



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Civil Suit 1345 of 2005 (OS)**

1. Constitution law

2. Insurance law

Insurance (Third Party Risk) Act Cap 405, Insurance Act Cap 487)

- a) Insurance Company gives out motor vehicle Insurance policies to their client.
- b) The Insurance Company collapses .
- c) Statutory Receiver Manager appointed: -
  - i) Declines to incorporate 3<sup>rd</sup> party risk Insurance policy holders in a moratorium.
  - ii) 3<sup>rd</sup> party risk insurance policy holders are executed against for judgement against them personally.
    - iii) Statutory Managers alleged failed in its duty.
- d) The 3<sup>rd</sup> party risk insurance policy holders constitutional rights are contravened.

3. In reply

- a) Kenya Re Statutory Management best placed person to handle receivership.
- b) Remedies elsewhere not in the constitution court.
- c) Statutory Manager, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> defendants protected by law by way of immunity.

4. Held

- a) That the Applicant /Petitioner constitution rights have been infringed
- b) That the Statutory Manager Kenya Re was illegally appointed.
- c) That a new Statutory Manager be appointed and report to the new Insurance Regulatory Board.
- d) That the Commissioner of Insurance and the Minister are liable but protected from immunity.

- e) That the Minister do forthwith establish the Compensation Policy Fund.
- f) Formal mention within 6 months to confirm compensation

5. Case law

By petitioners: -

- a) R. Vs Charles Lutta Kasamani T/A Kasamani & Co. Advocates

Ruling (7.10.05) Omollo, Githinji & Waki J.J A (C.A application Nai 243/2005)

- b) British America Insurance Co. Ltd -vs- Lawrence Kisilu

CA 189/2002. (2005) (EL KLR) Mombasa. Khaminwa.

- c) Nizar Virani t/a Kisumu Beach Resort vs Phoenix of East Africa Assurance

CA 88/2002 (2004) (EKLR) Omolo, O'khubasu & Waki JJA Company Limited.

- d) Kairu & Lion of Kenya Insurance Co. Ltd

(1988) KLR 790.

- e) Karanja vs Phoenix of East Africa Assurance Co. Ltd.

(1991) KLR 277

- f) Kenya National Assurance Co. Ltd vs Kimani & another

(1987) KLR 236.

- g) Standard Assurance Co. Ltd vs Jane Njeri Nga'nga'

CA 414/04 (Nairobi) Visram J (unreported)

- h) Johnson M. Mbugu vs Fidelity Shield Insurance Co. Ltd

CA 105/2005 Milimani Commercial Court

- i) Lion of Kenya Insurance Co. Ltd vs Samuel Masaka Mliwa

HCC 366/2004 Ang'awa (unreported)

By 1, 2, 3 respondents.

j) \_\_\_\_\_

By 4<sup>th</sup> respondent

- k) Ann Muchira v Commissioner of Insurance

Misc. application No.1674/2004 (2004) (eKLR)

- l) In the matter of Re: Central Bank of Kenya v Charters House

Misc application 960/07 (Warsame J)

m) Kigika developers Ltd v Nairobi City Commission

(1986) KLR 731

n) Inveco Assurance Co. Ltd & Others V Jacinta Koki Musundi

Hccc19/06 D.A. Onyancha J.

o) Harrikinsson v Attorney General of Trinidad & Tobago

(1979) 3 WLR

p) Kenya Bus Service Ltd & Others v Attorney General & Others

Misc.application413/05 Nyamu,J.

#### Statute law

- a) The Constitution of Kenya
- b) Civil Procedure Act Cap.21 Laws of Kenya
- c) Insurance Act Cap.487 Laws of Kenya
- d) Insurance/motor vehicle third party Risk Act Cap.405
- e) Halsbury Laws of England vol.22, 1958 edition

#### Advocates:

##### Applicant No.1,2,3

J.H. Kinyanjui of J.H. Kinyanjui & Co. Advocates for plaintiff

S.W. Ndegwa fo W.W. Ndegwa & Co. Advocates

#### Respondents

No.1,2 and 3 – Attorney General J.W. Mwaniki - absent

Brief held by K. Onyiso 1,2 and 3 defendants.

No.4 M.P. Muge of Muriu Mungai & Co. Advocates – absent

W.E. Werimu holds brief

No.5 J. Kiroaji of L.M. Kimburi & Co. Advocates

No.6 D. Gichuru.

W.E. Werimu holds brief for Gicheru and Gicheru Advocates - absent

**IN THE MATTER OF THE INSURANCE ACT CAP 487**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS &  
FREEDOMS UNDER SECTION 84 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 60(1), 65(2), 75(1), 84(1) & (6), & 123 (B) OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF RULE 10 & 11 OF THE CONSTITUTION OF KENYA  
(PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE  
INDIVIDUAL) PRACTICE & PROCEDURE RULES 2001**

**AND**

**IN THE MATTER OF THE INSURANCE (THIRD PARTY RISKS) ACT, CAP 405**

**AND**

**IN THE MATTER OF THE COMPANY'S ACT, CAP 486**

**AND**

**IN THE MATTER OF**

**KENSILVER EXPRESS LTD.....1<sup>ST</sup> PETITIONER**  
**SIMON KIMUTAI CHEPKWONY.....2<sup>ND</sup> PETITIONER**  
**PETER NJUGUNA NGATHI.....3<sup>RD</sup> PETITIONER**  
**NANCY WANJIRU KIMANI.....4<sup>TH</sup> PETITIONER**

**VERSUS**

**THE COMMISSIONER OF INSURANCE.....1<sup>ST</sup> RESPONDENT**  
**THE MINISTER OF FINANCE..... 2<sup>ND</sup> RESPONDENT**

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

THE STATUTORY MANAGER UNITED INSURANCE CO LTD..4<sup>TH</sup> RESPONDENT

CHARLES TAIFA OGUTA .....5<sup>TH</sup> RESPONDENT

**THIRD PARTIES: -**

1. PETER KITHAKA MUNYI;
2. ESTHER NYAMBURA & EUNICE NKIROTE;
3. MARY GITONGA
4. HELLEN KATHURE
5. HARRIET KARAMBU
6. CHARLES MWIRIGI
7. DAVID DIDA KARA
8. GRACE NGATHA (suing through MOSES NJAGI MUGO)
9. EUNICE MAKENA;
10. JOE MWANGI KAMAU & MARGARET NJOKI MWANGI (Suing as Legal Representatives of the late Michael Kamau Mwangi);
11. OSWARD MWENDA GITARI
12. BERNARD MUTHAURA M'MBWIRIA
13. JOHN GAIKUMI RUCHIUS
14. MERAMAN H. CHAVDA
15. NELSON GITHAHU;
16. FRANCIS NJOROGE RUFUS (Suing as the estate of Joseph Kipande Kabiri, Deceased);
17. ANTHONY JUMA WASHISINO
18. JOSEPH KIMEU NDUULU
19. NANCY NYAMBURA KARIUKI;
20. JOSEPH NYAGA KANAMBU
21. SUSAN WANGECHI NJOROGE PMCC NO 31/2006 Milimani Commercial
22. BERNARD TREREI CMCC 251/04 MILIMANI LAW COURT.

**ADVOCATES FOR THE INTERESTED PARTIES**

25. L. L. Naikuni Baroko Ukulara

Naikuni & Co. Advocate CMCC5582/02

Milimani Nairobi

26. C. W. Wamuanu Wangotho Farmers Company Ltd (absent)

27. O. H.J. Okeke Jamlic Maina Kinyua

NAKURU CMCC 901/2003

NAIVASHA SPMCC 711/2002

28. D. O. Kelly Margaret Wangechi Wambugu

Kopere & Co. Advocate NAIROBI CMCC 13662/04 (MILIMANI)

(Respondent D.N Gichuru) Margaret Wambugu

Nderitu

NAIROBI CMCC 3125/02 (Milimani)

29. D. W Kinyanjui Rose Wangari Thogo

PMCC 13887/05

Nancy Waweru Kamau

RMCC 11439/05

30. D. Kipkorir

Kipkoriri, Titoo & Kiarie Advocate

Paul Tergat V Attorney General

Misc1498/05

(APPLICANTS)

31. (J. N KINYANJUI)

(S. W NDEGWA APPLICANTS 1, 2 & 3)

(RESPONDENTS)

Respondents 1,2 and 3

Attorney General

and J. W. Mwaniki

Respondent 4

Statutory Manager

M. Munge

Respondent No. 5.

J. Kiroaji)

Respondent No. 6

D. Gichuru

## **RULING**

### **I: PROCEDURE**

1. United Insurance Co. Ltd a Limited Liability Company incorporated under the Company Act Cap 486 Laws of Kenya was in the business of Insurance. The business did poorly and was placed under Statutory Management by the Commissioner of Insurance on 15<sup>th</sup> July 2005.

2. The Commissioner of Insurance (1<sup>st</sup> Respondent) with approval of the Minister of Finance (2<sup>nd</sup> respondent) appointed M/S Kenya Re as the statutory manager.

M/s Kenya Re is a Reinsurance Company in Kenya (herein referred to as the “Statutory Manager”)

3. On 18<sup>th</sup> July 2005, the Statutory Manager declared a moratorium through a daily newspaper for a period of 12 months with effect from 15<sup>th</sup> July 2005. This would normally mean that all creditors are restrained from taking any action against United Insurance Co. Ltd till the said Statutory Manager would call a meeting of the creditors to propose how best to pay them. The Statutory Manager would also recommend to the Minister of Finance whether the Company would be revived or wound up.

4. The Statutory Manager did not apply the moratorium equally to all classes of policy holders and creditors nor did the Statutory Manager exempt from the moratorium to third party motor Insurance policy holders.

5. The third party Insurance policy holders are only insured against third party risks. In Kenya majority of such policyholders are public service vehicle commonly known as matatu & buses operators. It is common knowledge that the rate of accident within this group and category of class of policy holders are high.

6. The effect of not declaring a moratorium of exemption was that where a person held a genuine Insurance policy with United Insurance Company Ltd, they would:-

**i) Not be provided with legal representation when sued in court.**

**ii) Not be provided with financial funds to pay decretal sums of judgment awards against them.**

7. Many of the judgement debtors were being personally executed against and where no assets are traced were taken to civil jail. More of the judgement debtors are actual vehicle owners of public service vehicle. They include the four petitioners herein namely,

**Kensilver Express Ltd.**

**Simon Kimutai Chepkwony**

**Peter Njuguna Njatha**

**Nancy Wanjiku Kimani**

8. The four filed this constitution reference on 13<sup>th</sup> September 2005 under the 2001 rules (Chunga ruling). A second constitution reference was filed on 15<sup>th</sup> December 2005 by an individual known as Paul K. Tergat in Civil Case 1498/2005 (OS) at the High Court.

9. All the petitioners sought this courts protection as to their fundamental rights which were being infringed by the Government of Kenya and the Commissioner of Insurance through the Statutory Manager.

10. The Hon. The Chief Justice received the HCC Misc 1345/05 file on 25<sup>th</sup> May 2006 for directions. He nominated Kihara Kariuki on 6<sup>th</sup> June 2006 to hear this constitution reference. The parties rushed to be heard instead on an application for an injunction dated the 22<sup>nd</sup> September 2005 & filed on 22<sup>nd</sup> September 2005 as duly amended. The parties voluntarily entered into a consent granting orders to restrain:-

**“Kenya Reinsurance Corporate Ltd whilst acting in the Capacity of Manager of United Insurance Co. Ltd from selling by private treaty, public auction or otherwise howsoever any assets of United Insurance Co. Ltd during the pendency of its appointment until determination of the petitioners Originating Summons.”**

11. As this consent had been entered in the absence of the Statutory Manager, the said Statutory Manager filed an application to set aside the said order. This was duly granted by Kihara Kariuki for 23<sup>rd</sup> June 2006. Instead the hearing of the application was given further date to be heard inter parties and was indeed began on 29<sup>th</sup> June 2006. Various application were concurrently being filed by various applicants/interested parties. By 15 January 2007, the Hon. Judge had heard 110 other applications in the said suit and other related suit of 1663/2005

**“seeking stay of execution in various suits filed in various courts pending the determination of this reference”.**

As the Hon judge was also the Duty Judge, he requested that the Hon. Chief Justice nominate another judge to hear this case. The Hon Chief Justice on the 16<sup>th</sup> January 2007 nominated Ang’awa J to hear the matter. His orders were

**“ I nominate Ang’awa J to take over the hearing of this matter and proceed with the same until conclusion”**

**(Emphasis supplied)** More on this will be mentioned later.

12. I therefore finalized the application that was partly heard before Kihara Kariuki J. Before doing so I did direct on 24<sup>th</sup> January 2007 that all parties who are interested in this constitution cause should be notified. The parties kindly agree to withdraw all pending application under HCC 1345/2005 and HCC MISC 1663/05 seeking orders for stay of execution. An application for contempt proceedings was also withdrawn. Parties entered into a consent to stay all judgement decreed and warrants until the originating summons in HCC 1345/05 dated 12<sup>th</sup> September 2005 be heard and determined.

13. It was further ordered that it will be the duty of the Petitioners advocate to place an advertisement in the press to notify all interested parties of this constitution reference. The hearing inter parties of the application was heard on 5<sup>th</sup> July 2007. In my ruling 15<sup>th</sup> July 2007, I granted the injunction as prayed. The Statutory Manager was enjoined to this reference.

14. I believe the petitioners went to sleep thereafter. The Petitioners advocate stated that he was busy placing the advertisement in the press and receiving response from interested parties in this reference. Nonetheless it was not until 1<sup>st</sup> October 2007 when the parties came before me for further orders as the reference was filed under the old rules of 2001 direction under Order XXXVI and 8a and 12 Civil Procedure Rules was required. This was filed on 2<sup>nd</sup> October 2007 under order 48 for the parties agreed to go by way of affidavit evidence on the hearing of the constitution reference.

15. The Hearing commenced on 7<sup>th</sup> November 2007. All interested advocates and parties in person who responded to the newspaper advertisement came to court. The advocate for the Statutory Manager and the state counsel suggested and implied that the Chief Justice did not appoint this court to hear the constitution reference but only the application for stay of execution that ruling I delivered on 15<sup>th</sup> February 2007. On this I did rule that I was indeed appointed to hear the whole constitution reference on 16<sup>th</sup> January 2007.

16. They further stated that a three-bench judge be appointed to hear the matter. This too was over ruled as they had 10 months in which to have made such recommendation/or application but they failed to do so.

17. Whilst the proceedings was continuing, the defendant who sued in another court being CMCC 8450/02 appeared in court and informed the court that the Petitioner one Paul Tergat had filed a constitution reference HCC1499/05 that was consolidated to this cause. He requested he be permitted to be enjoined to this suit with the respondents. He further disclosed that he was in the process of hearing a winding up cause on behalf of the Statutory Manager at the Milimani court. I did call up for this file but it was not available. I received no application to verify there is indeed a winding up cause and as such any proceedings be stayed. The said advocate opted to continue with this constitution reference. One other advocate opted to also be enjoined in this suit as a respondent after his attempt to sue an original plaintiff by way of execution was referred to the Judicial Review and Constitution Division.

18. For ease of clarity, this court had permitted all cases where parties were insured legally with United Insurance Company, to be permitted to proceed to trial up to the stage of judgement in order to preserve the evidence. This court stayed any execution after judgement pending the hearing of the constitution reference by way of Originating Summons. Therefore, between 5<sup>th</sup> February 2007 to the 15<sup>th</sup> February 2007, to date of this ruling, there has been in force court orders on the constitution reference that no execution is to take place till the determination of this Originating Summons.

## **II: CONSTITUTION REFERENCE**

### **A: The originating summons**

19. The originating summons herein before me asks for the following questions to the determined:-

**19.1 “whether the plaintiff’s constitution rights to liberty, peaceful ownership of their property are violated by the third parties seeking to execute, process, decrees, judgments and claims against the Plaintiffs in suit which United Insurance Company Ltd had legally assumed or deemed to have assumed full responsibility to settle under Section 10 (2)[1] of this Insurance (Third party risks) Act Cap 405 as the plaintiffs Insurance within the meaning of the Insurance Act Cap 487.**

**19.2. Whether the Kenya Reinsurance Corporation Ltd since its appointment as Manager has diligently exercised its mandate to manage the United Insurance Co. Ltd in the best interest of the plaintiffs as policy holders with the United Insurance Co. Ltd and in the interest of the third parties named herein as members of the insuing public as envisaged under section 67 C (4) of the Insurance Act Cap 487[2].**

**19.3 Any other relief of redress that this Honourable Court may deem expedient in the course of its determination of this summons.**

**19.4. That costs of proceedings be awarded to the plaintiffs in any event.**

**B: BACKGROUND**

20. A brief background on the genesis of this constitution reference is required. I rely on the affidavits herein of all the parties including the annexures and the submissions made before this court.

21. United Insurance Company Ltd (herein referred to as the insurer) was incorporated on 28<sup>th</sup> April 1983 under the Companies Act 486 Laws of Kenya. It obtained of license to transact Insurance business in 1983 and commenced such business during the said same year. As at July 2004, the insurer had a head office situated at the United Insurance Towers, Westlands road Nairobi and twenty-three branches. It had a workforce of 330 employees. The directors of the insurer were named as:

**21.a) John K. Mburu – Land Economics Valuer**

**21.b) Peter J. Mwangi- Banker**

**21.c) George N. Kariuki – Insurance Executive**

**21.d) Jane Michuki- Lawyer**

**21.e) Allan Ngugi- Corporate Director**

The latter two directions are non- shareholding directors whilst the former three directors held equal shares of the Company totaling Kshs. 150 million.

22. As far back as the year 1999 the insurer was faced with financial difficulties. The Commissioner of Insurance was aware of this. To deal with the problem he held General meetings with the Board members to look into ways to salvage the business Company. It was a fact that J. K. Mburu was chairman whilst G. N. Kariuki doubled up as a shareholder, Principal Officer/ Chief Executive office and a director. The major problem according to the Commissioner of Insurance (the 1<sup>st</sup> defendant and herein referred to as the Commissioner) was:-

**22.1) Separation of ownership and management.**

**22.2) Poor inappropriate investments”**

23. The solution was found to be in the restructuring of the insurer, the removal of the Principal officer/ General Manager and identify another person to undertake the restructuring. That secondly the “massive” investment made in real estate / land would be sold. Management and liquidity was the basic problem. The Insurance Company had 80% of its business in motor claims. The claims are high as most of the assets are in land and building the Insurance Company was unable to meet its obligations. The insurer blamed the judiciary for its move. It gave large awards and colluded with crooked lawyers, doctors and victims. These huge claims would eat into the insurers income.

24. The Commissioner was aware by now that there was efforts by lawyers to wind up the Insurance Company. There was bad publicity and complaints by policyholders. He nonetheless made recommendations that:\_

**24.a [Whereas] United Insurance Company is a very important player in the market especially motor Insurance.**

**24.b. [Whereas] the [Insurer] Company has many stakeholders who may loose heavily. . . The public may completely loose confidence in the industry.**

**The Insurance has liquidity problems but it is not insolvent and therefore does not warrant closure.**

25. The Commissioner restructured the board yet again and removed P. J. Mwangi as the new Chief Executive /Officer Principal Officer, who had been chaired by Allan Ngugi - immediate past Chief Executive Officer of Kenya Association of Manufacturers and consisting of four independent directors and 3 shareholders directors were appointed. The Commissioner sat on the board as an observer.

**These measures have been handled quietly in order not to cause any alarm which may result on in a run on the Company.”**

26. The Commissioner launched the board on 8<sup>th</sup> July 2004. Six months later a proposal was put to the Commissioner that Kshs. 50 million would be injected by the shareholders in the form of cash. No report had been given quarterly to the Commissioner (though he was to sit on the board.) that he nonetheless requested. The surprising indication was that the board had requested George Kariuki, the former Executive Director, to be re- appointed as Chief Executive Officer. No objection to this was taken by the Commissioner as of 10<sup>th</sup> January 2005.

27. Although as of 26<sup>th</sup> April 2004, the Insurance Company gave “a performance report” to the Commissioner stating that their problems was a chaotic public service vehicle business that was brought to some order by the “NARC” government in 2003, the judiciary that saw the purge of several judicial officer, the exit of their Managers from the Company, they gave a statistic of their gross premiums and claim paid our as follows:-

<b>Year</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>
Gross	1.3 billion	1.4 billion	1.3 billion
Premiums			
Claims Paid	570,471, 000	731,096,000	880,000,000

28. On 26<sup>th</sup> May 2006 an Executive summary by Kenya Re Insurance Company disclosed that the data information by the Insurance Company was well below standard and does not measured up to the running of business. An example was given that out of 12,975 motor private vehicle policy cover in 2001 there were 7,960 which had no certificate numbers or registration numbers; the policy debtors information relating to receipts and credit notes. During this time there was a system failure, fraudulent interest and as such no proper underwriting took place. The policy that were issued were. **“Riddled with Management fraud by both the board and Management who were unable to deal with this.”**

29. The directors were aware of Kshs.70 million in treasury bills but which bills were not accounted in the Company’s book. The treasury bills were mature. A sum of Kshs. 32.1 million was owed to the Insured Company from related companies in which the Directors were shareholders. Further each of the shareholders had unsecured loans advanced to themselves as follows:-

**29.a) J. K Mbuu 9, 201, 069**

**29.b) P. J. Mwangi 9, 829, 142**

**29.c) G. N Kariuki 13, 577, 793**

**29.d) J. Michuki 99,454**

30. By 29<sup>th</sup> July 2005 the High court of Kenya at Kisumu (Tanui J) gave orders of Mandamus in a judicial Review proceedings whereby he commanded the Minister for Finance and the Commissioner of Insurance

**“To commence, prosecute and conclude winding up proceedings against United Insurance**

**Company Ltd the affected parties”.**

The said two offices were further prohibited.

**“... from issuing the affected party (United Insurance Company Ltd) with a license under the Insurance Act.”**

31. The said orders issued in the case of **Republic and Charles Lutta Kasamani t/a Kasamani and Company Advocate**[3] had been brought due to taxed costs of Kshs. 27, 825, 890.80 and bill of costs of Kshs. 10, 828, 062 due and owing to the said advocate. The Republic/State appealed and sought a stay. This was granted by the court of appeal and application at Nairobi[4] (Omolo, Githinji, Waki JJA) an outline was given under section 67 C(2) of the procedure in which the Commissioner is to take, in dealing with the Insurance Company that has ran into difficulties. This was that the Commissioner was to **“appoint any person to assume the Management control and conduct of the affairs and business of an Insurer to exercise all the powers of the Insurance to the exclusion of its board of directors including the use of corporate seal”**.

The said Manager, under Section 67 C(6) shall **“within a period of 12 months from the date of his appointment, prepare** and submit to the Commissioner a report on the financial position and Management of the insurers with recommendations as to whether: -

31.a) The Insurance is Capable of being removed or

31.b) The Insurance should be liquidated

32. Once a report is given then the Minister would decide whether there should be liquidation of the Insurance and Section 123 apply.

33. The court of appeal rightly ruled that it was not in the powers of the courts to decide whether an Insurance Company should be liquidated or not. This lay wholly with the Minister and not the courts prior to the Minister giving his approval. The court of appeal stated in Section 67 C(8):-

**“On its face, (it) appears to give the Minister a discretion to decide on whether or not the Insurance Company ought to be liquidated. If the Minister decides so, then the provisions of section 123 of the Act apply.”**

34. It is therefore clear that a party cannot just go directly to court and apply for the winding up of an Insurance Company[5]. The Minister must first give his decision on whether the Company should be wound up or not. If he so decides then winding up proceeding would be permitted under Section 123 of the Insurance Act Cap 487. I am aware that by legal Notice 11/06, the said section has since been amended to read that the Board and not the Minister would give prior approval for the Company to be wound up. I shall comment on this further later on in this ruling.

35. It therefore means all winding up proceedings filed in the subordinate court and in the High Court are null and void due to there being no such approval from the Minister concerned. There has been no approval from the state or “the board” for winding up proceedings herein.

36. The court of appeal ruling was delivered on the 7<sup>th</sup> October 2005. It in effect confirmed that the court had no powers to order and or “command” the Minister of Finance and the Commissioner of Insurance to wind up the insurer.

37. As matters stood as of 7<sup>th</sup> October 2007, the Commissioner of Insurance had appointed Kenya Reinsurance Co. Ltd as Statutory Manager in July 2005. The Petitioner herein had filed this constitution reference on 13<sup>th</sup> September 2005. Two other references were also filed. A stay of appointment of Kenya Re as Statutory Manager was granted on 6<sup>th</sup> June 2006. This was set aside. The Statutory Manager

continued with its work justifying that it was well placed to do so. Time began to go by as the High Court began to hear the application to restrain Kenya Reinsurance Corporation acting as the Manager of United Insurance Company. As stated earlier half way during the hearing of the said application 110 more litigants applied to be enjoined to the proceedings. By the time this file was placed before me, two years had lapsed. As stated earlier I granted a stay of the Statutory Manager and or any execution against the policy holders on judgement against them. The Statutory Manager had given its recommendations.

38. I will now look at the argument put forward by the parties.

### **C: ARGUMENT BY APPLICANT/PETITIONER**

39. The Applicant/Petitioner argued that they had entered into a legal contract with M/s United Insurance Company Limited. They bought third party Insurance policies. The Insurance at all times had been issued with a license to conduct Insurance business with the approval of the Commissioner. The Applicant/Petitioner admitted that the various motor vehicles so insured had been involved in one way or the other in motor vehicle accidents. Some of the claims against them more in court.

40. It was common knowledge that once one took out an Insurance policy and where an accident occurs, no liability is admitted and the Insurance Company is notified, the accident is reported to the police who come on the ground, assess the scene of accident make a report in the occurrence book and file, thereafter they take statements of parties concerned and issue a notice of intention to prosecute. Once the notice has been issued the police would charge to court the person concerned and or at fault. Where there is a conviction in a court of law, the same proceedings would be raised in a civil suit for compensation against the defendant. Unfortunately our criminal system in Kenya has failed and or collapsed. The litigant in a civil suit can no longer rely adequately on the criminal prosecution and if he does, the proceedings take considerable time to conclude. This explains the difficulties at times Insurance companies have to settle their claims.

41. The Insurance Company is never named in the criminal proceedings nor the civil proceedings. The litigant though requires to give them a notice to commence proceedings against their insured. With this notice the insurer would engage an advocate who would defend the suit in the criminal courts and again in the civil suit for compensation. For a long time, those insured would sit back and allow the Insurance Company to take charge of their case. The Insurance Company would then make payments if the insured is found liable for the said accident. It is not strange, due to fraud or non-disclosure of material fact, that you would find an Insurance Company avoiding a policy by filing a declaratory suit in the High court not to make payment. If there is no declaratory suit or appeal case, the Insurance Company is bound to make payments. It is at this stage that the cause of action against the Insurance Company arises.

42. Where the Insurance Company is deemed to be unable to meet its commitments, then the Commissioner of Insurance is permitted to intervene and to place such Insurance Company under Statutory Management. This statutory management is “not winding up” but an audit by the Commissioner as to whether the Company may be reviewed or it may be wound up. To do this, the Statutory Manager declares a moratorium of 12 months<sup>[6]</sup>, within this period, there would be no payment made by the insurer of its policy holders and other creditors and the declaration of a moratorium shall: -

**42.(a) “Be applied equally to all classes of policy holders and creditors subject to such exemptions in respect of any classes of Insurance as the Manager may by notice in the Gazette specify.”**

**42.(b) “Suspend the running of the few purpose of any law of limitation in respect of any claim by any policyholder or creditors of the insurer.”**

**42.(c) “Cease to apply upon the termination of the Managers appointment where upon the rights and obligations of the insurer its policy holders and creditors shall save to the extent provided in paragraph (a), (b) be the same as if there has been no declaration under the provisions of this subsection”.**

43. What I now understand from the Applicant/Petitioner is that on Monday 18<sup>th</sup> July 2005 they saw an advertisement in the local Daily that the insurer, United Insurance Co. Ltd was placed under Statutory Management on 15<sup>th</sup> July 2007. This came as a shock to them. The notices were two. The first was under the Insurance Act Cap 487 that was declaration of a moratorium and reflecting that the insurer was under Statutory Management.

44. The Commissioner of Insurance appointed the Kenya Re Insurance Corporation Ltd to Act as Statutory Manager.

The second notice was to the public at large. That all enquiries should be directed to on Samuel C. Mwueni, an employee of Kenya Re Insurance Corporation Limited regarding the Statutory Management of the said Company.

45. The said Applicant /Petitioners filed this constitution reference and argued that the said Kenya Re Insurance Corporation should never have been placed as a Statutory Manager, take control of the Company and render reports thereafter as to whether the Company should be revived on recommendation made for it to be wound up. Instead the Statutory Manager between July and September 2005 proceeded to sell the assets without leave of the court. They proceeded to advertise the sale of assets, the real properties contrary to section 67 C (2) iii and iv of the Insurance Act.

46. The branches around the country were closed down. There was therefore no way in which the premiums to be paid could be collected. This placed the insurer Company into a risk that would not see its recovery.

47. As to the applicant/Petitioners all the existing judgments, proceedings and execution against them continued. They being sued as defendants were not defended in a court of law. They experienced situation where defence were not filed in their case. Once judgement having been entered against them they were personally sued and at execution stage were committed and placed to civil jail. This traumatic experience saw them file this Constitution reference. Others declared bankruptcy. Each, of them were, as defendants, left at the mercies of auctioneers. Even after this court gave stay orders some advocates and judicial officers ignored my orders and proceeded to effect executions.

48. Its therefore certain that the Applicant/Petitioner were treated differently from other classes of Insurance policy holder, a moratorium had been declared. No execution on court proceedings should have commenced for 12 months until the Statutory Manager proceeded and completed its task. No such notice was clearly given in the process. The Applicant/Petitioner therefore claimed that they most certainly were being discriminated against. They were hounded by creditors and were not able to cope with this frequent attack on them. They all claimed to have legally paid their premiums. That the payment of such premiums amounted to abinding contract that the Insurer would meet their obligations.

49. Their constitution rights were being contravened. The protection of the law had been taken away from them. They explained this on the grounds that the Commissioner of Insurance had all along known that the said insurer was not fairing well. No steps were taken by the Commissioner to stop the said insurer from accepting premiums from the public. That was in essence the law in 1995 under section 67 C 10 **that at the appointment of a Manager .....[it] shall constitute an immediate suspension of any new Insurance contracts on the part of the insurer so affected.** This exposes the new policy holders and clients who continue to renew their policies, not knowing that the Company had undergone difficulties.

50. It is the Commissioner's silence and inactive on all this that put the defendants at further risk of being auctioned.

51. The Commissioner should have announced that the Statutory Manager had placed a notice in the Kenya Gazette. That a waiver of certain class of persons under the moratorium would be made but in this situation had not been done. The Applicant/Petitioners are therefore entitled to the same 12 months moratorium to protect them from their creditors. The Statutory Managers conduct had not been exercised

with “**due diligence**” and to “**the interest of the public**” the Commissioner had access, prior to the appointment of the Manager, to the insurer balance sheet and knew the Company was operating poorly. The Minister of Finance failed in his duty by not exercising his power under section 179 (i) of the Insurance Act Cap 489 to establish a policyholders compensation fund. The members of that fund, I am made to understand had been appointed in 2004 by the then Minister Hon. D. Mwira’ria as members of the compensation board. This fund is meant to regulate the amount of funds to be paid to the victims of accidents. Its operation, as stated earlier, is yet to come into effect.

52. The Applicants respondents ask I hold the state accountable for the actions of their agents and or servants defendants 1, 2, 3. To restrain the 4 respondent from Acting. The other original defendant mentioned agreed and supported these submissions

#### **D: THE RESPONDENT IN REPLY**

53. The Respondents herein are the Commissioner of Insurance, the Minister of Finance, the Attorney General represented by the Attorney General, J. M. Mwaniki state counsel. The Statutory Manager is represented by M/S Muriu Muigai and Co. Advocates, M.P Munge. The other respondents who later joined these proceedings representing the creditor decree holders, namely those plaintiffs who had sued in damages but found themselves with no tangible compensation payments are represented by M/s L.M. Kambuni & Co Advocates having instructed J. Kironji for the 5<sup>th</sup> Respondent for Charles Taifa Oguta who sued Paul Tergat in the subordinate court. A constitution reference as earlier stated HCCC 1498/05 against the respondent having been duly filed. D.N Gichuru representing a decree /creditor decree/ holder in one of the case before me was in attendance in file no 4 below. 54. According to the state, the issue before this court has got nothing to do with the interpretation of the constitution. All the Applicant/Petitioners are decree/debtors. They have court judgments against them and they now come to court seeking their constitution rights instead of filing appeals against such decision. The courts had in the past held in the case law of:-

#### **BOOTH IRRIGATION -VS- MOMBASA WATER PRODUCTION LTD**

HCCMISC 1052/04, Nyamu J.

that an unchallenged court order cannot be the basis of a constitutional application to prevent execution.

55. The Applicant/Petitioner failed its appeal against their judgement within 30 days. They are therefore estopped from making any claims and are guilty of laches.

#### **56. The state also said that in the case of KENYA BUS SERVICE LTD & ANOTHER -VS- THE ATTORNEY GENERAL & OTHERS**

Misc suit 413/05 Nyamu J where Kenya Bus Service Ltd Bustrack Ltd & Msafiri Passengers Service Ltd claimed their constitutional rights had been violated. The three accused the state for expending unbudgeted funds to comply with unlawful orders of providing safety belts in buses and speed governors and as such they were denied their fundamental rights. The said creditors numbered 221 who asked that the applicant pay their debts due and owing to the creditors. The 2<sup>nd</sup> interested party alone was owed Kshs. 177 million

57. The constitution court was of the view that there were other laws such as the Company Law and the Bankruptcy Act provisions that they were able to use. The constitution court was not available to the Applicants. The fundamental rights and freedoms of others are subject to right of others and the society.

58. The state likewise said that the Kenya Bus Case (supra) was similar to this matter before. I should therefore dismiss this reference.

59. The parties wish the state to make good the claims that under the statute law both the Commissioner of Insurance and the Minister of Finance are protected from any legal actions that may

have been committed either by omission or commission. The law does not permit them to bring this reference to court.

60. The 4<sup>th</sup> respondent also relied on the Kenya Bus Case extensively to state that the said case precludes the Applicant/Petitioners from filing this constitution reference. Their rights are not available to court. There are no constitution issue available to be determined herein.

61. According to the 4<sup>th</sup> Respondent and the state, in some instance, when the Statutory Manager was appointed it was after the Commissioner had made strides to contain the insurer to meet its obligations. The Commissioner did not just sit back and do nothing but he wrote to the insurer, gave them time to reconstitute, gave them time to inject 50 million to jump start the constitution. The Company insurers were not able to meet their obligations. They were short of liquidity and unable to meet their commitments. The directors had mismanaged the Company and had taken loans to themselves. Placing most of the cash they had in real estate/land was a bad mistake. This meant that there was no available cash to the insurers.

62. There was good faith on the part of the Commissioner and Statutory Manager. As a result the law clearly protects them from any liability on their part. Great care had been taken by the Commissioner.

63. There was nothing as regards any constitution issue. The Applicant/Petitioner should have sued the Insurance brokers for selling them unreliable Insurance policy.

64. The insurers were unable to keep their part of commitment to bring the Company to its correct level. There was no choice but to place the Company under Statutory Management.

65. The 5<sup>th</sup> Respondent claims that the remedy lies in winding up proceedings and not in this constitution reference. He was first to go to winding up proceedings when the defendant in his case filed a constitution reference.

66. The respondents took this court through the various court case law. I would commend them for their diligence and have noted the same. It does not mean not mentioning to them I do have regard for them but the point brought out are accordingly noted.

### **III: CONSTITUTION INTERPRETATION**

67. This constitution reference may be described as a public interest litigation. It touches on three groups of persons, namely the policy holders who genuinely bought Insurance cover to safeguard themselves from third party risks. The insurer who sold those said policy to their client, the public at large and more so to the ordinary members of public who individually run public service vehicle transportation business and may be considered middle class cum lower class of the Kenyan society. The victims of accidents where they have been injured personally and or fatally.

68. The groups of persons who have filed this constitution reference are the insured or policy holders. They had entered into a contract that the insurer would meet their liability when suddenly on 18<sup>th</sup> July 2005 without due warning they are notified their contract no longer exists and that they must fend for themselves.

#### **(i) OPINION**

69. The state and the Statutory Manager have argued before this court that their remedy lies in other laws that are in existence. For example, sue in the civil courts for breach of contract, sue for bankruptcy, sue for remedy under the Company Law Act Cap 486 Laws of Kenya to perhaps directly sue the directors or wind the Company.

70. If the insurer had filed this constitution reference then this reference would fall under the same

category as the **Kenya Bus Service & Another VS ATTORNEY GENERAL & OTHERS (Supra)**

The rights to sue for the fundamental freedom and protection is subject to other rights of others.

70. The Applicant/Petitioner the insured had innocently bought Insurance policy. The advocates for respondent No. 4 submitted that they ought to have known the Company was not doing well. They should therefore sue the Insurance brokers who sold them the policies and the Directors of the United Insurance Co. Ltd not the Commissioner of Insurance and the Minister of Finance who in any event are protected in law under immunity of being sued.

71. Indeed Ibrahim J in the case law of **ANNE MUCHIRA -VS- THE COMMISSIONER OF INSURANCE**

The Applicant sought prayers for stay of execution which the court declined to grant. Ann Muchira had paid third party Insurance cover and was issued with an Insurance premium by a licensed Insurance Company. Namely United Insurance Company Ltd. she had complied with the law. The Company had taken up her defence claim and out of seven claims had settled five. She still had execution against her of Kshs.500,000/-. The editor decree holder wished to execute against her in their suit filed in 1998.

The Hon. Judge declining to issue a stay of execution commented: -

**“The United Insurance Co. Ltd is a notorious Company in this court and the court takes judicial notice that the Company is unable to pay its claims. Is the Commissioner of Insurance responsible?. This question must go for determination in this court”.**

72. The Applicant/Petitioner are therefore blamed for insuring with the insurer United Insurance Co. Ltd in this Constitution reference. Should I be persuaded by this argument? As in the words of Ibrahim J of this Constitution Reference is against our Insurance industry and system.

(ii) **IS THE COMMISSIONER OF INSURANCE TO BLAME?**

73. The task of the Commissioner of Insurance is to regulate the Insurance industry. The Insurance Company must first be incorporated as a Limited Liability Company under the Company’s Law Act Cap 486 Laws of Kenya. It must have directors and do all that pertains under the Company’s Act. It then goes to the Insurance Act Cap 487 where it is issued with a license to conduct insurance business. As long as the business is sound the Commissioner of Insurance would not interfere with the running of the said company. He would of course receive the usual reports.

74. It is not the first time that the Insurance industry has neared collapse. An outcry by them saw the establishment of the **Hancox Commission** in 1986. The insurance industry formed the motor pool to shield themselves from the collapse of their business. The Commissioner, *inter alia* recommended standard compensation to be awarded in order to regulate high awards given by courts as compensation. It is the compensation board that was to be set up under Section 179 (1) of the Insurance Act Cap 487, known as the **“Policy Holders’ Compensation Fund”** that to date is not operational.

75. United Insurance Co. Ltd participated in the **Hancox Commission** that looked into the Insurance industry. They therefore were aware three years after their incorporation that dealing in motor vehicle Insurance business alone was a tricky and risky affair. The Commissioners have since changed but what is important is the office of the Commissioner is aware of the history of motor vehicle Insurance in Kenya.

76. United Insurance Company Ltd invested 80% of its business in the motor vehicle Insurance policy, they took the premiums and invested it in lucrative land which were later sold except some pieces in Kajiado. The Insurance Company was ambitious with 23 branches all over Kenya and a staff of 300, they could not sustain themselves. Things came to the fore in 1999 but according to Ibrahim J’s judgement he was dealing with one of their clients who was sued in 1998.

77. The present Commissioner was aware that things were not really good as far back as 1999. For five years the Commissioner is said to have been having meetings with the board of the insurer. For five years auctioneers were at the doors of United Insurance. In 2004, the Commissioner notified the Minister of Finance that there was still hope in the Company. All that was required was to have the Company restructured. This did not work. Advocates were filing winding up proceedings. The Commissioner, the Minister were being sued and even despite this, the Commissioner took no action until 15<sup>th</sup> July 2005 when he declared the insurer be placed under Statutory Management. A Kenya Gazette notice was required to be filed. I have seen none but what was shown to me was notices in the daily newspapers of 18<sup>th</sup> July 2005.

78. I believe the first serious mistake, besides the delay in placing the insurer under Statutory Management sooner (the reason being that Stallion Insurance, Lakestar Insurance had gone under and duly placed under Statutory Management it would erode the confidence of the public if United Insurance Company Limited would be allowed to go the same way) was the appointment of Kenya Reinsurance Corporation as Statutory Manager.

79. It is true that the Act say “anyone” may be a Statutory Manager but this most definitely does not include Kenya Reinsurance Corporation.

80. The task of a Reinsurance Company is to collect Insurance premiums from the local Insurance Companies. This could be about 5% of their total value in business each. The said Reinsurance Company would in turn invest in another Reinsurance company. For instance, United Insurance Co. Ltd and all like Insurance Company would deposit an Insurance cover with Kenya Re-Insurance Corporation Company. This Reinsurance Corporation would then cover the local Insurance Company from any risks and or liability that would befall them in the event they are unable to meet their obligations. The Kenya Reinsurance corporation to cover themselves from any risks would then deposit some of its funds with Africa Reinsurance Corporation (Africa Re) who would cover Kenya Re Insurance corporation from any such risks Africa Re would in turn invest widely to cover itself from any risk.

81. This is indeed a perfect system to safeguard the Insurance industry. The unique aspect of Kenya is that of fraudulent claims, the judiciary giving large amounts and the high rates of accident in our country which could be controlled if there is the will power from the government, the establishment of the criminal justice system and corruption.

82. With all these elements against the industry, the Commissioner of Insurance ought to have been diligent. The Act gave him wide powers to be involved. This involvement only began rigorously in 2004. This was a year after the “NARC” government came into power. It was a time the Insurance felt some elements of “hope” when they saw enforcement as safety belts being compulsory, uniforms for drivers and conductors and sanity in the said industry. The purge of judges in the fight against corruption was also welcomed by the insurer. Despite all this, a year later the said insurer was unable to deliver. The Commissioner had deliberately set aside taking any action so as not to “alarm” the public. This had been an omission on his part. The Court of Appeal outlined the procedure to be followed in handling a Statutory Manager. The commissioner obliged and tried to put in place the said procedure. He asked the Statutory Manager to give a report. Was this too late because the Statutory Manager instead of giving a report immediately embarked in selling the assets. This was liquidating the Company without the Minister actually giving his approval.

83. Namely, although the Company is incorporated under the Company’s Act Cap 486 laws of Kenya, you cannot place it under winding up proceedings nor can you liquidate it. The procedure in the Act and as the Court of Appeal described, was to give a report of the Statutory Manager. By a much later supplementary affidavit filed herein there is a report to the Commissioner. This report is undated. It is therefore unclear when it was actually written. A hand written date for the year 2006 had been added. This is suspect.

84. It therefore came to my attention that by the year 2006 section 67 C(8) that gave the Minister powers to decide whether the insurer should be liquidated or not was amended by legal notice 11/06. the

“Board” and not the “Minister” is the one who now decides the issue liquidation. I am not a bit disturbed about this new provision. It refers to a “**Board**” that

**“means the Board of Directors of the authority constituted under this section 3B”.**

85. The authority is the “**Insurance Regulatory Authority**” who makes up in its board.

**85.a) The chairman- appointed by the president and on recommendation of the Minister.**

**85.b) The Commissioner of Insurance . . .**

**85.c) The permanent secretary for the time being responsible for finance... or his representative**

**85.d). The Chief Executive officer of the Retirement Benefits Authority (who is the custodian of the would be funds of the policy holders compensation fund)**

**85.e) The Governors Central Bank of Kenya on his representative.**

**85.f) A nominee of the Insurance Institute of Kenya**

**85.g) Four other members not being public officers appointed by the Minister.**

**The chair and all persons appointed as nominees and members not being of the public must have knowledge and experience in matters relating to Insurance, Finance banking or Actuarial science”.**

86. It probably was enacted to put in more checks and balance in the office of the Commissioner of Insurance. This law though does not affect this case. When laws are enacted they effect matter from the day of their in enactment. Anything that had been pending prior to the enactment must follow the existing law. In this case the Statutory Manager (which this court denies they were legally appointed) must at all times seek the Ministers approval in order for there to be winding proceedings to be commenced. This has not yet been effected.

87. I would hold that the office of the Commissioner of Insurance did not Act with expediency to appoint a Statutory Manager and place the said insurer under Statutory Management in 1999. Even in 2004 the time had long past for this to occur. The appointment of Kenya Reinsurances is null, void and ab initio. The said Kenya Reinsurance is in conflict of interest with United Insurance Company. In the report by the insurer of 26<sup>th</sup> April 2004 to the Commissioner of Insurance on the recoveries from Reinsurers:-

**“The Company has made significant recoveries from reinsures especially from November 2003 to the first quarter of this year amounting Kshs. 30million net of their recoveries from Kenya Re after exerting much pressure for them to pay. We still anticipate more recoveries worth over 40 million net of their recoveries in the coming second and third quarter.”**

88. According to the above report the Kenya Re Actually made payments to the insurer for their losses. This would therefore mean that they were still to make payments of 40 million per quarter thereafter. These are the same persons who are appointed as the Statutory Manager. They are most certainly biased. They have access to the running of the insurer and selling is their best unlawful action.

89. To prove this biasness in the Statutory Manager’s report by Samuel C. Mweni a Manager with Kenya Re he comments that:-

**“The Company did not maintain sufficient level of resource to support the business they were writing.**

**Indeed a significant contributor of the Company’s inability to settle claims was difficulties in convincing reinsures to pay for their apportioned shares of claims.**

**The reluctance and in most cases outright refusal by the reinsurers was hinged on the acceptable argument that United Insurance Company has over the years not paid reinsurance premiums.**

**In addition, the reinsurers were put on enquiry as a result of information flow on the level of fraudulent claims that United Insurance Company was handling”**

90. Kenya Re was not a person to appoint as a Statutory Manager. The said corporation was not just “anyone”. It has a stake in the Company to pay its reinsurance premiums. It was not diligent in the Management of United Insurance Co. Ltd

91. This case herein has a uniqueness in that the issue before it is not pending decrees, judgments and proceedings. The issue is, whether the Commissioner of Insurance was diligent in ensuring that the members of public were protected from Insurance Company that were insolvent and could not meet its commitment? Whether the Statutory Manager Acted with due diligence? I can only conclude that both the Commissioner of Insurance and the Statutory Manager acted mala fide.

92. The law envisage a situation where limitation to third party risk compensation would be pooled and discussed by a compensation board. This had never been operationalized by the Minister of Finance, the second defendant, nor did the Attorney General give the Minister adequate advise as to the urgency and or expediency of such compensation board.

#### **IV: HUMAN RIGHTS**

93. The parties come to court under Chapter V of the Constitution of Kenya that is based on the Declaration of Human Rights passed by the United Nations on

10<sup>th</sup> December 1948. They are just declaration and have not force of law but they are contained in our constitution and due regard must be given to it.

94. I wish to quote the Honourable P. N Bhagwati the Chairman United Nations Human Rights Committee and former chief justice of India who in a key note address in Guatemala he stated that:

**“Human rights represent the normative standards or values by reference to which we must judge the Actions of the executive and the legislative. They present the basic values of justice according to the perceptions of the world community. It is therefore essential that these standards or means be taken into account by the judges while developing the law or interpreting the Constitution or Statutory law.”**

95. The Applicant/petitioner have done everything correct according to the law. They have brought Insurance premiums. They entered into contracts with the insurer, the Commissioner of Insurance over five years after being aware the Insurance Company was at a brink of collapse continued issuing a license to continue business. I believe the clause that was deleted in 1996 stating that once **an Insurance Company is under Statutory Management it should not accept any new premiums** should be revived.

96. On the other hand, you have the victims of accident who have been rightly or otherwise awarded their compensation and cannot access their fruits of judgement because the insurer is unable to pay. What do they do? Should they proceed to directly execute against the defendants who are not at fault? The original plaintiffs responded to the advertisement in the press and were in court to express their anxiety after being injured and losing their loved ones through a traffic accident and the difficulties they have been put through as to how they may access their compensation.

97. I wish to distinguish this matter from that of Stallion Insurance and Lakestar Insurance. I do not have their details save the comments made by the Commissioner of Insurance. I believe in this former Insurance Company above a moratorium and or Statutory Manager was swiftly appointed. The Commissioner moved with speed and declared a moratorium through the Statutory Manager and

thereafter the closure of the said Insurance Company. Yes, the reputation of the Insurance Company is at stake but a reputation has to be earned. It does not come on a silver platter. Where action is taken immediately and due process is followed, the constitution provision may not be available to the insurer.

98. As to the insured and victims I believe where the Commissioner has not acted with due diligence as was in this case, I would be left with no option but declare that the rights of the insured and the victims have been infringed. The government has acted in 2006 by Act 11 of 2006 in which it has set up the “**Insurance regulatory authority**” which has a board of 11 persons instead of leaving the decision to only one person, the Commissioner of Insurance to decide whether to recommend placing the insurer to liquidation. To this end the government is to be commended.

#### **V: DECLARATION**

99. As it stands I would accordingly make the following declaration in favour of the applicant/Petitioner:-

99.1. Whereas the Plaintiffs constitutional rights to liberty and peaceful ownership of their property are violated or jeopardy of being violated by the third parties seeking to execute processes, decrees judgement and claims against the defendants in which United Insurance Co. Ltd had legally assumed on deemed to have assumed full responsibility to settle vide Section 10 (2) of the Insurance (third party risks) Act Cap 405 as the Plaintiffs insure within the meaning of the Insurance Act Cap 487.

99.2. Whereas the Kenya reinsurance corporation Ltd, since its appointment as Manager, has not qualified to be such Manager and has failed to diligently exercise its mandate to manage United Insurance Co. Ltd in the interest of third parties named herein as members of the insuring public as envisaged under Section 67 C(4) of the Insurance Act Cap 487 laws of Kenya.

99.3. Whereas the United Insurance Company Ltd is in Statutory Management.

100. It is hereby declared both with the Plaintiff/Victims creditors and the original defendant decree debtor’s applicants petitioners herein have had their rights infringed.

100.1 That it is hereby declared that 1<sup>st</sup> defendant, the Commissioner of Insurance failed to take remedial measures in time to forestall a situation whereby the Applicant petitioners hold policies but are unable to have them paid and the victims hold judgement decree which they are unable to execute.

100.2. That it is hereby declared that the appointment of Kenya Re as a Statutory Manager is null, void abinitio and illegal.

100.3 It is hereby declared that an independent Statutory Manager be appointed to look into the affairs of the said United Insurance Company Ltd, expeditiously duly appointed by the **Insurance Regulatory Board** and in the event it has not been constituted, by the **Minister of Finance**.

100.4 That the new Statutory Manager, do respond to the board within six months of his or her appointment.

100.5. It is hereby declared that there be an injunction to issue and duly extended on all cases for execution by decree/ creditors until a report of the intended new Statutory Manager is tabled on claims touching on United Insurance.

100.6. That it is hereby declared that the Minister is under a duty to implement the policyholders compensation fund forth

with. This fund **is for purpose of providing assistance to policy holders of an insolvent insurer**. (emphasis supplied) Section 179 (1) Insurance Act refers.

100.7 That the victims claim would be settled and be subject to the said compensation fund.

100.8 That no judgement debtor should be subjected to civil jail as this contravenes the United Nations Conventions on the subject.

100.9 That the Applicants are to await the outcome of the new Statutory Manager yet to be appointed, report within 6 months of the appointment.

100.10. That each claim by the victim must be established strictly to eliminate fraud. That the claim by the insured must also be established strictly. If per chance the

certificate of Insurance is questioned and the fault lies with the insurer, or vice versa, the same must be first determined by the board and new Statutory Manager before it is forwarded to the compensation fund.

100.11. That the Commissioner of Insurance and the Minister are held liable for not acting with expediency. Whereas they are and have immunity and protection, this court declares that the government of Kenya are duty bound to pay the claims under the compensation fund to the established under section 179(1) if not so already established.

100.12 I declare that the insurer be held liable and responsible according to law and subject to the Statutory Managers report.

100.13. That for clarity and benefit of removal of doubt, where a Limited Liability Company deal in the Insurance business and is duly licensed under the Insurance Act Cap 487 laws of Kenya, no winding up proceedings is permitted to be undertaken by any party except with the approval and permission of the Board of the **Insurance Regulatory Authority**, formerly the Minister under section 67 C (8) legal Notice 11/2006. That the person who undertakes and applies winding up proceedings is the Commissioner only and would be governed by section 123 of the Insurance Act. Namely, the Commissioner of Insurance is the one who applies for winding up proceedings under the Companies Act. The court can wind up a Company under voluntary resolution of that Company (Section 271 Company Act). Applications filed by individual parties through advocates are null and void abinitio and of no effect.

100.14 That this constitution reference be mentioned within six months of to-days date to confirm compliance.

## **VI: COSTS**

101. I award the costs of this reference to be borne by the respondent 1, 2, 3 & 4 jointly and severally in favour of the Applicants petitioners, the parties who attended this court proceedings namely:-

101.1 Applicant petitioner No 1, 2, 3 & 4.

101.2 L.L. Naikuni's client

101.3. O.H. G Okeke's client

101.4. G. O Kelly's client.

101.5. D. W Kinyanjui's client

parties in person.

101.6. Traveling and subsistence Allowance of

500/=

each to

- a) Susan Wangechi Njoroge
- b) Bernard Ireriri
- c) Margaret Wanjiku
- d) Esther Wanjiru Mwangi
- e) Jane Kagemi Warichi
- f) Henry Imbusu Resa

102. I take this opportunity to thank the advocates and parties who appeared in person for their submissions.

**DATED THIS 18<sup>TH</sup> DAY OF DECEMBER 2007 AT NAIROBI.**

**M.A. ANG'AWA**

**JUDGE**