



**Muange & another v Kiberenge & another (Suing as Legal Representative of the Estate of Frankline Bora Malenge - (Deceased) & 2 others (Petition 1 of 2020) [2024] KEHC 10692 (KLR) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10692 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
PETITION 1 OF 2020  
FROO OLEL, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**ELIZABETH MUANGE ..... 1<sup>ST</sup> PETITIONER**

**THOMAS RATEMO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ELIZABETH MAZIDO KIBERENGE & ANOTHER (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF FRANKLINE BORA MALENGE - (DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTLINE ASSURANCE COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**LAW COURTS ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Vide a Petition dated 12<sup>th</sup> February 2020, the applicant did move this court seeking orders that;
  - a. A declaration that the Petitioner’s right to fair hearing and fair administrative action were infringed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
  - b. A declaration that the proceedings in the Chief Magistrate’s Court at Mavoko Civil case No. 57 of 2018 be set aside and a hearing denovo ordered.
  - c. Petitioners be awarded cost of these proceedings.
2. The Petitioners averred that they were the defendants in Mavoko Chief Magistrate’s Court Civil Case No. 57 of 2018 and were represented by the firm of Kairu McCourt and Co Advocates, appointed by the 2<sup>nd</sup> Respondent in fulfillment of the subrogation principle, they having insured their motor vehicle registration Number KCE 702W, ( herein after referred to as the 1<sup>st</sup> suit motor vehicle) with them



and which motor vehicle had been involved in a road traffic accident with motor vehicle registration number KCC 760D,( hereinafter referred to as the 2<sup>nd</sup> suit motor vehicle) and resulted in the death of one Franklin Bora Malenge, who was a passenger in the 1<sup>st</sup> suit motor vehicle .

3. The petitioner's averred that upon receiving summons in September, 2018, they forwarded the same to the 2<sup>nd</sup> Respondent to protect their interest. The 2<sup>nd</sup> Respondent thereafter never informed them about the case progress nor did they inform them of any hearing date, save for a letter dated 22<sup>nd</sup> August, 2019 which informed them that given the nature of the claim, it was likely that judgement would be entered in excess of Kshs.3,000,000/= and there was need for them to appoint an advocate to protect their interest. Subsequently on 16<sup>th</sup> September 2019, they received a second letter dated 6<sup>th</sup> September 2019 from the 2<sup>nd</sup> respondent herein, informing them that judgement had been entered in favour of the 1<sup>st</sup> Respondent for a sum of Kshs.9,936,675/= plus cost and interest. The 2<sup>nd</sup> Respondent would pay Kshs.3,000,000/= which was the maximum amount payable under Insurance (Motor vehicle Third party Risks) Act, Cap 405 and they expected the Petitioners to pay the balance of the decretal amount being Kshs.6,736,675/=.
4. Shocked by this development, the Petitioner's instructed counsel to peruse the court file and they did discover that the firm of Kairu McCourt Advocates had entered appearance on 15<sup>th</sup> October, 2018 and filed their statement of defence on the same day, the said firm did not issue third party notice to the owner of the 2<sup>nd</sup> suit motor vehicle, also insured by the 2<sup>nd</sup> Respondent. Further the said law firm had failed to inform the Petitioner's about the hearing date of 2<sup>nd</sup> July, 2019 to enable them attend and defend this claim and by these several omissions exposed them to serious prejudice loss and damage. After noting the lacuna that had occurred, the petitioners did move court and sought to set aside the said award/decreed but their application dated 26<sup>th</sup> September, 2019 was dismissed with costs and they were thereby condemned to pay an amount of Kshs.6,736,675/=, without being given a chance to be heard to their loss and detriment.
5. The Petitioner therefore urges this court to find that their right to fair administrator action as enshrined under Article 47 of *the constitution* and as further protected under *Fair Administrative Action Act* had been infringed and they were unfairly being condemned to pay a colossal amount of money and urges the court to find that this petition had merit and be pleased to grant the orders sought.

#### **B.The 1st Respondent's Response.**

6. The 1<sup>st</sup> Respondent, who was the Plaintiff in the primary suit, Mavoko CMCC No. 57 of 2018, confirmed that judgement had been entered in their favour following full hearing of the said suit which proceeded in the presence of counsel of all parties, including the Petitioner's counsel on record (Kairu McCourt Advocates) and if dissatisfied by the trial court ruling, where the court refused to set aside the said judgment, they should have appealed to the High Court as against the said ruling. Secondly, on the petitioner's, complaint that no 3<sup>rd</sup> party proceedings were instituted, the same was still a lame excuse as they were represented during the primary proceedings and no evidence to had been led/brought to demonstrate that if the said 3<sup>rd</sup> party proceedings were allowed, then a different outcome would have been reached.
7. It was also to be noted from the petitioners pleading, and annexure's that the 2<sup>nd</sup> Respondent had informed the Petitioners of the maximum limit which the insurance would cover, the likely outcome of the case and what was expected from him and it was therefore too late to refuse to take up his obligation under the decree. This petition as filed therefore lacked merit and was being used by the Petitioners to block and delay payment of the balance due from the decree. The 1<sup>st</sup> Respondent therefore urged the court to dismiss this petition with costs.



### **C.The 2nd Respondents Response**

8. The 2<sup>nd</sup> Respondent, too did oppose this petition by filing a comprehensive Replying Affidavit sworn by one Pauline Waruhiu, the head of legal claims. She averred that in the year 2014, the 1<sup>st</sup> Petitioner approached the 2<sup>nd</sup> Respondent and requested to be given a Third Party only (TPO) policy insurance for the 1<sup>st</sup> suit motor vehicle and upon evaluation of the proposal form and consideration of payment of premium, the 2<sup>nd</sup> Respondent agreed to indemnify the 1<sup>st</sup> Petitioner for a period of seven (7) months commencing 24<sup>th</sup> February, 2017 to 23<sup>rd</sup> September, 2017 as provided for under Section 5 (b) of the Insurance (Motor Vehicle Third Party Risks) Act.
9. Sometimes on 5<sup>th</sup> April 2017, the 1<sup>st</sup> Petitioner reported to the 2<sup>nd</sup> Respondent, that the insured 1<sup>st</sup> suit motor vehicle had been involved in an accident along Nairobi-Kitengela-Namanga road. Several passengers had been injured and one passenger (Franklin Bora Malenge) had died. The 2<sup>nd</sup> Respondent commissioned the company's investigator, who conducted investigations into the circumstance's surrounding the accident and the investigations had revealed that the Petitioner's driver was to blame for the accident as he was overtaking when it was not safe to do so and collided head-on with the 2<sup>nd</sup> suit motor vehicle. As a result of the said accident one passenger Franklin Bora Malenge died on the spot and the Petitioner's driver was charged with the offence of causing death by dangerous driving.
10. Subsequently, the 1<sup>st</sup> Respondent had filed Mavoko PMCC No. 57 of 2018 claiming compensation for the death of her husband, and upon being served with summons to enter appearance, the Petitioner's had forwarded the same to them (his insurer) to defend them under the doctrine of subrogation. They did instruct the firm of Kairu and McCourt Advocates to enter appearance and file an appropriate statement of defence. The said firm professionally reevaluated the matter and made the same conclusions that the petitioners would be held 100% liable for this accident and vide their letter dated 16<sup>th</sup> August 2019 advised the Petitioners that judgement was likely to exceed the sum of Kshs.3,000,000/= and thus there was need for them to appoint their own advocate to work alongside the said firm of Kairu & McCourt to secure their interest. Subsequently, judgment was delivered for a sum of Kshs.9,936,675/= and on 11<sup>th</sup> November 2019 they did paid their portion of Kshs.3,000,000/= pursuant to provisions of Section 5 (b) (iv) of the Insurance [Motor Vehicles Third Party] Act as statutorily required.
11. Further, there was no evidence that the 2<sup>nd</sup> suit motor vehicle had contributed to the said accident and thus there was no need to institute third party proceedings, as against them. The 2<sup>nd</sup> respondent reiterated that, facts had clearly established that it was the Petitioner's driver, who was 100% on the wrong as he was overtaking when it was not safe to do so and collided with the second suit motor vehicle, while not on its lawful left lane. Under the said circumstance, they were not conflicted, and urged the court to find that the petition as filed to be unmerited and be pleased to dismiss the same.
12. The 3<sup>rd</sup> Respondent, did not take part in these proceedings.

### **C. Parties Submissions**

#### **(i) The Petitioner's Submissions**

13. The Petitioners rehashed their averments giving background facts the basis of bringing this petition and posited that their right to fair hearing and fair administrative action had been infringed by the 2<sup>nd</sup> Respondent who failed and/or neglected to inform them of what was transpiring in court and had also failed to institute 3<sup>rd</sup> party proceedings against the owner of the 2<sup>nd</sup> suit motor vehicle, in order for the trial court to properly determine the issue of liability as between the two suit accident motor vehicles.



Reliance was placed in the case of Catherine Chepkemoi Mukenyang v Evanson Pkemei Lomaduny & Another [2022] eKLR where the court emphasized the point that a person whose interest and right are likely to be affected by administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken.

14. The 2<sup>nd</sup> Respondent, in their Replying Affidavit had admitted that they never involved them during the hearing of the primary matter and only wrote to them towards the tail end of the process asking them to pay excess insurance charges. They had therefore failed to give him an opportunity to advance their defence thus putting them in a prejudicial position. This omission had also infringed on their right to fair hearing as provided for under Article 50 of *the Constitution* of Kenya, which was a basic universal right in cases involving administrative acts or decisions affecting personal right. Reliance was placed of Ridge v Baldwin [1964] AC 40, Kenya Human Right Commission and Another v Non-Governmental Organization Co-ordination Bard and Another [2018] eKLR and Tinyefuze v Attorney General of Uganda [1997]UGCC3.
15. The Petitioner urging this court to find that this petition had merit and be pleased to grant the orders sought.

#### **(ii) The 1<sup>st</sup> Respondents Submissions**

16. The 1<sup>st</sup> Respondent faulted the petitioner's approach and stated the petitioner's had counsel representing their interest at all material times during the primary trial and it was not the court's duty to monitor and/or regulate how the said counsel choose to undertake his duty. The petitioners had been served with summons to enter appearance and the plaintiff willfully surrendered the legal process to his insurer under the principal of subrogation. There was also correspondence exchanged towards the end of the primary suit, which was enough proof to show that the petitioners were informed of the case progress and therefore, the facts as pleaded herein did not support the petitioner's contention, that their rights were violated. The 1<sup>st</sup> Respondent further stated that if the petitioners were aggrieved by the refusal of the trial magistrate to set aside the judgment entered and to begin the case denovo, the petitioners should have appealed against the said Ruling and not to file this petition. Reliance was placed on Nairobi HCC no 140 of 2008 Gideon Mose Onchwati versus Kenya Oil Co. and Nation Media group where Hon Lady Justice Aburili stated that "discretion of this court shall not be exercised to assist a party who seeks to frustrate the plaintiff's quest to accessing justice and revamping the fruits of his lawful judgment...."
17. The 1<sup>st</sup> Respondent therefore prayed that this petition be dismissed with costs.

#### **(iii) The 2<sup>nd</sup> Respondents Submissions**

18. The 2<sup>nd</sup> Respondent submitted that they fulfilled their obligation under the doctrine of subrogation, hired an Advocate for the petitioners who ably represented them in court and eventually paid part of the decretal sum of ksh.3,000,000/= pursuant to provision of Section 5(b) of the Insurance (Motor vehicle third party risks) Act Cap 405 Laws of Kenya. Reliance was placed in the case of Egypt Air Corporation v Suffish International Food Processors (U) Ltd & another [1999] I EA 69 & Dolk Limited v Ivesco Assurance Company Ltd & 5 others (2018) eKLR where the principle of subrogation & Insurer obligations was discussed.
19. The Petitioners having allowed the 2<sup>nd</sup> Respondent to step into their shoes and agreed to allow them to defence them in Mavoko Civil case no.57 of 2018, could not be heard/ to turn around and assert that they were not involved and/or were not consulted regarding action/steps taken to defend their interest in the primary suit. The petitioners, could therefore not claim that their actions in protecting



their interest, were unfair and/or their right to fair administrative action had been infringed. Further, the said right under Article 47 of *the constitution* was also not applicable to them as a private company, but to public administrative bodies with statutory powers to undertake certain public obligation and duties. Reliance was placed on *Judicial Service Commission vrs Mbalu Mutava* [2016] eKLR and *Dry Associates Limited v CMA & Another* [2012]eKLR when the Court of Appeal held that Article 50 of *the constitution*, applied to court's, impartial tribunal or a body established to resolve a dispute while Article 47 of *the constitution* on the other hand applied to administrative action generally. The petitioners could therefore not rely on Article 47 of *the constitution* as the proceeding of the primary court were not administrative in nature.

20. The 2<sup>nd</sup> Respondent also faulted the petitioners for failing to plead his case in a precise manner. They did not specify the rights, which had been violated or infringed, the manner of infringement and jurisdictional basis for seeking reliefs. It was also to be noted that the petitioners were basically aggrieved by the ruling delivered on 13<sup>th</sup> December 2017 refusing to set aside the judgment of the primary suit, and that being so, they could not turn a contractual relationship between them and the 2<sup>nd</sup> Respondent into a constitutional issue. It was trite law that where an alternative remedy could be obtained, constitutional relief could not be granted. Reliance as placed on *Ananta Karimi Njeru v Republic (no.1)1979 KLR 154*, *Mumo Matamo v Trusted Society of Human Rights Alliance* [2014] eKLR and *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* 2016 eKLR.
21. The facts as pleaded in the petition clearly revealed that the petitioner were dissatisfied with the manner in which the 2<sup>nd</sup> Respondent conducted an/or handled the primary suit at Mavoko CMCC no. 57 of 2018 and if that be the position, they had the option/recourse under Section 10 of Insurance (motor vehicle third party risks) Act Cap 405 Laws of Kenya to institute a declaration suit seeking various declarations and not to file a constitutional petition. They further urged the court to find that, it could not rewrite a contract signed by two willing parties and any dispute had to be resolved as provided for therein. Reliance was placed on *JNN (a minor) suing through next friend MNM vrs Naisula Holding Limited T/A N School* [2018]eKLR.
22. The 2<sup>nd</sup> Respondent reiterated that they had honoured their obligation under the said contract and had paid the 1<sup>st</sup> Respondent as sum of ksh.3,00,000/= which was the maximum limit they were obligated to pay and thus could not be held liable for violating the petitioner's rights.
23. The 2<sup>nd</sup> Respondent prayed that the petition be demised with costs.

#### **D. Analysis & Determination**

24. I have considered all the pleadings filed herein, the party's submission's, and the various legal authorities relied upon and find that this petition as filed has to fail for the simple reason, the right to be heard (*audi alteram partem*) is not absolute, it can be waived by a party and the waiver may be express or by conduct. The petitioner's expressly allowed the 2<sup>nd</sup> respondent to take over the conduct of the primary suit on their behalf under the principle of subrogation and a counsel was appointed to act on his behalf. Investigations as to circumstances of how the accident occurred revealed that the petitioner's driver was on the wrong and ultimately judgment was entered as against them. Under the circumstances, it is clear that the petitioners acquiesced to being represented and cannot then be allowed have one foot in and one foot out as regards the said representation.
25. Secondly the petitioner, having opted to seek to set aside the judgment in the primary matter, and failed should have exercised their right of Appeal and filed an appeal against the ruling of the trial magistrates dated 13<sup>th</sup> December 2017 to the High court and not to seek to snooker the primary proceedings and



valid judgement of the trial court through this petition. The 3<sup>rd</sup> respondent too as a neutral arbiter had no role to play and direct the petitioners counsel as to how they were to conduct their defence. One the evidence had been lead and the case closed, the trial Magistrate simply executed her statutory and constitutional mandate to so determine the dispute and therefore was being wrongly dragged into this dispute.

26. Finally, what is raised herein as failure to be informed of the case progress are matters of contractual obligation as guided and provided for under the Motor vehicle insurance policy, which was annexed in the 2<sup>nd</sup> respondents replying affidavit and any party aggrieved by the others inaction, and/or omission had to sue the party in default at the commercial court for enforcement of their contractual obligations willingly entered into between the two parties.
27. The principle of constitutional avoidance would also then kick in as it is trite law that where an alternative remedy is available in law, a constitutional relief should not be sought because such action would be an abuse of the court process. See *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & Another* [2016] eKLR, where the court did state that

“The principle holds that where it is possible to decide a case without reaching a constitutional issue, that should be done. In the case of *communications commission of Kenya & 5 others v Royal Media services & 5 others*, Petition No 14, 14A, B & C of 2014, the supreme court delivered itself thus on the said issue;-

(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the constitutional court, Kentridge AJ, articulated the principle of avoidance in his majority judgment as follows {at paragraph 59}:

“ I would lay it 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.”

(257) Similarly the U.S Supreme court has 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 ( *Ashwander v Tennessee valley Authority*, 279 U.S 288, 347 [1936].”

## **E. Disposition**

28. The upshot is that the petition as filed lacks merit and the same is dismissed, with no orders as to costs.
29. It is so ordered.

**JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF SEPTEMBER 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 16TH DAY OF SEPTEMBER, 2024.**

In the presence of:



No Appearance for Applicant

No Appearance for 1<sup>st</sup> Respondent

No Appearance for 2<sup>nd</sup> Respondent

Susan/Sam Court Assistant

