



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MILIMANI LAW COURTS

Miscellaneous Civil Application 1258 of 2007

IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER SECTION 70(A), 75(1) (2) AND 82 OF THE CONSTITUTION

AND

IN THE MATTER OF FINANCE BILL 2006

AND

IN THE MATTER OF THE INSURANCE (AMENDMENT) ACT 2006

AND

IN THE MATTER OF CIRCULAR NO. 1B/01/2007 DATED 11<sup>TH</sup> SEPTEMBER, 2007

AND

IN THE MATTER OF THE FINANCE ACT 2007

AND

IN THE MATTER OF THE SECTION 153, 156 AND 179 AND REGULATIONS 39 OF THE  
INSURANCE ACT

AND

IN THE MATTER OF THE LEGAL NOTICE NO. 2. (INSURANCE AMENDMENT)  
REGULATIONS 2007 DATED 5<sup>TH</sup> JANUARY 2007

AND

IN THE MATTER OF THE LEGAL NOTICE NO. 65 (INSURANCE AMENDMENT)  
REGULATIONS 2006 DATED 15<sup>TH</sup> JUNE, 2006

AND

IN THE MATTER OF-

KENFIRM INSURANCE BROKERS LTD.....  
..... 1<sup>ST</sup> PETITIONER

PAELINA INSURANCE BROKERS LTD.....  
.....2<sup>ND</sup> PETITIONER

MILLENIUM INSURANCE BROKERS LTD.....  
..... 3<sup>RD</sup> PETITIONER

V E R S U S

THE HON. AMOS KIMUNYA (MINISTER FOR FINANCE)  
..... 1<sup>ST</sup> RESPONDENT

THE COMMISSIONER OF INSURANCE.....  
2<sup>ND</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....  
3<sup>RD</sup> RESPONDENT

J U D G M E N T

This is a **PETITION** filed on 30<sup>th</sup> November, 2007 by Rumba Kinuthia & Company advocates for the petitioners named as **KENFIRM INSURANCE BROKERS LTD (1<sup>st</sup> Petitioner)**, **PAELINA INSURANCE BROKERS LTD (2<sup>nd</sup> petitioner)**, and **MILLENIUM INSURANCE BROKERS LTD (3<sup>rd</sup> petitioner)**. The respondents are named as Hon. Amos Kimunya, **MINISTER FOR FINANCE (1<sup>st</sup> respondent)**, **THE COMMISSIONER OF INSURANCE (2<sup>nd</sup> respondent)**, and **THE HON. ATTORNEY-GENERAL (3<sup>rd</sup> respondent)**.

In the petition, there is no description of the complaints of the petitioners. However, several declarations are sought, as follows-

**1. A declaration that the decision of the 1<sup>st</sup> Respondent**

***through Legal Notice No. 65 and 2 dated 15<sup>th</sup> June, 2006 and 5<sup>th</sup> January, 2007 is ultra vires for derogating governing the operations of the petitioners in particular the Insurance Act, the Finance Act and above all the Constitution of Kenya.***

**2. A declaration that the Circular by the 2<sup>nd</sup>**

**Respondent dated 14<sup>th</sup> September, 2007 referenced circular No. IB/01/2007 to implement the Legal Notice Numbers 65 and 2 respectively is discriminatory as it favours a particular class of brokers mainly the internationally renowned and/or by Insurance Brokers companies at the expenses of eliminating the small and well established and insurance upcoming brokerage firms.**

**3. A declaration that the decision of the 1<sup>st</sup>**

**Respondent as contained in the two Legal Notices mentioned above is discriminatory and does not aim to serve the public interest instead wipe out the small Insurance Brokers practicing within Kenya and in total disregard of the Insurance Act that requires that insurance brokers maintain a professional indemnity policy for Kshs.10,000,000/=.**

**4. A declaration that the 1<sup>st</sup> Respondent's decision as**

**contained in the said legal notices is discriminatory as the Minister has on one hand opened the gate for Insurance Agents who have always not been allowed to act for more than three (3) Insurance Companies to do so but the Legal Notices subject herein have put financial barriers to close the door for Insurance Brokers.**

**5. A declaration that the 1<sup>st</sup> Respondent's decision as**

**Contained in the two Legal Notices subject herein is discriminatory as it aims to create a monopoly in the brokering fraternity so as a particular selected group of brokers to control big contracts which brokers such as the petitioner hereinabove can be locked out.**

**6. A declaration that the 1<sup>st</sup> Respondent's decision**

**contained in the two Legal Notices subject matter herein is a nullity to the extent that it contravenes and accordingly is ultra vires to section 70(a) of the Constitution which guarantees the Petitioners fundamental rights to the due protection of the law.**

**7. A declaration that the 1<sup>st</sup> Respondent's decision**

**contained in the two respective legal notices dated 5<sup>th</sup> June 2006 and 5<sup>th</sup> January, 2007 is made in blatant disregard of common law rules of natural justice of fair hearing and in flagrant breach of the Applicants constitutional rights to be heard and to be protected from inhuman treatment (Section 74) and being discriminated (section 82) of the Constitution of Kenya respectively.**

**8. A declaration that the conditions imposed by the 2<sup>nd</sup>**

**Defendant (should be respondent) in his circular dated 14/11/2007 is discriminatory under section 82 of the Constitution.**

**9. All necessary directions be given or that such orders**

**as this Honourable Court may deem fit and just be granted.**

The petition was filed with a supporting affidavit sworn by **ANTHONY K. MUHINDI** described as a director of the 1<sup>st</sup> petitioner (*who is said to have been given authority by the petitioners to do so*) on 30<sup>th</sup> November, 2007.

In the affidavit it was deposed, inter alia, that in two gazette notices Legal Notice No. 6 dated 15<sup>th</sup> June 2006, and Legal Notice No. 2 dated 5<sup>th</sup> January 2007 the 1<sup>st</sup> respondent increased the amount of deposit for insurance brokers from Kshs.1,000,000/= to kshs.5,000,000/=, then reduced it to Kshs.3,000,000/= to be paid effective renewal year 2008. It was deposed that this was in addition to the requirement for insurance brokers to maintain a professional indemnity policy of Kshs.10,000,000/=. It was deposed that the increased amount of deposit was arbitrary and meant to protect well established and large insurance brokers against small firms. It was deposed that the decision of the 1<sup>st</sup> respondent was ultra vires the Insurance Act (**Cap. 487**) and was also a violation of the provisions of sections 70(a) 75(1) & (2), and 82 of the Constitution. It was deposed that the action of the 1<sup>st</sup> respondent amounted to inhuman treatment contrary to section 74 of the Constitution, and also amounted to discrimination contrary to section 82 of the Constitution. It was therefore concluded in the affidavit that the increase of the deposit from Kshs.1,000,000 to Kshs.3,000,000 be deemed unconstitutional and null and void and that the previous amount of Kshs.1,000,000 be retained as guarantee.

The petitioners also filed a further affidavit sworn by the same deponent on 6<sup>th</sup> December 2007. The said further affidavit was sworn on the same date. It was deposed in the said further affidavit that there were some other interested members of the Association of Insurance of Kenya, who should be joined as interested parties. The list annexed to the said affidavit as "**AKM1**" lists two hundred and eleven (**211**) Insurance Brokers.

The petitioners also filed their written submissions on 28<sup>th</sup> May, 2009. It was contended that the 1<sup>st</sup> Respondent purported to exercise powers under section 180 of the Insurance Act (**Cap. 487**) to increase the bank guarantee to Kshs.5 million, and later on 5<sup>th</sup> January, 2007 decreased the amount to Kshs.3million. It was contended that the action by the 1<sup>st</sup> respondent contravened section 70, 75(1) and (2) of the Constitution, especially section 70(a) which protected the right to life, security of the person and protection of the law. It was contended that in exercising powers under section 180 of the Insurance Act, the 1<sup>st</sup> respondent did not take into consideration the fundamental right of equal protection of the law. On section 82(2) of the Constitution it was contended that the 1<sup>st</sup> respondent's directives were discriminatory to a particular social class. It was contended that the court should take cognizance that brokers were initially required to deposit only Kshs.100,000/= guaranteed before it was increased from time to time to Kss.500,000/=:, and later without justification to Kshs.5 million, then reduced to Kshs.3 million. This was in addition to a mandatory professional indemnity of Kshs.10,000,000/= to counter risks of professional negligence. The decision of the 1<sup>st</sup> respondent was so punitive that it has to be termed as unconstitutional, as it was meant to shut out the common man from making a decent living. Reliance was placed on Halsbury Laws of England Fourth Edition (revised) Vol. 8(2) and the cases of **R -Vs- BARNESLEY METROPOLITAN BOROUGH COUNCIL [1976] 3 ALL ER. 452;** and the case of **GREEN -VS- AMALGAMATED ENGINEERING UNION [1971] I ALL ER 1150.**

In response to the petition, the 2<sup>nd</sup> respondent filed a replying affidavit sworn by **SAMMY MUTUA MAKOVE** the Commissioner of Insurance and Chief Executive Officer of the Insurance Regulatory Authority on 25<sup>th</sup> February, 2008. It was deposed in the said affidavit, inter alia, that the petitioners were represented by their association in the task force that recommended the review of the bank guarantee to Kshs.5,000,000/=:; that the reason for the bank guarantee was to safeguard policy holders against failure of insurance brokers to pay premiums to underwriters; that the indemnity policy cover is only relevant to professional advice by the

broker which is different from the requirement for the deposit; that the association of the petitioners complained and the amount of guarantee was reduced from Kshs.5 million to Kshs.3 million; that about 80 insurance brokers had already complied with the requirement and more were likely to comply; that there was need for insurance companies and insurance brokers to have a strong financial base in order to protect the interests of the insured public; that the petitioners were free to convert themselves to insurance agents who were not required to provide the guarantee; and that the petition was misconceived, misplaced, and did not fall within the provisions of sections 70(a), 75(1) & (2) and 82 of the Constitution of Kenya and was an abuse of the court process.

The 2<sup>nd</sup> respondent also filed written submissions on 18<sup>th</sup> June, 2009. It was contended that the Legal Notices were not issued arbitrarily, capriciously or unreasonably. They were issued after a task force carried out a study and made recommendations. It was also contended that the individual rights under section 70 of the Constitution were subject to other peoples individual rights and public interest. The decision of the respondents was meant to protect the public interest after a study was done and there was therefore no contravention of section 70 of the Constitution. On section 80 of the Constitution it was contended that the petitioners had not demonstrated any discrimination against them. They were merely using generalities and making wild allegations of monopolies without any substantiation. The petitioners have in particular not shown how they have been individually discriminated against. It was contended that the requirement for the guarantee of Kshs.3,000,000/= was to strengthen the insurance industry by ensuring that brokers were financially sound and able to meet their obligations. The brokers had not been stopped from earning a living. The 2<sup>nd</sup> respondent relied on the cases of **KENYA BUS SERVICES LTD. -VS- ATTORNEY-GENERAL [2005] I KLR 787**; and the case of **KENYA BANKERS ASSOCIATION -VS- MINISTER FOR FINANCE AND ATTORNEY-GENERAL H.C. MISCELLANEOUS NO. 908 OF 2001**.

The first issue is whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted precariously and in breach of the principles of natural justice. The petitioners claim so. In my view no material has been placed before me to demonstrate that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had acted in bad faith, capriciously and with the intention of oppressing the petitioners or pushing them out of business. The Minister (**1<sup>st</sup> respondent**) acted under section 108 of the Insurance Act. I have not been told that he had no powers to impose the conditions of a bank guarantee. In fact it is admitted by the petitioners that the requirement of the guarantee was an old requirement. The only thing that has changed is the amount.

Secondly, according to the task force report which the Minister acted upon, the petitioners were represented by their own association. They do not claim to be non members of the Association of Insurance Brokers. The respondents even reduced the amount of bond or guarantee required from Kshs.5 million to Kshs.3 million. In the report, section 2.5.6, it is stated-

#### **“PAYMENT OF PREMIUMS**

##### **2.5.6**

***The primary channels for distribution of insurance are through agents and brokers. The latter is allowed under section 156 (2) of the Insurance Act to remit premiums to insurers within sixty days except for fire and motor classes which are proposed to be on cash and carry basis. The credit period accorded to insurance brokers has proved unworkable. Premium remains outstanding long after the sixty days have elapsed. Insurance companies are expected to pay claims yet substantial amounts of premium***

***remain outstanding. It is recommended that in the long run all classes of insurance business should be on cash and carry basis.”***

With the above grim scenario in mind, I cannot say that the decision of the 1<sup>st</sup> respondent of increasing the guarantee from Kshs.1 million to Kshs.3 million is capricious or meant to punish any insurance brokers, since there does not appear to be a limit on the amount of premium or the class of insurance that any broker, whether small or big can collect from the public.

The respondents have also indicated that any broker who is not able to comply with the requirement can trade as an insurance agent, which has not been challenged. I find and hold that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not make an unreasonable and capricious decision.

The second issue, which is the main issue, is whether this matter raises a constitutional or constitutional issues. In my view, this is the main issue in this matter. It was brought to court by way of a Petition on alleged contravention of the petitioners fundamental rights and freedoms under section 70(a), 75(1) and (2) and 82 of the Constitution.

The enforcement or protection of Constitutional rights under section 70 to 83 (***inclusive***) is provided for under section 84 of the Constitution, which confers on the High Court Jurisdiction to hear and determine such issues. The Hon. The Chief Justice promulgated rules under Legal Notice No. 6 of 2006 -Constitution of Kenya (***Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual***) High Court Practice and Procedure rules, 2006 for the enforcement of these rights under the provisions of section 84(6) of the Constitution, which inter alia, provide for the filing of such proceedings by way of a petition, as was done herein by the petitioners.

It is trite that when one comes to court under section 84 of the Constitution to enforce his constitutional rights, he or she is duty bound to plead with reasonable precision the provisions allegedly breached and the nature and manner of the breach he complains of.

In the case of **MATIBA -VS- ATTORNEY-GENERAL MISCELLANEOUS APPLICATION NO. 666 OF 1990** the court held-

***“An applicant in an application under section 84(1) of the Constitution is obliged to state his complaint, the provisions of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of the court under the section. It is not enough to allege infringement without particularizing the details and the manner of infringement.”***

In **ANARITA KARIMI NJERU -VS- REPUBLIC (No. 1) (1979) IKLR 154** Trevelyan and Hancox JJ held-

***“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”***

In the later case of **CYPRIAN KUBAI -Vs- STANELY KANYONGA MWENDA HC. Miscellaneous 612/02** Khamoni J. stated that in such application the applicant must state with precision the section, paragraph and even sub-paragraph allegedly infringed to enable the

respondent prepare for his case.

In the present case, the petition dated 30<sup>th</sup> November, 2007 does not even attempt to give a description of the matters complained of, let alone mention the constitutional provisions said to be infringed and the manner of infringement. It merely introduces the names of the petitioners on its first page, and on the second page gives a list of 8 declarations sought from the court. It is in submissions that the counsel suggests that the petitioners were being denied a right of livelihood, without specifically pointing out the Constitutional provision that guarantees that right. In my view, this petition is for dismissal as the petitioners have failed to give with precision the section contravened and the manner of contravention.

The other important point on the same issue, is that the petitioners seem to be challenging the exercise of power by the 1<sup>st</sup> and 2<sup>nd</sup> respondents under an Act of Parliament, that is the Insurance Act. In my view, acting in excess of powers conferred by an Act of Parliament, is very different from contravention of the provisions of the Constitution. Possibly it could be a matter for judicial review. However, it does not amount to a constitutional issue. I find and hold that the petitioners have not demonstrated any constitutional issue or contravention in their pleadings or the petition.

The conclusion therefore is that, I find that there is no Constitutional issue that has been raised by the petition or the petitioners. I will therefore dismiss this petition.

For the above reasons, I find no merits in the petition and I dismiss the same. The petitioners will pay the respondents costs of the proceedings.

It is so ordered.

Dated and delivered at Nairobi this 18<sup>th</sup> day of November, 2009.

**GEORGE DULU**

**JUDGE.**

**In the presence of –**

**Ms. Kimiti for petitioners**

**Ms Gatonye for respondents**

**David – Court clerk.**