



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndonye v Insurance Regulatory Authority & 2 others; Kinyili & 4 others (Interested Parties) (Petition E004 of 2024) [2025] KEHC 556 (KLR) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 556 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
PETITION E004 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**

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

**INVESCO ASSURANCE COMPANY LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**DAMARIS KAMENE KINYILI ..... INTERESTED PARTY**

**RUTH MWONGELI DAUDI & MATHEW MUMO TATIA (SUING ON BEHALF OF THE ESTATE AND DEPENDANTS OF BONFACE MUTUA MUMO) ..... INTERESTED PARTY**

**LUCY WACHERA MWANGI ..... INTERESTED PARTY**



**SARAH NDUKU MULAI ..... INTERESTED PARTY**  
**DAVID MATUKU ..... INTERESTED PARTY**

## **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 constitution 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:-  
(I did not find this)
3. The parties filed a written submission in the Notice of Preliminary Objection as follows:- the 2<sup>nd</sup> respondent submitted that the petitioner has involved the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who are not privy to the details of the contract as the petitioner has insured his motor vehicle registration number KBJ 163C with the 3<sup>rd</sup> respondent. the 2<sup>nd</sup> respondent argued that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. There are however exceptions to the doctrine of privity of contract provided by law under the *Insurance (Motor Vehicles Third Party Risks) Act*. Even with this exception it is evident that both the petitioner and the 1<sup>st</sup> to 5<sup>th</sup> interested party are entitled to claim from the 3<sup>rd</sup> respondent.
4. The 2<sup>nd</sup> respondent argued that the prayers in the petition herein wish to ignore the insurance contract and attach liability on the 1<sup>st</sup> and 2<sup>nd</sup> respondent. It was the 2<sup>nd</sup> respondent's argument that the Attorney General and the Insurance Regulatory Authority are not subject of the insurance policy. The IRA being the regulatory is not mandated to fulfil judgement arising from insurance policies. The involvement of the regulator is confined to regulatory oversight of insurers but not to fulfil decretal sums.
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 argued that 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 herein is compensation by the 3<sup>rd</sup> respondent on his behalf to clear his decretal sum in the civil suits listed. It is clear that his decretal sum can only be granted in a civil suit and not a constitutional petition. The petition herein is thus misguided and should be struck out.
6. The 1<sup>st</sup> respondent in its submissions agreed with the sentiment of the 2<sup>nd</sup> respondent and reiterated the same.
7. The petitioner alternatively submitted that prayers (b) and (d) are not founded on the Contract of Insurance between the petitioner and the 3<sup>rd</sup> respondent but on the respondent's breach of their constitutional and statutory obligations and as such the doctrine of privity of contract does not apply in the circumstances herein.
8. The petitioner argued that the 3<sup>rd</sup> respondent's 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.
9. The petitioner on the doctrine of constitutional avoidance submitted that the 1st respondent being the 3rd 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 3rd 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 3rd respondent who is under it, it would not as well hold the 1st and 2nd respondents accountable for their constitutional and statutory breaches.
  10. 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?
  11. The Petitioner filed two Constitutional Petitions being Voi Constitutional Petition No. E004 of 2024 and Voi HCCH 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.
  12. I find that the Petitioner is seeking to enforce the judgments obtained in the above stated suits against the Respondents.
  13. 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.



14. The said motor vehicle was insured by the 3<sup>rd</sup> Respondent vide Policy No. AME/085/1/001282/2012.
15. 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.
16. The Interested Parties filed the suits the Petitioner/Respondent is seeking to enforce against the Respondents.
17. 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.
18. I find that the 2<sup>nd</sup> Respondent is not privy to the insurance contract between the Petitioner and the 2<sup>nd</sup> Respondent in this case.
19. 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. The threshold for a constitutional petition was set out in the case of Anarita Karimi Njeru v Republic [1979] eKLR where the court 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 a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
20. 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.
21. 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:-
  7. Res judicata  
No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
22. I allow the two Preliminary Objections and I strike out this Petition with costs to the 2<sup>nd</sup> Respondent.
23. 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 VOI.**

**ASENATH ONGERI**

**JUDGE**

In the presence of:-

Maina/Trizah – Court Assistants

