocates & 5376 others v J Namada Simon t/a Namada & co Advocates & 726 others** [2014] eKLR and stated thus;

“It clear to us that when an advocate represents his or her client in any matter, his or her position rests on a purely professional platform: and such advocate should not, as a player of a professional role governed by law, be enjoined as a litigant, whether in that very matter or on appeal in respect of any acts or omissions in the conduct of the cause.”

25. That is what the 1st petitioner has done in the present petition. This is an irregularity that cannot, however, defeat this petition given that the 2nd petitioner on whose behalf the 1st petitioner pleads, is also a substantive party herein. Even if the Court were persuaded to strike out the 1st petitioner's name from the petition, that alone would not defeat the petition since the petition would still remain because the real petitioner is a party thereto.

26. The more fundamental question here is whether this is a real constitutional petition. A proper constitutional petition is one that identifies and challenges violation of the Constitution, infringement of rights or threat of violation of the Constitution or fundamental rights and freedoms. It is on that basis that Courts have often stated that it is a fundamental principle in constitutional litigation that there be accuracy in the identification of the provisions of the constitution said to have been infringed on the grounds that the breach is inconsistent with the Constitution or fundamental rights and freedoms. Further, the alleged constitutional challenge must be explicit, with due notice to all those affected in order to ensure that the interested parties have an opportunity to suitably respond to the allegations and to enable them lead relevant evidence where necessary. (see **Saili v National Commissioner of South African Police Service & others** [2014] ZACC19), **Phillips & others v National Director of Public Prosecutions** [2005] ZACC 15; 2006(1).

27. To qualify as a constitutional petition, the petitioner must show much more than merely stating that his or her constitutional rights have been violated. As stated by the Constitutional Court of Seychelles in **Elizabeth v President Court of Appeal** (2010) SLR 38, for a petition to disclose a cause of action, the petitioner must show, one that s/he enjoyed a constitutional right; second that the right had been violated and third, that the defendant is liable for the said violation.

28. And the Supreme Court, while approving the statement in **Anarita Karimi Njeru v Republic** [1979] KLR154 in the case of **Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others** [2014] eKLR, emphasized that the necessity

of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

29. The petitioners have claimed that the 1st and 2nd respondents have violated the 2nd petitioner's right to dignity and access to justice. The blame placed at the 1st respondent's door step is that it has not responded to their letter and further that it has failed to regulate the 2nd respondent which in turn has refused to settle the decree issued in the 2nd petitioner's favour.

30. I must state, and plainly so, that I am unable to decipher a violation of the petitioners' rights on the part of the respondents. The petitioners have not identified the real constitutional right they claim respondents violated. The 1st petitioner acted for the 2nd petitioner and obtained a decree with regard to injuries the 2nd petitioner sustained following a road traffic accident involving a motor vehicle insured by the 2nd respondent.

31. Upon obtaining the decree, the petitioners had the right to have the decree settled. They could pursue payment from the owner of the motor vehicle or the insurance company, the 2nd respondent. There is a clear procedure laid down for that; to execute directly against the owner of the motor vehicle as the judgment debtor, or pursue the insurance company in accordance with section 10 of the Insurance (Motor Vehicle Third Party Risks) Act. Those are modes of enforcement provided by law. There is no evidence, however, that the petitioners called any of these modes into operation. Instead, they have moved this Court through a constitutional petition without identify the constitutional right violated by any of the respondents and which they want the Court to redress.

32. A party, who moves the constitutional court on account of violation of rights and fundamental freedoms, must place before the court clear constitutional issue(s) identify the constitutional rights violated or under threat of violation and that the respondent is the violator. Only then will the matter fall within the scheme to the Article 23 as read with Article 165 of the Constitution. It is not enough for a petitioner to simply plead that there is a violation rights. There must exist circumstances that would point out to a clear violation of the constitution, the law or rights and fundamental freedoms.

33. Having considered this petition, the submissions and the law, I am unable to agree with the petitioners on the merit of their petition. Consequently, this petition is declined and dismissed. Costs being discretionary, the order I make is that each party do bear own costs.

Dated, Signed and Delivered at Nairobi this Day 14th Day of March 2019

E C MWITA

JUDGE