Republic v Insurance Regulatory Authority; Old Mutual General Insurance Kenya Limited (Exparte Applicant); Tropic Air Limited (Interested Party) (Judicial Review Miscellaneous Application E030 of 2024) [2025] KEHC 4570 (KLR) (Judicial Review) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4570 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E030 OF 2024

JM CHIGITI, J

APRIL 8, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

INSURANCE REGULATORY AUTHORITY ..... RESPONDENT

AND

OLD MUTUAL GENERAL INSURANCE KENYA LIMITED .... EXPARTE APPLICANT

AND

TROPIC AIR LIMITED ..... INTERESTED PARTY

JUDGMENT

Applicant's case;

1. The application before this Court is the Notice of Motion dated 3rd April, 2024. The application is brought Under Order 53 Rule3(1) of Civil Procedure Rules 2010.It seeks the following orders:

    1. That an order of Certiorari, to remove and bring to this High Court for the purposes of quashing, the decision by the Respondent dated 3rd November, 2023 directing the Applicant to pay a claim within thirty (30) days of the decision.

    2. That an order of prohibition directed against the Respondent and the interested party, prohibiting them through their servants and/or agents or directly from in any way enforcing the decision dated 3rd November, 2023.

3. That costs be provided for.

2. The application is supported by a statutory statement dated 18th March, 2024 and a Verifying Affidavit by Franklin Nyaga sworn on 18th March, 2024.

3. It is the Applicant's case that the interested party approached Infiniti Aviation of South Africa through the interested party's brokers (LFV) in2014 and purchased Aviation Hull and Liability Insurance and the contracting and policy documentations were handled between the interested party and Infiniti.

4. Infiniti then approached Old Mutual General Insurance (then UAP) through the interested party's brokers (LFV) to participate in the risk which we accepted a share of 12.5% for Aviation Hull and 1% for Liability resulting to a facultative reinsurance business.

5. This resulted in a facultative obligatory reinsurance facility which was then filed with the Respondent in 2015 for its review and approval. The same was later reviewed and approved.

6. According to them the risk assessment, underwriting and claims control was retained by Infiniti Insurance as evidenced by the wordings of the Claims Control and the Cut through clauses in the acceptance documents received and signed off by the interested party on 25th October 2021.

7. On 4th August 2022, the Helicopter 2012 Eurocopter AS350 B3E 5Y-CCP (hereafter the Helicopter) was involved in an accident in Turkana.

8. The accident was reported to the lead insurer in South Africa, Infiniti and the Interested Party's agent's (Stefan Potgienter) proceeded to notify the Applicant of the accident on 4th August 2022.

9. It is contended that the lead re insurer advised the Applicant that the claim was not admissible and that the Applicant should decline the same which the Applicant proceeded to decline the claim on inter-alia two grounds: -

    a. Material non-disclosure in breach of the insurance principle of uberimmae fidei to wit; that it regularly and as a matter of business practice flew scenic flights below 500 ft AGL and fairly regularly, at less than 100ft AOL;

    b. The interested party flew its aircraft below 500 feet contrary to Section I0(l)(e) of the Civil Aviation (Rules of Air) Regulations,2018 (Rules of Air).

10. The interested party approached the Respondent who via a letter dated 14th March, 2023 informed the Applicant that it had received a request to investigate and determine a complaint from. Tropic Air Limited pursuant to Section 204A of the Insurance Act. On 20th March, 2023 vide a letter, the Applicant responded explaining the reasons for declining to pay the Claim.

11. The Respondent responded to the letter via an email dated 22nd March, 2023 indicating that the Applicant should avail evidence of the primary insurer/insurers including insurers including how Infiniti, Nature, MUA, and UAP participated in the risk.

12. It is averred that the Applicant responded to this email on 4th April, 2023 explaining and the Respondent responded on the same date requesting requested the Applicant to avail the approvals which the Applicant did on the same day.

13. It is its case that on 12th April, 2023 the Respondent invited the Applicant for a meeting during which meeting various issues were raised by the Respondent around the on boarding process, regulatory aspects and whether the claim was properly declined or not.

14. It is contended that it addressed the onboarding process vide email of 18th April, 2023.

15. It is averred that subsequent follow up meetings were held between the Respondent and Applicant on 2nd May, 2023 and 5th June, 2023.

16. It is the Applicant's case that they were never invited to a hearing on the issue of whether it was right in declining to pay the Claim thus violating their legitimate expectation.

17. According to it, the Respondent via a letter dated 3rdNovember, 2023, simply indicated that the Respondent wrote to KCM via a letter dated 18th July, 2023 and KCAA via a letter dated 29th September, 2023 has concluded that Tropic Air was compliant in operating her Helicopters in areas other than congested areas. The Respondent then proceeded to direct the Applicant to settle the Claim within 30 days.

18. It is the Applicant's case that Respondent discriminated and/or demonstrated bias against it failing to channel correspondences through its advocates and thus a breach of section 4(3)(e) - (g)and section 4(4) (a) - (d) of the Fair Administrative Actions Act as read together Article 27, 47 and 50of the constitution.

19. It is contended that the Respondent abdicated its statutory duty to determine the merit of the Complaint and instead wholly relied and/or placed disproportionate weight on the response by KCM without even according the Applicant an opportunity to be heard regarding KCM's response

20. It is the Applicant's case that Respondent decision was unreasonable as the Respondent: -

    i. Failed to consider the question as to whether the interested party could fly its hell-safaris flight (including the ill-fated flight) below 500ft AGL in complete contravention of Section 10(2) (e) of the Civil Aviation Regulation 2018 as read together with sub-section 2(g) of Section IV of the policy and without disclosing this material fact in complete breach of the principal of uberimmae fidae.

    ii. Proceeded to consider the place of regulations 57(1), 59(1) and 59(2) of Civil Aviation (Aerial work) Regulations, 2007 in the context of the claim and the declinature without according the Applicant an opportunity to be heard on this aspect

21. It is also that the Applicant's case that the procedure leading to the decision was marred with procedural impropriety as: -

    i. The Respondent instead of hearing the dispute contained in the complaint embarked on a totally different aspect being the question as to whether the Applicant had engaged in regulatory breaches then turning around and suddenly making a decision on the complaint itself.

    ii. The Respondent did not at any time accord the Respondent a real opportunity to be heard and to make representations in opposition to the Claim in breach of section 4(3)(6) of the Act of the Fair Administrative Actions Act

22. The Applicant canvassed its application by way of written submissions dated 28th May, 2024.

23. It is submitted that the Applicant is entitled to question the impugned decision dated 3rd November, 2023 notwithstanding existence of execution proceedings in Insolvency Cause No. E004 of 2024 and Civil Appeal No. E058 of 2024 which is an Appeal filed by the Interested Party questioning jurisdiction of the Insurance Appeal's tribunal to (i) extent time within which to file an Appeal (ii) Holding the Interested Party in Contempt.

24. It is further submitted that Section 204A(iii) of the Insurance Act states that any party dissatisfied with the decision of the Respondent may within thirty (30) days appeal to the tribunal, the tribunal is not

the appropriate forum to resolve the question of whether the decision dated 3rdNovember, 2023 is marred with procedural impropriety having been made in complete breach and/ or disregard of inter-alia Articles 47 & 50 of the Constitution as read together with Section 4 of the Fair Administrative Actions Act as the tribunal is not empowered to determine violation of constitutional rights.

25. It is contended that Subordinate courts and tribunals do not have jurisdiction to determine violation of constitutional rights unless that jurisdiction is clearly conferred by the enabling statute.

26. Reliance is placed in the case of Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) where the court held thus:

> " Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of the Constitution as read with Section 4(1) of the Environment and Land Act. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of the Constitution. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in William Odhiambo Ramogi & 3 others v Attorney General & 6others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, J) stated: "In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."
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> We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need- for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court"

27. According to the Applicant, Section 204A of the Insurance Act grants the Respondent powers to settle Claims. Both the Act and the Insurance Appeals Tribunal Rules, 2013 do not lay down the procedure to be followed while determining such claims.

28. The Applicant invokes Article 47(1) and 50 of the Constitution as read together with Section 4 of Fair Administrative Action Act.

29. Reliance is also placed on the case of Republic v Director of Public Prosecutions & 2 others; Realtime Company Limited & another (Interested Parties); Davetronic Company Ltd& another

(Exparte) Judicial Review Miscellaneous Application E190 of 2021) [2023] KEHC 228 (KLR) 0udicial Review) (26th January 2023) Judgment where the court pronounced itself on the Irrationality and unreasonableness in the decisions taken or act done, by an authority.

Respondent's case;

30. The Respondent opposes the Application through a Replying Affidavit sworn by Godfrey Kiptum dated 16th July, 2024.

31. The Respondent is a statutory regulatory body established under the Insurance Act Cap 487 Laws of Kenya (hereinafter referred to as the Act) with the mandate to supervise, regulate and promote the development of the insurance industry in Kenya objects and functions under Section 3A of the Act.

32. It is deponed that Section 204A of the Insurance Act, clothes it with power to settle disputes and then provides that parties that are dissatisfied with the Commissioner's determination of the dispute may appeal against the determination within thirty days.

33. It is its case that on 14th March 2023 it received a complaint from the Interested Party regarding a declined aviation claim for Eurocopter AS350BE registration SY CCP that was involved in an accident on 4th August 2022.

34. There was an exchange of various correspondences between the Applicant herein and the Respondent on various dates running from February 27th 2023 up to 31st May 2023 when the Respondent vide an email invited Applicant to a meeting scheduled for 5th June 2023 to discuss "Complaint against UAP/ Old Mutual in Re: Claim by Tropic Air Limited involving helicopter accident SYEurocopter AS350 B3E SY-CCP-Accident at Lake Logipi, Kenya on 4/08/2022."

35. The meeting took place and was attended by representatives from both the Applicant and the Interested Party at the Respondent's offices during which the Parties buttressed positions without any qualms whatsoever.

36. It is contended that the Applicant admitted vide its letter dated 9th June 2023 that it was engaging KCAA with regards to Civil Aviation Regulations on flight limitations on behalf of the parties.

37. It is the Respondent's case that vide letter dated 18th July 2023 it wrote to KCAA seeking an opinion as to whether the Interested Party was in breach of the Civil Aviation Regulations which letter was responded to vide letter dated 29thSeptember 2023 wherein KCAA provided an opinion in which they indicated that they had conducted a comprehensive evaluation of the Interested Party's documentations and it's finds were inter alia that it was:

> "satisfied that Tropic Air was compliant in operating its helicopters [. ....] the flight operation was compliant with the regulations governing the helicopter operations more so Regulations 57(1) and 59(1) and (2) Civil Aviation (Aerial work) Regulations, 2007..."

38. The Respondent having considered the facts and submissions of the Parties, through its letter dated3rd November 2023, delivered its detailed determination of the dispute and concluded as follows: "In view of the determination by KCAA that Tropic Air was within the rules of the aforesaid flight, you are directed to settle the claim within 30 days of this letter and keep us posted."

39. It is posited that the Respondent having found the Applicant in breach of the Act issued a Notice to Show Cause letter dated 3rd November 2023where it directed the Applicant as follows: "You are required to show cause why regulatory action should not be taken against Old Mutual General

Insurance Company Limited for non-compliance with Section 20 of the Insurance Act. Your response should reach the Authority within fourteen (14) days from the date of this letter."

40. The Respondent contends that it followed due process with strict adherence to statute including Section 204A of the Insurance Act, the Fair Administration Actions Act, the Constitution and Rules of Natural Justice and rendering its decision after due consideration of all the documentary evidence and submissions made by the Applicant and the 1st Interested Parties.

41. It is averred that being dissatisfied with the Commissioner's determination of the dispute between themselves and the Interested Party, the Applicant appealed to the Insurance Appeals Tribunal in Memorandum of Appeal filed on 5th December 2023 which appeal was accompanied with a Notice of Motion Application filed under Certificate of Urgency dated 5th December 2023 seeking inter alia for stay of execution of the Respondent's decision and also seeking an extension of time to file the appeal.

42. The matter progressed to hearing of the Respondent's Preliminary Objections on grounds that the appeal was time barred when Applicant opted to withdraw its Memorandum of Appeal and Notice of Motion Application on 18th March 2024 thus forfeiting their right to appeal. The withdrawal was upheld by the Tribunal when the parties appeared before it on 22nd April 2023.

43. It is the Respondent's case that the Applicant offends the statutory provisions of the legal principles of exhaustion of alternative dispute resolution mechanisms as provided for under Section 9(2) of the Fair Administrative Action Act it has not exhausted the remedies available under the Insurance Act under Section 173 and204A which provides that:

> " A party that is dissatisfied with the determination of the dispute by the Commissioner may within thirty days appeal the determination to the Tribunal."

44. It is contended that the Applicant's allegations that it was irrational for the Respondent to join the issue of the declinature of the claim and the issue of regulatory breaches is grossly untrue.

45. The Respondent filed written submissions dated 23rd December, 2024.

46. It is submitted that this honorable Court lacks the jurisdiction to hear and determine the instant suit as by dint of Section 204A of the Insurance Act Cap 487 Laws of Kenya avail the avenue to the Applicant to its grievances to the Commissioner of Insurance.

47. The Respondent invokes Section 170(1) of the Insurance Act provides as follows: -

    1. On the hearing of an appeal the Tribunal shall have all the powers of a Resident Magistrate's Court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.

    2. Where the Tribunal considers it desirable for the purpose of avoiding expense or delay or any other special reason so to do, it may receive evidence by affidavit and administer interrogatories and require the person to whom interrogatories are administered to make a full and true reply to the interrogatories within the time specified by the Tribunal.

    3. In its determination of any matter the Tribunal may take into consideration any evidence which it considers relevant to the subject of an appeal before it, notwithstanding that such evidence would not otherwise be admissible under the law relating to evidence.

4. The Tribunal shall have power to award the costs of any proceedings before it and to direct that costs shall be taxed in accordance with any scale prescribed.

5. All summonses, notices or other documents issued under the hand of the chairperson of the Tribunal shall be deemed to be issued by the Tribunal.

48. Reliance is placed in the case of William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR where the Court held as follows: -

> " The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts."

49. It is submitted that legal principles of exhaustion of alternative dispute resolution mechanisms as provided for under Section 9(2) of the Fair Administrative Action Act which provides thus:

> " The High Court or a Subordinate Court under subsection (1) shall not review an administrative action or decision under this act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted."

50. It is its case that the procedure employed by the Respondent in reaching the impugned decision was proper as per Section 204A of the Insurance Act which grants the Respondent powers to resolve disputes which process as contemplated is quasi-judicial in nature.

51. In the case of Selvarajan v Race Relations Board [1976] 1 ALL ER 12 at 19 quoted in Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR where Lord Denning held:

> " ...in all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it.
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> The investigating body is however the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only"

52. The Respondent submits that it followed due process and steps as is prescribed in the Insurance Act, took into consideration submissions of all the Parties 2023 the Fair Administrative Action Act, the Constitution of Kenya and observed the rules of natural justice in delivering its decision dated 3rd November.

53. It is further submitted that the instant Application does not meet the test to merit grant of the orders sought as was set out in Pastoli -vs- Kabale District Local Government Council & Others (2008) 2EA 300 and Bato Star Fishing Limited -vs- Minister of Environmental Affairs and Others (2004) ZACC 15; 2004

(4) SA 490 CC at 512 paragraph 44, O'Reagan approved the reasonableness test which was stated as follows by Lord Cook in R-vs- Chief Constable of Sussex, Exparte International Trader's Ferry Limited (1995) 1ALL ER 129 at 157: -

> " The simple test used throughout was whether the decision in question was one which reasonable authority could reach. The converse was described by Lord Diplock as "...a conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt. These unexaggerated criteria give the administrator ample and rightful rein consistently with the constitutional separation of powers...whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him."

54. The Respondent thus prays that the Notice of Motion Application dated 3rd April, 2024 should be dismissed with costs.

Interested party's case;

55. The Interested party opposes the Application through a Replying Affidavit by James Robert sworn on 8th May, 2024 and written submissions dated 9th July, 2024.

56. It is contended that the application before this honorable court is incompetent and that this court has no jurisdiction to hear the same on the following grounds:

i. There is material non-compliance with the constitutive instruments relied upon by the Exparte Applicant;

ii. There is material non-disclosure of material facts at the Exparte stage;

iii. There is no jurisdiction in the proceedings herein to supervise, countermand, set aside or otherwise contradict the orders issued in other concurrent divisions of the High Court;

iv. The proceedings are an appeal against decisions of other tribunals and courts of concurrent jurisdiction which is impermissible in law;

v. Judicial review is not the proper jurisdiction to determine the subsisting dispute between the Exparte Applicant and its rival/contestant, Infinity Insurance of South Africa, as to who is the "insurer" or the "re-insurer" of the ill-fated helicopter that is the subject matter of the dispute herein;

vi. Because the Exparte Applicant and Infinity Insurance of South Africa dispute their respective capacities ["insurer" or "re-insurer"] and persist in that dispute, the Exparte Applicant is not a bona #ide party with legal capacity for purposes of judicial review proceedings because there are no reliefs that can be issued to a party whose status is indeterminate

vii. Because the status of the exparte Applicant and Infinity Insurance of South Africa has yet to be determined in a separate but binding dispute resolution mechanism the both the Exparte Applicant and Infinity Insurance of South Africa have mutually determined agreed to, the Interested Party (and we suspect the Respondent also) do not know what case they are to meet

(whether the judicial review proceedings have been brought by an "insurer" or a "re-insurer") because the Interested Party would answer and adopt a different legal stance depending on whether the proceedings have been brought by an insurer or a re-insurer under the applicable contractual documents which have been produced by the Exparte Applicant;

viii. Because the status and competence of the Exparte Applicant and Infinity Insurance of South Africa are yet to be determined, the Interested Party does not know the defenses/reliefs/ options it could seek or deploy against either of the parties if their status was admitted or determined, and this uncertainty is prejudicial to the rights of the Interested Party and offends the Interested Party's constitutional rights to a fair hearing;

ix. Because both the Exparte Applicant and Infinity Insurance of South Africa have declared in express written terms that there is no legal/contractual nexus between the Interested party the Exparte Applicant or Infinity Insurance of South Africa who both assert that they are re-insurers, neither the Exparte Applicant nor Infinity Insurance of South Africa have locus to initiate the judicial review proceedings herein;

x. The Judicial Review proceedings herein are premature and are in any event otiose unless and until the Exparte Applicant and Infinity Insurance of South Africa first resolve their personal dispute as to their respective status before engaging other parties in judicial disputes; and

xi. There are pending proceedings before other courts of equivalent and concurrent jurisdiction.

57. According to the interested party, the Applicant has committed perjury as it is prohibited by law, to purport to procure an insurance policy for a Kenyan operation from a foreign underwriter. There is an express statutory prohibition both under the mother legislation, the Insurance Act, and the legislation dealing with aviation, to wit, the Civil Aviation (Insurance) Regulations.

58. It is the interested party's case that the Applicant's case is based on an admitted illegality, therefore the same is untenable, otiose, and the same should be struck out.

59. It is posited that the Applicant issued a certificate of insurance but refused to release the insurance policy to the Interested Party because it has an unrelated dispute/contest with its reinsurer, Infinity Insurance Company of South Africa which is a dispute/contest that does not relate to the Interested Party.

60. It is its case that the Applicant has filed Appeal No. 10 of 2023 – Old Mutual Insurance Kenya Limited vs Insurance Regulatory Authority and Tropic Air Limited before the Insurance Appeals Tribunal wherein it obtained Exparte orders and subsequently procured contempt of court orders against the Interested Party leading to the conviction of the Interested Party, notwithstanding the Interested Party's objections at the Insurance Appeals Tribunal that the Applicant had lodged its appeal out of time and in violation of Section 173(1) of the Insurance Act and, therefore, that the decision of the Commissioner of Insurance could not now be contested.

61. The conviction and sentencing of the Interested Party for contempt of court, was appealed in the High Court of Kenya in two appeals; High Court Civil Appeal No. E047 and High Court Civil Appeal No. E058 of2024 – Tropic Air Limited vs Insurance Regulatory Authority & Old Mutual Insurance Kenya Limited. The High Court stayed further proceedings before the Insurance Appeals Tribunal pending the determination of High Court Civil Appeal No. E47 of 2024.

62. There is also another matter in court Insolvency Cause No. E004 of 2024 – Tropic Air Limited vs Old Mutual General Insurance Kenya Limited in which the Applicant herein obtained stay orders.

63. It is argued that this application is thus premature and in breach of the doctrine of exhaustion of remedies because the dispute resolution mechanism cannot be short circuited by issuing a statutory demand under the Insolvency Act as is provided for under Section 9(4) of the Fair Administrative Action Act and have also not sought exemption as is provided under S.9(4).

64. Reliance is placed in Petition (Application) No. 4 of 2021 United Millers Limited vs Kenya Bureau of Standards & 5 Others in which, the Supreme Court gave the High Court decision a ringing endorsement:

> "(26) We also take judicial notice that the superior courts' findings on jurisdiction is in harmony with our finding in Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others; SC Petition No 3 of2016, [2019] eKLR, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the constitution and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance."

65. The interested party invokes section 173(1) of the Insurance Act which obligates parties dissatisfied with any decision of the Commissioner of Insurance to appeal against such a decision within one (1) month of the decision, it follows that if no exemption is sought within this time of one (1) month, an exemption can neither be sought nor granted on pure jurisdictional interpretation.

66. They invoke the doctrine of constitutional avoidance and rely on the case of Mokua v Nyasani & 4 Others, Petition No. 001 of 2024 and Waatari & 11 Others v Registered Trustees of Teleposta Pension Scheme, Civil Appeal No. 390 of 2019, approved the doctrine and pronounced as follows:

> "29. ...This brings into focus the doctrine of constitutional avoidance, which is defined as a preference of deciding a case on any other basis other than one, which involves a constitutional issue being resolved. (See S. Woolman & M Bishop, Constitutional Law of South Africa (2013) 3-21). The doctrine of constitutional avoidance was forti ed in Sports and Recreation Commission v Sagittarius Wrestling Club and Anor 2001 (2) ZLR 501 (S) in which Ebrahim JA said the following:
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> "... courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the declaration of rights."
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> 30. Courts are generally loathed to determine a constitutional issue in the face of alternative remedies. Courts would rather skirt and avoid the constitutional issue and resort to the available alternative remedies. (See the Constitutional Court Zimbabwe in Chawira & Ors v Minister of Justice Legal and Parliamentary Affairs & Ors CCZ 3/17). In Ashwander v Tennessee Valley

Authority, 297 U.S. 288, 347 [1936] the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of.

31. We reject the appellants' attempt to invoke the doctrine of Legitimate Expectation in a contract dispute, and proceed to lay it down as a general principle that where it is possible to decide any case, criminal or civil, without reaching a constitutional issue, that is the course which should be followed."

67. It is submitted that this court has no jurisdiction or discretion to extend time for the applicant as is provided for under section 173 of the Insurance Act. They place reliance in the case of Kibutha vs Kibutha Civil Appeal No. 54 of 1985 where the court stated as follows:

> " Can the inherent jurisdiction of the court under s97 of the Civil Procedure Act be invoked so as to override the rules to which I have just referred" I do not think so. The inherent jurisdiction of the court was considered in the case of Ahmed Hassam Mulji v Shirinbai Jadavji [1963] EA 217). In his judgment, Sir Ralph Windham, said (ibid at p 219):
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> "That being so, the applicant cannot invoke this court's inherent jurisdiction as preserved by s151 of the Indian Civil Procedure Code, since another remedy was available to her: vide (Mulla's Civil Procedure Code (12th Edn) Vol 1, p 660. In Ajodhya v Mussamat Phul Kuer ([1922], AIR pat 479), a case where, similarly, no application under O 9, r 13 had been filed in time, it was held that:
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> 'Moreover, a definite period of limitation has been prescribed by art 164 of Schedule 1 of the Limitation Act for an application to set aside an Exparte decree and the court would not be entitled, by purporting to act under s 151 in effect to extend that period.'
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> A definite period has been laid down in the Civil Procedure (Revised) Rules after which suits maybe dismissed for want of prosecution and I do not think that I would be entitled by purporting to act under S 97, in effect to shorten that period."

68. It is the interested party's case that the application before this honorable court is for purposes of avoiding payment of a straightforward insurance claim and the same should be dismissed with costs borne by the Applicant.

Analysis and determination;

69. Upon perusing the pleadings, the supporting documents, the rival submissions and authorities cited by counsel the following are the issues for determination;

    i. Whether this court has jurisdiction.

    ii. Whether or not the applicant has made out the case for the grant of the order sought.

    iii. Who shall bear the costs.

Whether this court has jurisdiction;

70. In the case of Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] eKLR, where the Court held that jurisdiction is a fundamental prerequisite, and any proceedings conducted without it are null and void.

71. In order to determine whether or not this court has jurisdiction, the Applicant submitted that it is entitled to question the impugned decision dated 3rdNovember, 2023 notwithstanding existence of execution proceedings in Insolvency Cause No. E004 of 2024 and Civil Appeal No. E058 of 2024 which is an Appeal filed by the Interested Party questioning jurisdiction of the Insurance Appeal's tribunal to (i) extent time within which to file an Appeal (ii) Holding the Interested Party in Contempt is misplaced.

72. The Applicant admits that Section 204A(iii) of the Insurance Act states that any party dissatisfied with the decision of the Respondent may within thirty (30) days appeal to the tribunal, the tribunal is not the appropriate forum to resolve the question of whether the decision dated 3rdNovember, 2023 is marred with procedural impropriety having been made in complete breach and/ or disregard of inter-alia Articles 47 & 50 of the Constitution as read together with Section 4 of the Fair Administrative Actions Act as the tribunal is not empowered to determine violation of constitutional rights.

73. This court is in agreement with the holding in the case of Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) where the court held thus:

> " Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of the Constitution as read with Section 4(1) of the Environment and Land Act. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of the Constitution. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in William Odhiambo Ramogi & 3 others v Attorney General & 6others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, J) stated: "In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."
>
> We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need- for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court".

74. This court is persuaded that there are peculiar circumstances in this suit that call for consideration in the existence of Appeal No. 10 of 2023 - Old Mutual Insurance Kenya Limited vs Insurance Regulatory

Authority and Tropic Air Limited before the Insurance Appeals Tribunal. The Applicant herein obtained exparte orders and subsequently procured contempt of court orders against the Interested Party. There is High Court Civil Appeal No. E047 and High Court Civil Appeal No. E058 of 2024 - Tropic Air Limited vs Insurance Regulatory Authority & Old Mutual Insurance Kenya Limited.

75. Further to this, the court notes that The High Court stayed further proceedings before the Insurance Appeals Tribunal pending the determination of High Court Civil Appeal No. E47 of 2024. The decision of the Insurance Appeals Tribunal precipitated proceedings under the Insolvency Act being Insolvency Cause No. E004 of 2024 - Tropic Air Limited vs Old Mutual General Insurance Kenya Limited in which the Applicant herein obtained stay orders.

76. The court in the instant suit is satisfied that the foregoing clearly fits into what would invite a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress and it is clear that the above cases present special and specific circumstances that have an impact and sway on the court in determining the approach that the Applicant should have adopted.

77. This invites the court to determine whether or not the Applicant is bound by the doctrine of exhaustion. In the case of Council of County Governors v Attorney General & 12 others [2018] eKLR where it was held that applying and exhausting alternative dispute resolution mechanisms, is a condition precedent to filing of court action by either of the units of government. Only after applying and exhausting the available dispute resolution mechanisms should parties resort to judicial intervention.

78. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved.

79. In the case Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 Others [2014] eKLR it was held that: the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition.

80. The doctrine is at times referred to as the Constitutional-Avoidance Rule. Black's Law Dictionary, 10th Edition at page 377 defines it as:

> " The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion".

81. In S v Mhlungu, [1995] (3) SA 867 (CC) a South African case, Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.

82. In the case of Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others [2015] eKLR the Court of Appeal stated that: -

> " It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be of last resort and not the first port of call the moment a storm brew... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts...These accords with

Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

83. In Mohamed Ali Baadi & Others v The Attorney General & 11 others it was held that while our jurisprudential policy is to encourage parties to exhaust and honor alternative forums of dispute resolution where they are provided for by statute the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of Dawda K. Jawara vs Gambia, it was held that:

> " A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

84. The principle running through the above cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it is necessary for the Court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it.

85. In the case Mark Ndumia Ndungu -Versus- Nairobi Bottlers Limited & Another (2018) eKLR (supra) the High court cited with approval the case of Dawda K Jawara v Gambia 147/95-149/96 on availability of effective alternative remedies, where it was held that:

> " A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint... The government's assertion of non-exhaustion of local remedies will therefore be looked at in this light... a remedy is considered available only if the applicant can make use of it in the circumstance of his case." (emphasis added)

86. Hon. Justice Mativo in Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR stated as follows:

> " The uncompromising manner in which courts have consistently enforced the sub judice rule was best explained in Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga,[13] which held that it is not the form in which the suit is framed that determines whether it is sub judice, rather it is the substance of the suit (emphasis ours). The court went further and stated that in determining whether or not sub judice applies, it is the substance of the claim that ought to be looked at rather than the prayers sought."

87. It is my finding that Appeal No. 10 of 2023 - Old Mutual Insurance Kenya Limited vs Insurance Regulatory Authority and Tropic Air Limited, High Court Civil Appeal No. E047 and High Court Civil Appeal No. E058 of 2024 - Tropic Air Limited vs Insurance Regulatory Authority & Old Mutual Insurance Kenya Limited and Insolvency Cause No. E004 of 2024 - Tropic Air Limited vs Old Mutual General Insurance Kenya Limited are substantially related to the suit before this court.

88. Issuing the orders, sought will no doubt have an impact these suits or have an impact on the subsisting or pending activities in the said files thereby occasioning an embarrassment to the court. In any event the Applicant has not demonstrated why it did not seek redress within these suits.

89. The applicant has not exhausted the redress avenues available within the above legal avenues that are at its disposal. In any event, the applicant has not made an application to be exempted from the doctrine of exhaustion.

90. Having found as I have above, this court has to down its tool in line with the principles as settled in the Supreme Court Case of Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019/ eKLR, /36) wherein it was observed that,

> " Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non judice and amounts to a millity because, as Nyarangi, JA famously said in the locus classicus, Owners of the Motor Vessel
>
> "Lillian S" Caltex Oil, (Kenya) Ltd [1989) KLR 1, "jurisdiction is everything. Without it, a court has no power to make one more step"

Disposition;

91. The applicant has not made out a case fit for the grant of the orders within the principles of judicial review.

Order;

The suit is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL 2025

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J. CHIGITI (SC)

JUDGE