



REPUBLIC OF KENYA



**Ndonye v Insurance Regulatory Authority & 2 others; Kariuki & 11 others (Interested Parties) (Petition E005 of 2024) [2025] KEHC 8885 (KLR) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 8885 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
PETITION E005 OF 2024  
AN ONGERI, J  
JANUARY 17, 2025  
IN THE MATTER OF ARTICLE 2(1), (4); 3(1); 10; 19(2); 20(1),  
(2), (3) & (4); 21(1); 22(1); 23; 27(1); 258(1) & 259(1) OF THE  
CONSTITUTION OF KENYA 2010  
AND  
IN THE MATTER OF VIOLATION OF RIGHTS UNDER ARTICLE  
28; 40(2), (3); 46; 47(1); 48 & 50 OF THE CONSTITUTION OF  
KENYA 2010  
AND  
IN THE MATTER OF SECTION 67C, 203 & 204A OF THE LAWS  
OF KENYA  
AND  
IN THE MATTER OF SECTION 4 & 10 OF THE INSURANCE  
(MOTOR VEHICLE THIRD PARTY RISKS) ACT CAP 405 THE  
LAWS OF KENYA**

**BETWEEN**

**BERNARD MUSYOKA NDONYE ..... PETITIONER**

**AND**

**INSURANCE REGULATORY AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AFRICA MERCHANTS ASURANCE CO. LTD ..... 3<sup>RD</sup> RESPONDENT**

**AND**



<b>SAMUEL NJENGA KARIUKI .....</b>	<b>INTERESTED PARTY</b>
<b>MOSES GARISHA .....</b>	<b>INTERESTED PARTY</b>
<b>AMINA MWIKALI MBITHI .....</b>	<b>INTERESTED PARTY</b>
<b>RODGERS WAMBUA MUTHENGI .....</b>	<b>INTERESTED PARTY</b>
<b>REGINA KAWAYA KAMUTI .....</b>	<b>INTERESTED PARTY</b>
<b>PHYLIS KARISA .....</b>	<b>INTERESTED PARTY</b>
<b>JACINTA NJOKI .....</b>	<b>INTERESTED PARTY</b>
<b>KINGOO MUUALANZA .....</b>	<b>INTERESTED PARTY</b>
<b>MUSLIMA NURU MUSYIMI .....</b>	<b>INTERESTED PARTY</b>
<b>ERICK MUSYOKA YOHANA .....</b>	<b>INTERESTED PARTY</b>
<b>MARY KAMBUA MUNYOLO .....</b>	<b>INTERESTED PARTY</b>
<b>ELIZABETH MASWAI MWANZA .....</b>	<b>INTERESTED PARTY</b>

## RULING

1. The 2<sup>nd</sup> Respondent filed a Notice of Preliminary Objection (NOPO) dated 20<sup>th</sup> May 2024 in the following terms:-
  - a. That the suit and prayers (b) and (d) therein offend the doctrine of privity to contract.
  - b. That the petition offends the doctrine of constitutional avoidance as it ought to have been filed as a declaratory suit and not a constitutional petition.
2. The 5<sup>th</sup> Interested Party also filed a Notice of Preliminary Objection dated 16<sup>th</sup> May 2024 as follows:-
  - a. That the application is res judicata similar applications having been filed dealt with in primary suits CMCC No. 1725 Mombasa, CMCC No. 274 of 2023 Mombasa and Mombasa High Court Civil Application No. 190 of 2023 and rulings delivered hence it offends the provisions of Section seven of the Civil Procedure Act 2010.
  - b. That the application herein is contrary to Order 2 Rule 15 in that
    - i. It discloses no reasonable cause of action in law
    - ii. Is scandalous, frivolous and vexatious.
    - iii. Shall prejudice, embarrass or delay the fair trial of this case and
    - iv. It is otherwise an abuse of the process of the court.
3. The parties filed a written submission in the Notice of Preliminary Objection as follows:- the 2<sup>nd</sup> respondent submitted that the prayers (b) and (d) are declarations made by the petitioner against the respondents to make payments of all decretal sums entered against the petitioner in the civil suit. The insurance contract was initiated by the insurer who is the 3<sup>rd</sup> respondent and the terms accepted by the insured who is the petitioner. It was thus the 2<sup>nd</sup> respondent's argument that the petitioner has involved the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who are not privity to the details of the contract. that a contract



cannot confer rights or impose obligations on any person other than the parties to the contract and accordingly a contract cannot be enforced against a third party.

4. The 2<sup>nd</sup> respondent submitted that contract of insurance provides an exception to the doctrine of privity of contract. The exception is expressly laid out in law under the *Insurance (Motor Vehicles Third Party Risks) Act*, where a 3<sup>rd</sup> party can enforce a judgement from an insurance policy. However, even with this exception, it is evident that both the petitioner and the 1<sup>st</sup> to 12<sup>th</sup> interested party are entitled to claim from the 3<sup>rd</sup> respondent.
5. The 2<sup>nd</sup> respondent further submitted that the petitioner offends the doctrine of constitutional avoidance by filing a constitutional petition instead of a declaratory suit. The 2<sup>nd</sup> respondent contended that where a suit can be determined by any other way without invoking provisions for the protection of constitutions it is prudent to do so. The court can only resort to a constitutional issue where the dispute can only be resolved through a constitutional petition. The petitioner's main issue for determination is compensation by the 3<sup>rd</sup> respondent on his behalf to clear his decretal sum in the civil suits listed in the petition.
6. The 1<sup>st</sup> respondent in its submissions agreed with the sentiments of the 2<sup>nd</sup> respondent and reiterated the same.
7. The 5<sup>th</sup> interested party submitted that the petition herein is vexatious, frivolous and a blatant abuse of court process and should thus be dismissed. The 5<sup>th</sup> interested party contended that the petitioner has failed to disclose material facts; that he has two pending cases filed by himself against the 3<sup>rd</sup> respondent and the 5<sup>th</sup> interested party. That the petition herein is therefore sub-judice as there are similar prayers in Mombasa CMCC No. 274 of 2023 and Misc Application No. 190 of 2023.
8. The petitioner alternatively and in response to the 5<sup>th</sup> interested allegation that the matter herein is sub-judice argued that this was not raised in her notice of preliminary objection. The petitioner indicated that it is trite law that parties are bound by their pleadings. That further the petitioner filed a notice to withdraw the declaratory suit and as such there is no other suit pending before any other court of law.
9. The petitioner further submitted that prayers (b) and (d) of the petition do not offend the doctrine of privity of contract as they are not founded on the contract of insurance between the petitioner and the 3<sup>rd</sup> respondent but on the respondent breach of their constitutional and statutory obligations.
10. The petitioner argued that the 3<sup>rd</sup> respondents failure to discharge its obligation in paying claims arising out of judgements listed in the petition herein, pursuant to section 10 of the Insurance (Motor Vehicle Third Party Risks) Act and Section 203 of the *Insurance Act*, the petitioner reported the 3<sup>rd</sup> respondent to the 1<sup>st</sup> respondent who in breach of its obligations under Section 3A (2) (b) of the *Insurance Act* and notwithstanding the draconian powers under Section 67 C (1) (e) of the *Insurance Act*, failed to act hence occasioning breach of the petitioner's constitutional rights. The 2<sup>nd</sup> respondent being the chief government Legal Advisor failed in its constitutional obligation under Article 156(6) of *the Constitution* of Kenya by failing to render the correct advice to the Government and the 1<sup>st</sup> respondent.
11. The petitioner on the doctrine of constitutional avoidance submitted that the 1<sup>st</sup> respondent being the 3<sup>rd</sup> respondent's regulator infringed on the petitioner's consumer rights under article 46 of *the Constitution* by failing to perform its role thus failing to note that the 3<sup>rd</sup> respondent is facing liquidity problems and acting early enough to protect the public or even invoking payments under the policy Holder Compensations Fund (PCF). That as such whereas a declaratory suit would not yield any substantial remedy for the petitioner as against the 3<sup>rd</sup> respondent who is under it, it would not as well hold the 1<sup>st</sup> and 2<sup>nd</sup> respondents accountable for their constitutional and statutory breaches.



12. The issues for determination in the two Notice of Preliminary Objections are as follows:-
  - i. Whether the Petition filed by the Petitioner offends the doctrines of privity of contract and also constitutional avoidance.
  - ii. Whether the Petition is resjudicata.
  - iii. Who pays the costs of this Preliminary Objection?
13. The Petitioner filed two Constitutional Petitions being Voi Constitutional Petition No. E004 of 2024 and Voi HCCCH PET No. E005 of 2024 together with application dated 18<sup>th</sup> April 2024 seeking the following prayers:-
  - i. That this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.
  - ii. That this Honourable Court be pleased to order stay of execution of Judgments/decrees in Taveta Senior Principal Magistrate's Court Civil Suit Numbers 34 of 2015, 35 of 2015, 36 of 2015, 37 of 2015, 7 of 2014, 9 of 2014, 16 of 2014, 17 of 2014, 26 of 2014, 27 of 2014 and Mombasa Chief Magistrate Cause No. 1725 of 2014 pending the hearing and determination of the application herein.
  - iii. That this Honourable Court be pleased to order stay of execution of Judgments/decrees in Taveta Senior Principal Magistrate's Court Civil Suit Numbers 34 of 2015, 35 of 2015, 36 of 2015, 37 of 2015, 7 of 2014, 9 of 2014, 16 of 2014, 17 of 2014, 26 of 2014, 27 of 2014 and Mombasa Chief Magistrate Cause No. 1725 of 2014 pending the hearing and determination of the Petition herein.
  - iv. That this Honourable Court do make such further orders that they may be appropriate in the interest of justice.
  - v. That costs of this application be provided for.
14. I find that the Petitioner is seeking to enforce the judgments obtained in the above stated suits against the Respondents.
15. A brief history of the case is that the Petitioner/Respondent in the two Notice of Preliminary Objections was at all material times the lawful owner of motor vehicle registration number KBJ 163C.
16. The said motor vehicle was insured by the 3<sup>rd</sup> Respondent vide Policy No. AME/085/1/001282/2012.
17. The said motor vehicle registration number KBJ 163C was involved in an accident on or about 2017/2013 along Voi – Taita Road at Miembeni village in which the Interested Parties were injured.
18. The Interested Parties filed the suits the Petitioner/Respondent is seeking to enforce against the Respondents.
19. The 3<sup>rd</sup> Respondent has refused to honour the terms of the Insurance Policy between him and the Petitioner/Respondent and the Petitioner/Respondent has now filed this Petition against the 3<sup>rd</sup> Respondents.
20. I find that the 2<sup>nd</sup> Respondent is not privity to the insurance contract between the Petitioner and the 2<sup>nd</sup> Respondent in this case.
21. This is a civil suit between the Petitioner and the 3<sup>rd</sup> Respondent and the same does not meet the threshold to be considered a Constitutional Petition.



22. I do find that it is not in dispute that a similar application was filed in Mombasa being Mombasa High Court Civil Application No. 190 of 2023 in which a Ruling was delivered.
23. I find that this Petition is res judicata as it offends the provisions of Section 7 of the [Civil Procedure Act](#) which provides as follows:-  
(Julie please quote it here and put any relevant case)
24. I allow the two Preliminary Objections and I strike out this Petition with costs to the 2<sup>nd</sup> Respondent.
25. The orders to abide in both Voi HCCHPET No. 004 and 005 of 2024 which are similar. Orders to issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 17<sup>TH</sup> DAY OF JANUARY 2025 VIRTUALLY AND IN OPEN COURT AT VOL.**

**ASENATH ONGERI**

**JUDGE**

In the presence of:-

Maina/Trizah – Court Assistants

