



**Maingi v Insurance Regulatory Authority & 3 others; Nguli & another (Interested Parties)
(Constitutional Petition 18 of 2022) [2023] KEHC 20819 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION 18 OF 2022**

**MW MUIGAI, J
JULY 13, 2023**

BETWEEN

SAMUEL MWANGI MAINGI PETITIONER

AND

INSURANCE REGULATORY AUTHORITY 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

BLUE SHIELD INSURANCE COMPANY 3RD RESPONDENT

ANDREW KYALO MWANZIA 4TH RESPONDENT

AND

GEORGE MUSILI NGULI INTERESTED PARTY

SYOMBUA MUSILI INTERESTED PARTY

JUDGMENT

1. The application dated 28th September, 2022 and filed on 29th September, 2022 was brought under Order 40 Rule 1 sub-rule (a), Order 51 of the Civil Procedure Rules sections 3A & 3B of the [Civil Procedure Act](#) & Articles 40 (2 & 3); 46; 47 (1) and 159 of [the Constitution](#) of Kenya 2010 in which the Petitioner/ Applicant sought orders THAT:
 - a. A stay of execution to the decree dated 25th June, 2021 emanating from Machakos CMCC NO. 223 of 2012 and all consequential orders emanating therefrom including notice to show cause why the Applicant should not be committed to Civil Jail, Pending the hearing and determination of the present application
 - b. This Court declares that the proceedings in Machakos CMCC 223 of 2012 a nullity.



- c. The Court issues a temporary injunction restraining the interested parties herein from themselves, their agents, nominees and or servants from executing the decree dated 25th June,2021 until hearing and determination of this application and petition
 - d. The Court issues permanent injunction restraining the interested parties herein from themselves, their agents, nominees and or servants from executing the decree dated 25th June,2021 until hearing and determination of this application and petition.
 - e. Cost be provided for.
2. The Application was/is premised on the grounds that: the interested party is in the process of executing a decree dated 25th June, 2021 against the Petitioner/ Applicant by way of committal to Civil Jail on 5th October,2022 and that the Petitioner/ Applicant has an arguable petition with high chances of success and therefore meets the threshold to be granted an injunction ex-parte and interparties, hearing. Further that the Petitioner/ Applicant is likely to suffer double jeopardy if he is committed to Civil Jail on account of a cause of action that he lawfully insured against and ought to be indemnified as per Insurance Law.

Supporting Affidavit

3. As per the affidavit dated 27th September,2022 and filed on 29th September,2022 sworn by Samuel Mwangi Maingi. In the said affidavit he deposed that he was sued by the 3rd and 4th Respondent in Machakos CMCC 223 of 2012 by virtue of being Director of Saris Hardware Ltd, the registered owner of motor vehicle registration number KAY 229ZC which was involved in fatal road traffic accident at Athi River Mombasa- Nairobi Road on 25th October,2009 resulting to the death of the 3rd and 4th Respondents' son (annexed and marked copy of CR12).
4. He lamented that the interested party is in the process of executing a decree against him by/ of committal to civil jail on 5th October,2022 (annexed and marked copy of the decree); he deposed further that he has an arguable petition with high chances of success and therefore meets the threshold to be granted an injunction ex-parte and/or interpartes. He deposed that he is likely to suffer double jeopardy if he is committed to Civil Jail on an account of a cause of action that he lawfully insured against and ought to be indemnified as per Insurance law and that at the time of the Accident the motor vehicle was insured by Blue Shield Insurance Co. Ltd vide Policy Number 087/008297/07/06/B89 (COMP) (annexed and marked copy of police abstract);
5. It was his case that he informed his then insurer Blue Shield Insurance Company Ltd and they appointed the firm of Ann Thoronjo & Company Advocates to defend the suit (annexed and marked copy of memorandum of appearance); he deposed that Blue shield Insurance Company was then placed under Moratorium (annexed and marked copy of public notice and a newspaper advert notifying the country of a moratorium on the 3rd Respondent): disposing that the court proceeded to enter interlocutory judgment against him while he was unaware and the suit proceeded to formal proof when he was still in the dark and that the firm of Anne Thoronjo never served him with their application to cease acting as he was always under the impression that they were still on record as his advocates as per his Insurer's instructions to them.
6. The Petitioner lamented that his Advocates on record have advised him that there are two conflicting affidavits sworn by Andrew Kyalo Mwanzia a process server who purportedly served him and swore an Affidavit of Service condemned him unheard (annexed and marked copy of two affidavits as filed in court). He stated that affidavits referred to in paragraph 10 purported to have had him served at Safaris Hardware Ltd shop at Kitengela along Namanga Road Opposite Naivas Supermarket on 10/4/2012



- while another affidavit by the same process server who is the 4th Respondent herein purported to have served him at Kitengela Opposite Batian Medical Centre next to Kobil Petrol Station on November 2018.
7. The Petitioner further deposed that Safaris Hardware Limited where he is the Director has had its shop opposite Naivas Supermarket along Namanga Road at all times relevant to this and has never had its offices opposite Batian Medical Centre Next to Kobil Petrol Station since its inception until they closed their doors in 2018.
 6. The Petitioner opined that years later after commencement of the suit he was served with a Notice of Entry of Judgment on 20/1/2020 (annexed and marked copy of the notice of entry of judgement); deposing that he promptly instructed his advocates on record to file an application setting aside the judgment and seeking a stay of execution of the said interlocutory judgment and any other consequential orders emanating therefrom which they did on 26/2/2020 (annexed and copy of the application);
 7. The Petitioner lamented that he got interlocutory orders and the said application was dismissed vide a Ruling delivered by the Magistrates Court on 14/3/2021 leaving him exposed to execution by the interested party and that the interested Parties' Advocates took out a decree and proceeded to proclaim several assets at his place of work and his matrimonial home (annexed and marked copies of proclamations by Mbusera Auctioneers).
 8. The Petitioner that the interested party has now served him with a notice to show cause why execution should not issue against him by way of committal to Civil Jail for nonpayment of a sum of Kshs 1,885,624.60/= as per the court's decree and the said notice to show cause is coming up on 5th October,2022 (annexed and marked copy of the notice to show cause); he finally stated that he is now in imminent risk of being jailed and having his rights further violated on account of a matter he verily believe to be double jeopardy having paid his motor vehicle insurance premium to the 3rd Respondent vide insurance policy number 087/008297/07/06/B89 (COMP) to indemnify him of the third party risk and that it pains him as to how and why he should be obligated to take out an insurance cover and still not be indemnified in the event of an accident which is the purpose of the insurance cover to the extent of being threatened with a jail term after he followed the law to the latter.

Petition

9. The Petitioner vide the petition attached to the Application herein filed on 29th September,2022 averred that the 1st, 2nd and 3rd Respondents have violated the rights of the public guaranteed under Article 40 (2 & 3); 46;47 (1); 48;50 (1) of Constitution of Kenya 2010. Stating it is this violation that the Petitioner herein has approached this Honorable Court in the Public Interest by filing this petition.
10. It is his petition that Article 10 of that Constitution embodies values and principles of governance which binds state officers in interpreting and applying the Constitution which values include rule of law, human dignity, human rights, good governance equity and social justice. He opined further that it is a statutory duty of the Insurance Company under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act is to pay claims arising out of the judgments resulting from insurance cover taken pursuant to Section 4 of the Act.
11. He lamented that the duty of an insurer to meet judgment awards is also recognized under Section 203 of the Insurance Act where the insurer is required to meet claims within 90 days of them being lodged subject to extensions that may be issued by the Commissioner of Insurance; stating that Article 46 of the Constitution safeguards consumer rights and consumers are entitled to services of reasonable



quality, protection of their economic interest and compensation for loss or injury arising from the defects in services.

12. The petitioner humbly sought the following orders: that:
 - a. An order or a declaration be made that the conduct of the civil proceedings or litigation in Machakos Civil Suit No.223 of 2012, was or is a nullity, unconstitutional, null and void.
 - b. The omission renders the decree in issue, unconstitutional, null and void.
 - c. A declaration that fundamental rights and freedoms of the Petitioner have been violated by all Respondents.
 - d. A declaration and order that the 1st, 2nd & 3rd Respondents, jointly and severally meet and make payments of all decretal sums and costs against the Defendants in the cases arising from accidents for which the Petitioner had obtained Insurance cover with the 3rd Respondent under Section 4 of the Insurance (Motor Vehicle Third Party Risks) Act.
 - e. An order for permanent injunction to restrain the Interested Parties from executing the court judgment and decree against the Petitioner in respect of the Accident for which the Petitioner had obtained insurance Cover under Section 4 of the (Motor Vehicle Third Party Risks) Act. specifically, in Machakos CMCC 223 OF 2012.
 - f. Costs of this Petition.
 - g. Any other relief that this Honorable Court may deem just to grant.

Affidavit In Support Of The Petition

13. Vide the affidavit in support of the Petition dated 27th September,2022 and filed on 29th September,2022 Sworn by Samuel Mwangi Maingi, He deposed that he was sued by the 3rd & 4th Respondent in Machakos CMCC 223 OF 2012 by virtue of being a director of Saris Hardware Ltd the registered owner of motor vehicle registration number KAY 229ZC which was involved in a fatal road accident at Athi River Mombasa Nairobi Road on 25/10/2009. The Petitioner informed the then insurer BlueShield Insurance Company Ltd and they Appointed the Firm of Anne Thoronjo & Company Advocate to defend the suit and that the BlueShield Company was then placed under moratorium; further that the firm of Anne Thoronjo made an application to cease acting and the same was allowed and that he was never served personally with any summons or pleadings after the said firm ceased acting.

Replying Affidavit By The 1st & 2nd Interested Parties

14. Vide the replying affidavit dated 11th November,2022 and filed on 14th November,2022, the 1st & 2nd interested parties herein deposed that: both the application and the petition do not meet the constitutional threshold to attract any of the declarations and reliefs sought as most of the complaints being raised were all raised in Machakos CMCC NO.223 OF 2012 and satisfactorily addressed by the relevant courts.
15. Depositing further that the issue of service of court process by the 4th Respondent was subject to an application to set aside judgment and the Trial Court made a determination that such service was proper, a finding that the petitioner did not challenge either on appeal or review despite being represented by his current advocates and that the joinder of the 4th Respondent as a process server because he served court process on the petitioner is bad in law for misjoinder.



16. It was stated that the subject motor vehicle that fatally crashed their son the late Lenox Nguli Musili was working for Saris Hardware Limited who Directors are the Petitioner and his wife but the vehicle was registered in the sole names of the petitioner herein (annexed and marked copy of the records used in the lower court); opining that when served with the decree and notice of intention to execute, the petitioner moved to the High Court vide Machakos High Court Civil Misc. Application NO.E072 OF 2021 seeking to appeal out of time which application was also dismissed by the High Court for lacking merit.
17. It was their case/position that there is no legal basis for seeking to stay execution in Machakos CMCC NO. 223 OF 2012 as they have followed the due process for the last ten (10) years while seeking compensation from the petitioner for the loss of their son and that the Petitioner is engaging in what they consider an abuse of the court process by instituting the present petition; it was deposed that the Petitioner should settle their claim and pursue his insurers with whom he had a contract and avoid dragging other parties into the dispute with the insurers.
18. They averred that the issues raised in the Notice of Motion were all addressed in the primary suit and therefore are precluded under the doctrine of res judicata from being raised in the instant petition; it was finally deposed that the Court dismisses both the application dated 28/9/2022 and the Petition with costs.

Replying Affidavit By The 3rd Respondent

19. Vide a Replying Affidavit of the 3rd Respondent dated 23rd November, 2022 and filed on 29th November, 2022 sworn by William Masita Statutory Manager of Blue Shield Insurance Company, deposed that BlueShield Insurance Company was placed under statutory Management on the 15th September, 2011 by the Commissioner of Insurance Pursuant to Section 67 of the Insurance Act Cap 487 (act). a legal moratorium was subsequently declared as envisaged under the Act.
20. He stated that the current statutory Manager of BlueShield Insurance Company is Policy Holder Compensation Fund and that the fundamental breaches allegedly committed against the Petitioner are facts and issues which occurred prior to Moratorium declaration, the Statutory Manager did not commit or participate in any of the actions complained of and is a stranger to all of them.
21. It was his position that it is true the Insurance Company failed to defend the Petitioner under doctrine of subrogation and pay the claim arising out of the judgement against the Petitioner, this is one of the grounds for placing the Company under Statutory Management anticipated under Section 67 (c) part (e) and (g) and Section 203 of the Act.
22. BlueShield Insurance Company Limited is still under legal Moratorium and by virtue of the same, proceedings relating to its policyholders such as the Petitioner herein of whatever nature have been stayed pending the existence of the Moratorium, and that High Court sitting in Nairobi in High Court Civil Case No. 465 of 2011 expressly prohibited any proceedings, including execution proceedings against BlueShield Insurance and/ or its Policyholders such as the Petitioner pending the Moratorium as declared by the Statutory Manager.
23. Depositing that any attempt by the Court in this case to grant orders for payment as prayed by the Petitioner will be in breach of the subsisting orders by the court of concurrent jurisdiction.
24. Further it was stated that the High Court in Nairobi, High Court Miscellaneous NO. 547 of 2012 did extend the term of statutory Manager pending the hearing and determination of winding up cause in High Court Winding up Cause No. 238 of 2017 or until otherwise terminated by the court; he averred that the Statutory Manager has limited obligations which includes to establish the state of affairs of



- the company under legal Moratorium as provided under Section 67 (c) (9) of the Act. The terms of reference for the said manager are inter alia limited to tracing, preserving and securing all assets and properties of the company and the duties therein do not include taking responsibilities or liability of the Insurance Company under Management.
25. It was his point that the orders issued in High Court Civil Case No. 465 of 2011 stayed all proceedings involving BlueShield Insurance Company Limited, its property or by policyholders and creditors during the currency of moratorium as issued under Sub Section 67 (c) of the Insurance Act and that the institution of this suit therefore was and remains an unmitigated violation and contrary to the express orders of a court of current jurisdiction.
 26. He posited that Section 67 (c) (11) of the Insurance Act as Amended by Section 5 (c) of the Insurance (Amended) Act,2019 expressly prohibits proceedings against an insured or policyholder such as the Petitioner herein, whose insurer has been put under Statutory Management such as in the case of BlueShield Insurance Company. Hence the Execution proceedings against the Petitioner herein is tainted with illegality and in violation of clear provisions of the law as well as express orders of the High Court.
 27. He further deposed that under Section 67 (10) (b) of the Insurance Act time stops running for purposes of Limitations of Actions Act; and that the Statutory Manager has not inherited the debts of BlueShield Insurance Company (under Statutory Management). The fate of the Company and its going concern status remains unknown abiding the final outcome of the due process as guided by the Insurance Act; he finally stated that the petition herein as drawn and presented is misdirected, vexatious, incompetent and fatally defective and he besieged the court to strike it out with costs.

The 1st Respondent's Grounds Of Opposition

28. Vide its grounds of opposition dated 12th May,2023 claimed that the Petition has failed to meet conditions set out in Article 22 of the Constitution and raises no Constitutional issues for determination by this Honorable Court and therefore ought to be struck out with costs to the 1st Respondent; further it opposed the petition on the ground that it failed to meet the basic requirements as to form as set out in Rule 10 11 (2) of the Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and Procedure Rule 2013; that in the public interest the Petition be disallowed and found frivolous, vexatious and an abuse of court process.

The 2nd Respondent's Grounds Of Opposition

29. The 2nd Respondent vide its grounds opposition to the petition dated 9th March,2023 and filed on 15th March, 2023 stated that: the petition has failed to meet the threshold for specificity in drafting as set out in the authority of Anarita Karimi Njeru vs R (1979) eKLR; further that the petition does not raise issues for constitutional interpretation by this Court hence ought to be struck out with costs to the 2nd Respondent.
30. The matter was canvassed vide written submissions.

Submissions

The Petitioner's Written Submissions.

31. The Petitioner in his written submissions dated 7th February,2023 and filed on 14th February,2023 submitted on the following issues:
 - a. Whether the 1st Respondent has fulfilled its obligations as the insurance sector regulator?



- b. Whether the 3rd Respondent has fulfilled its obligations as an insurer?
 - c. Whether the legal moratorium imposed over the 3rd Respondent prevents it from satisfying the decree obtained by the interested parties?
 - d. Whether the Petitioner/ Applicant is entitled to the orders sought in the Application?
 - e. Whether the Petitioner is entitled to the orders sought in the petition?
32. On the issue of whether the 1st Respondent has fulfilled its obligations as the insurance sector regulator? It was the Petitioners submission that the mandate of the 1st Respondent is clearly provided for under Section 3A of the *Insurance Act* which provides as follows:

The objects and functions of the Authority shall be to –

- (a) ensure the effective administration, supervision, regulation and control of insurance and reinsurance business in Kenya;
 - (b) formulate and enforce standards for the conduct of insurance and reinsurance business in Kenya;
 - (c) license all persons involved in or connected with insurance business, including insurance and reinsurance companies, insurance and reinsurance intermediaries, loss adjusters and assessors, risk surveyors and valuers;
33. Averring that the 1st Respondent is obligated to ensure that all companies that offer insurance services in Kenya are properly run and are capable of indemnifying all their policyholders in the event an unforeseen event occurs hence responsible to all Kenyans who are policyholders in all the insurance companies in Kenya including the Petitioner.
34. Reliance was made on the case of *Commission on Administrative Justice V Insurance Regulatory Authority & Another* (2017) eKLR, the Court outlined the 1st Respondent mandate as follows

“Insurance is characterized as a business vested or affected with the public interest. [25] Thus, the business of insurance, although primarily a matter of private contract, is nevertheless of such concern to the public as a whole that it is subject to governmental regulation to protect the public’s interests. [26] Therefore, the fundamental purpose of insurance regulatory law is to protect the public as insurance consumers and policyholders. Functionally, this involves: -

- a) Licensing and regulating insurance companies and others involved in the insurance industry;
- b) Monitoring and preserving the financial solvency of insurance companies;
- c) Regulating and standardizing insurance policies and products;
- d) Controlling market conduct and preventing unfair trade practices; and
- e) Regulating other aspects of the insurance industry. [27]”

My reading of the provisions of the *Insurance act* [28] is that the functions of the first Respondent are: - to ensure effective regulation, supervision; development of insurance in Kenya; to formulate and enforce standards; to issue licences; to protect the interests of insurance policy holders and insurance beneficiaries; to promote the development of



the insurance sector; to ensure prompt settlement of claims; to investigate and prosecute insurance fraud.

In my view, regulation entails ensuring that players comply with the provisions of the *Insurance Act*. [29] Supervision means the oversight function the first Respondent exercises over the operations of insurance companies. Among the supervisory functions are; Ensuring the viability of applications for licensing, ensuring that all board members are Fit & proper, ensuring that all senior management staff Fit & proper, ensuring that insurers have adequate Capital at all times, Approval of insurance products, Inspection, investigation, analysis of accounts and returns, intervention and withdrawal of licenses among others.”

35. It was further submitted that the 1st Respondent cannot escape from its obligations and has to ensure that all persons are protected if any insurance company is struggling to stay afloat. Urging that the 1st Respondent has failed to protect policyholders like the Petitioner who have been affected by the poor running of an insurance company like the 3rd Respondent and the Petitioner should not suffer as a result.
36. It was the Petitioner’s Submission that 1ST Respondent has also violated the national values and principles under Article 10 of *the Constitution* for failing to be accountable for all the players in the insurance sector. Urging that the 1st Respondent bear the burden of satisfying the interested parties decree for failing to fulfill its obligations as the insurance sector regulator
37. On the issue of whether the 3rd Respondent has fulfilled its obligations as an insurer, it was the submission of the Petitioner that the indemnity is the most basic principle of insurance and the whole reason why the entire insurance industry even exists. Reliance is placed on the case *Dao Doa Tented Camps and Lodges Limited vs Jubilee Insurance Company of Kenya Limited* (2021) eKLR where the court held as follows:

“Indemnity has several interlinked meanings in the insurance contract context inherent in the notion that an insurance contract should provide no more and no less than a full indemnity is the goal of preventing windfalls to either party. This aspect is emphasized in *Castellain v Preston*. Brett LJ declared that:

“ The very foundation.....of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, an of indemnity only, and that this contract means the assure, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it.....that proposition must certainly be wrong.”
38. It was averred that the reason why the Petitioner approached the 3rd Respondent for cover, other than it being a requirement under the law was to make sure he will not pay out of his pocket the moment unfortunate and unforeseen events such as a road accident. Contending that the actions of the 3rd Respondent are not only a violation of its obligations but also a violation of the Petitioner’s legal right to representation.
39. As regards whether the legal moratorium imposed over the 3rd Respondent prevents it from satisfying the decree obtained by the interested parties. Petitioner submits that when the insurance contract was entered into with the 3rd Respondent he had full expectation that he is fully insured and in any unfortunate event the 3rd Respondent would step in to indemnify him. Urging that at all times during



the existence of the insurance contract he shall not be required to pay from his pocket in case of any loss while still paying his premium.

40. He quoted the Supreme court case in *Communications Commission of Kenya & 5 Others Vs Royal Media Services Limited & 5 Others* (2014) eKLR held as follows:

[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.

[266] Wade and Forsyth in their work, *Administrative Law*, 10th ed (pages 446-448), discuss the relevant legal principles on legitimacy of an expectation. For an expectation to be legitimate, it must be founded upon a promise or practice by the public authority, that is said to be bound to fulfil the expectation.

41. The Petitioner, submitted that he fully paid his premiums and is about to be punished for following the law. Contending that the fact that there is a Moratorium over the 3rd Respondent does not exempt it from fulfilling its obligations and that the 3rd Respondent is required to settle judgment Awards in accordance with Section 203 of the *Insurance Act* hence failing to do so is a clear violation of its obligation. He contended that a moratorium is not a barrier to the fulfillment of the 3rd Respondent's obligations.
42. As to the issue of whether the Petitioner/ Applicant is entitled to the orders sought in the Application? Petitioner submits that the Application is seeking injunctions against the interested parties who are seeking to enforce the decree they obtained from a lower court as well as the nullification of the proceedings in the lower court. He contends that he was condemned unheard hence he sought the nullification of the proceedings in the lower court reliance is placed on the case of *James Kanyitta Nderitu & Another v Marios Philotas Ghikas & Another* (2016) eKLR.
43. It was the contention of the Petitioner that this court is not to legitimize flawed proceedings by allowing the interested parties to execute a flawed decree against the Petitioner.
44. On Whether the Petitioner is entitled to the orders sought in the petition? He Submits that the petition seeks the nullification of the proceedings and decree in the lower court, a permanent injunction against the interested parties from executing the decree against him and a declaration that the decretal sum should be cleared by the 1st to the 3rd Respondents urging that the Court has the power to issue all the orders sought and he should not be coerced and to ensure that ends of justice are met.

3rd Respondent's Submissions

45. Vide the submissions dated 20th February, 2023 and filed on 21st February, 2023, the 3rd Respondent submitted on the issue of Whether the Statutory Manager is Liable of the alleged breaches committed against the petitioner and averred that the said Statutory Manager did not commit or participate in any of the actions complained of and it is a stranger to all of them.
46. Reliance was placed on the case of *Joseph Mbutia Gichuru vs Kenya Reinsurance Corporation Ltd* (2012) eKLR, in which the court elaborated the role of Statutory Manager as follows:

“... Applying the first consideration to the circumstances of this case, the applicant's claim is solely against the Insurance Company with which he entered into a sale agreement. The



respondent was not a party to the same. I cannot therefore see how the applicant can succeed against him. The Insurance Company was put under statutory management on or about 15th July, 2005. That is common ground. The terms of reference for the said appointment are limited to tracing, preserving and securing all the assets and properties of the company. Those duties do not include the sale or disposal of the assets belonging to the company unless the sale is initiated by the statutory manager for purposes of improving the company's liquidity. It is also common ground that upon placing the Insurance company under statutory management, a moratorium was declared barring the settlement of all claims as against the Insurance Company pending the hearing and final determination of a winding up cause. That being the case, I do not see how the applicant can maintain a claim for the refund of the purchase price or for an order of specific performance. In deed in HCCC. No.748 of 2009, *Re United Insurance Company Limited*, Kimaru J. ordered;

“that no statutory notices, demands and claims of whatever nature or form shall be effective against United Insurance Company Limited (under Statutory Management) its property or its policy holders during the currency of the moratorium declared by the Statutory Manager on 15th July, 2005”.

47. It is contended that the Applicant has not made out a prima facie case to warrant the grant of temporary injunction. Submitting that the Statutory Manager declared Moratorium for all classes of creditors under Section 67 (c) which applies equally to all classes of creditors and the petitioner being a policyholder as he alleges falls in the same category as a creditor.
48. 3rd Respondent submits that following a moratorium declaration the Statutory Manager moved to court in HCC NO 465 of 2011 (O.S) and obtained express orders staying all manner of proceedings of whatever nature or form subsisting against BlueShield insurance company and or policyholders during the currency of moratorium declared by the Statutory Manager. Reliance was made on the case of *Wycliffe Otieno Onyango vs Statutory Manager BlueShield Insurance Co. Ltd (2021) eKLR*, in which the petitioner therein had filed a similar petition held as follows:

“The petitioner has annexed an order in Civil Suit Number 465 of 2011(O.S), Milimani Law Courts relating to BlueShield Insurance Company Ltd. The order in paragraphs 5 and 6 states;

That no statutory notices, demands or claims of whatever nature of form shall be effective against BlueShield Insurance Company (under statutory management), its property or its policyholders during the currency of the moratorium.

That the running time for the purposes of any law or limitation in respect of any notice, demand or claim by any policyholders or creditors of BlueShield insurance company Ltd (under statutory management) is suspended during the currency of the moratorium declared by the statutory manager.

If this be the case, there is no difficulty in finding that the moratorium protects the petitioner from execution. The difficulty that may have arose here is that the petitioner did not inform the trial court that there is a moratorium in force.

If there is a moratorium in force as well as subsisting court orders barring the levying of any execution against the policyholders of BlueShield that should be placed before the trial court.



The court does not find any of the petitioner’s constitutional rights that have been infringed or threatened to be infringed by the respondents’ actions. He has recourse in the lower court that heard the civil suit; all he has to do is inform the court on the existence of the orders and his rights will be protected by that court.”

49. The 3rd Respondent highlighted various decisions in the similar instances involving Companies under statutory Management have proceeded to issue orders of stay pending the moratorium. To buttress the position on the statutory Management the following cases were relied on *Benard Njoroge Gathua vs MM* (2019), *Peter Muinde vs Statutory Manager Invesco & 2 Others* (2009) e KLR, *Kenya Commercial Bank Vs John K Mbuu & Others* (2016) e KLR, *Charles Lutta Kasamani & Company Advocates (decree Holder) vs United Insurance Co. Ltd (under Statutory management)* (2018) e KLR, *Phylis Wangui Njau VS Heritage Contractors Ltd* (2019) e KLR.
50. Regarding the Amendment of Section 67C (11) of the *Insurance Act*, Cap 487 (as Amended by Section 5 (c) of the Insurance (Amendment) Act, 2019), it was submitted that the Act as amended prohibits proceedings against an insured or policyholder whose insurer has been placed under statutory Management such as the case of Blue Shield Insurance Company. The section provides:

“For the purpose of this section, where moratorium is declared under subsection (10), policyholder shall not be liable to pay any claim not payable by the insurer due to the moratorium.”
51. It is submitted that the provision was intended to protect the policyholder from any claim by 3rd parties in the circumstances where were it not for moratorium the Insurance Company under the Principle of subrogation would be liable to settle such as in the circumstance of the instance Petition.
52. On the issue of the role of the Statutory Manager, reliance was made on Section 67 (c) (9) of the *Insurance Act*, which provides for the terms of reference of the said Statutory Manager. Further reliance was placed on the case of *Joseph Mbutia Gichuru vs Kenya Reinsurance Corporation Ltd (supra)*.
53. It is the position of the 3rd Respondent that allowing the prayers sought in the instant petition will open Pandora’s Box and setting a bad precedent where all other claimants will hurl the Company into litigation by suing the policyholders who will in turn rely on the doctrine subrogation to force the Company into endless litigation thus defeating the purpose of statutory Manager.

1st & 2nd Interested Parties Submissions

54. 1st and 2nd parties in their Submissions dated and filed on 6th April, 2023, submitted that the 4th Respondent is the process server who effected service of the court process in the primary suit before the Subordinate Court. Urging that the Petitioner moved the lower court to have the judgment set aside but the court found out that he was properly served with the summons to enter appearance and even appointed an advocate to appear for him.
55. The interested Parties submits that the Petitioner suffered loss when his cover with BlueShield Insurance Company Limited failed to indemnify him from the losses suffered by the interested parties herein. Contending that the petitioner should therefore settle the interested parties’ claim and the seek indemnity from the Respondents. Urging that staying the interested parties claim any further would subject them to more pain than they have endured since 2012.



1st Respondent's Submissions

56. 1st Respondent's vide its Submissions dated 12th May, 2023 and filed on 16th May, 2023, submitted on its issues sequentially in which it raised the issue of whether the 1st Respondent has violated the Petitioner's rights? in which it submitted that the Insurance Company was placed under Statutory Management by the Commissioner of Insurance on 16th September,2011 pursuant to Section 67 C of the Insurance Act. Reliance was placed on Section 67 C (10) of the Insurance Act which provides:
- (10) For the purposes of discharging his duties, a manager shall have power to declare a moratorium on the payment by the insurer of its policy holders and other creditors and the declaration of a moratorium shall;
 - (a) be applied equally to all classes of policyholders and creditors, subject to such exemptions in respect of any class of insurance as the manager may, by notice in the Gazette specify;
 - (b) suspend the running of time for the purposes of any Law of limitation in respect of any claim by any policyholder or creditor of the insurer
 - (c) cease to apply upon determination of the manager's appointment whereupon the rights and obligations of the insurer, its policyholders and creditors shall, safe to the extent provided in paragraph (b), be the same as if there had been no declaration under the provisions of this subsection. Provided that this subsection does not apply to any sum due as contributions or penalties to the Policyholder Compensation Fund.
57. It is the 1st Respondent submission that the Petitioner's allegation that the 1st Respondent or 3rd Respondent have failed to protect its interest are unfounded. Reliance was on the case of Wycliffe Otieno Onyango vs Statutory Manager BlueShield Insurance Co. Ltd (2021) eKLR supra, in which the petitioner therein had filed a similar petition.
58. The Petitioner has annexed an order in Civil suit Number 465 of 2011(O.S), Milimani Law Courts relating to BlueShield Insurance Company Ltd. The order in paragraphs 5 and 6 states;
- That no statutory notices, demands or claims of whatever nature of form shall be effective against BlueShield Insurance Company (under statutory management), its property or its policyholders during the currency of the moratorium.
- That the running time for the purposes of any law or limitation in respect of any notice, demand or claim by any policyholders or creditors of BlueShield insurance company Ltd (under statutory management) is suspended during the currency of the moratorium declared by the statutory manager.
59. If this be the case, there is no difficulty in finding that the moratorium protects the petitioner from execution. The difficulty that may have arisen here is that the Petitioner did not inform the Trial Court that there is a moratorium in force. If there is a moratorium in force as well as subsisting court orders



barring the levying of any execution against the policyholders of Blue Shield that should be placed before the Trial Court.

The Court does not find any of the petitioner's constitutional rights that have been infringed or threatened to be infringed by the respondents' actions. He has recourse in the lower court that heard the civil suit; all he has to do is inform the court on the existence of the orders and his rights will be protected by that court.

60. On whether the Petitioner is entitled to the prayers sought in the Petition? It is submitted that it has been established that the moratorium issued by the statutory manager was to powers granted by statute Section 67 C of the *Insurance Act* hence the Honorable Court cannot be able to override the powers of the statutory Manager. Reliance was placed on the case of *Phyllis Njau v Heritage Contractors Ltd* (2019) eKLR where the High Court held as Follows:

“ 32. It was also evident that a Statutory Manager could declare a moratorium on the payment by the insurer of its policy holders and other creditors (emphasis court). For that reason, this court could not direct that she be allowed to execute her judgment against the Defendant herein because then, in all matters involving the Insurer, the Statutory Manager was performing a statutory function.

33. Indeed, Section 67C (10) of the *Insurance Act* is clear that the moratorium will cease to apply upon the termination of the Manager's appointment whereupon obligations of the Insurer, Insureds and Creditors will be as if no moratorium had been declared. It is at this stage that the Plaintiff can proceed with execution of her judgment against the Defendant.

34. It was also correct as the Plaintiff argued that the court has power to try as much as possible to pave way for a decree holder to enjoy the fruits of his judgment. However, its hands will be tied if there were statutory provisions holding its hands not to pave that way. In other words, just because it has immense powers, a court cannot encroach on other authorities or entities that have powers donated to them to do certain acts by enacted legislation.

35. A moratorium is one instance where the court cannot purport to override the powers of a statutory manager who has been empowered to do certain acts by legislation. Indeed, a court must be very cautious not to overstep its mandate or to become so overzealous to ensure decree orders enjoy their fruits of judgment.

36. As long as the order for moratorium remains in place, the court will not be able to grant an order of the nature that has been sought in Prayer No (b) of the Plaintiff's present application.”

61. It is the Position of the 1st Respondent that the prayers sought by the Petitioner seeking that the Respondents be compelled to Jointly and severally make payments of decretal sums and costs against them. Reliance was made in the case of *Charles Lutta Kasamani & Co. Advocates vs United Insurance Co. Ltd (under Statutory Management) & KCB Bank Kenya Ltd* (2018) eKLR, where the Decree Holder/ Applicant had sought inter alia orders that the Respondent be compelled to pay the decree. The Court found that that it would be negating the express orders of a court of concurrent jurisdiction



that had upheld the moratorium issued by the statutory Manager of United Insurance Co. Ltd and more so the Honorable court had no jurisdiction to issue the orders sought.

Analysis/ Determination

62. The Court considered Petition and Responses and the Written Submissions by parties through respective Counsel.

The issues distilled for determination are as follows;

- a. Is there a competent Constitutional Petition in Court for Determination?
- b. Are issues raised by the Applicant res judicata
- c. What is the statutory mandate of the 1st Respondent in relation to Petitioner's Constitutional Right(s)
- d. What redress/remedies/orders commend themselves in the matter.

Constitutional Threshold

63. The thrust of Petitioner's petition is that contrary to Art 2, 10, 19, 20, 27, 40 (2 &3); 46; 47 (1); 48;50 (1) 258 & 259 of *Constitution of Kenya* 2010 is that his Constitutional rights are /have been violated in the circumstances as the Petitioner detailed in the Supporting Affidavit of the Application and the Petition herein.

64. Art 2(1) of *the Constitution* binds all persons all state organs at both levels of government..... Art 2(4) of *the Constitution* every person including the Respondents is under Constitutional obligation to respect, uphold and defend *the Constitution* and Art 10 of *the Constitution* embodies national values and principles of governance which binds all state officers. The Petitioner also relied on Chapter 4 of *the Constitution* on the Bill of Rights specifically Art 20 which permits every person to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of right and fundamental freedom and mandates the Court to adopt interpretation that most favors the enforcement of the right or fundamental freedom.

65. The case by the Petitioner, as I understand it, that the Respondents acted in a manner that did not measure up to the constitutional values and principles required of public bodies and thereby violated the rights of the public guaranteed by *the Constitution*.

66. Whether the Petition meets the Constitutional threshold set in *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154, & *Meme vs. Republic* [2004] eKLR & *Trusted Society of Human Rights Alliance vs. AG. & 2 others* [2012] eKLR, is considered as follows; the Court in *Anarita Karimi Njeru vs. Attorney General supra* provides;

“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 reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

67. The Court's jurisdiction on Constitution Petition is pegged on Article 165 3 (b) as read together with Articles 22 (3) & (3) (b) and 23 of *the Constitution* that governs the power, process, procedure and remedies of a party seeking to enforce the Bill of Rights.



68. *The Constitution* of Kenya (Protection of Rights and Fundamental freedoms) Practice and Procedure Rules 2013 called *Mutunga Rules* 2013 regulate the form, contents and manner of the filing, service, amendments and the mode of hearing of a constitutional petition. Among them, Rule 10 thereof governs the form of a petition which includes the description of parties, facts relied upon, articles of the bill of rights (freedoms) infringed, particulars of the breaches, pending suits relating to the matter and reliefs sought.
69. The Petitioner, Samuel Mwangi Maingi, deposed that he was sued by the 3rd & 4th Respondents in Machakos CMCC 223 of 2012 as a Director of Saris Hardware Ltd, the registered owner of motor vehicle registration number KAY 229ZC which was involved in a fatal road accident at Athi River Mombasa Nairobi Road on 25/10/2009.
70. The Petitioner informed the then insurer BlueShield Insurance Company Ltd who appointed the Law Firm of Anne Thoronjo & Company Advocates to defend the suit and later that the BlueShield Company was then placed under moratorium.
71. The Petitioner was served with a notice of Entry of Judgment on 20/1/2020 and interested parties' advocate took out a decree and proceeded to proclaim several assets at his place of work and his matrimonial home and now the interested party has served him with a notice to show cause why execution should not issue against him by way of committal to civil jail for non-payment of the sum of 1,885,624.60/- as per the Court decree.
72. The Petitioner is now in imminent risk of being jailed and having his rights further violated on account of a matter he verily believe to be double jeopardy having paid his motor vehicle insurance premium to the 3rd Respondent vide insurance policy number 087/008297/07/06/B89 (COMP) to indemnify him of the third party risk and that it pains him as to how and why he should be obligated to take out an insurance cover and still not be indemnified in the event of an accident which is the purpose of the insurance cover to the extent of being threatened with a jail term after he followed the law to the latter.
73. The Petitioner posited the 1st Respondent is clothed with wide powers under the *Insurance Act* & Insurance [Motor Vehicle 3rd Party Risks] on supervision, monitoring and regulation of insurance companies. The 1st Respondent being a public office holds fiduciary duties and is legitimately expected to perform its duties to protect and forestall loss to policy holders and shareholders of the Company, victims of injuries arising from actions of policy holders or their agents, lawyers employees of the Insurance Companies and Creditors and the public.
74. The Petitioner sought orders of declaration that conduct civil proceedings, litigation and execution of judgment in Machakos Civil Suit No.223 of 2012, was or is a nullity, unconstitutional, null and void. Secondly, a declaration that fundamental rights and freedoms of the Petitioner have been violated by all Respondents. Thirdly, a declaration and order that the 1st, 2nd & 3rd Respondents, jointly and severally meet and make payments of all decretal sums and costs against the Defendants in the cases arising from accidents for which the Petitioner had obtained Insurance cover with the 3rd Respondent under Section 4 of the Insurance (Motor Vehicle Third Party Risks) Act. Fourthly, an order for permanent injunction to restrain the Interested Parties from executing the court judgment and decree against the Petitioner in respect of the Accident for which the Petitioner had obtained insurance Cover under Section 4 of the (Motor Vehicle Third Party Risks) Act in Machakos CMCC 223 OF 2012. I am of the persuasion that the petition before me is properly anchored in *the Constitution*, and to a large extent the petition meets the standard of what a constitutional petition should be about.



Res Judicata

75. The 1st & 2nd interested parties objected to the Petition on ground that all issues raised in the Petition and Application are issues raised in the Trial Court and therefore precluded from determination by this Court.
76. The issue of Liability and quantum were determined by Trial Court and the interested parties annexed bundle of documents used during trial to prove their claim in MACHAKOS CMCC 223 of 2012. The issue of service by Process Server of the pleadings before the Interlocutory judgment was entered was canvassed before the Trial Court and the application to set aside Interlocutory judgment was dismissed.
77. The Petitioner failed to seek review or appeal the decision/ruling of the Trial Court.
78. The fatal accident occurred when the Petitioner's driver driving Petitioner's vehicle and hence the Petitioner as registered owner of the vehicle is deemed vicariously liable to settle the decretal sum/ judgment debt to the interested parties, family of the deceased son who died from the accident and have pursued compensation for over 10 years to date in futility. There is no legal basis to stay execution as interested parties have followed due process in seeking compensation. The Interested parties are not privy to the contract of insurance between the Petition and 3rd Respondent infact the said contract is to/for their benefit.
79. The Petition should be dismissed and execution of the decretal sum granted /allowed against the Petitioner. The law pertaining to the doctrine of res judicata is captured under the provision of Section 7 of the [Civil Procedure Act](#) which provides as follows-
- “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.”
80. In [Uhuru Highway Development Ltd -Vs- Central Bank of Kenya & 2 Others](#) Civil Appeal No. 36 of 1996, the Court held;
- “There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature That is to say, there must be an end to applications of similar nature: that is to say further, wider principles of res judicata apply to applications within the suit.”
81. The test to determine whether a matter is res judicata was well laid in the case of [DSV Silo v The Owners of Sennar](#) [1985] 2 All ER 104 and repeated in the Kenyan case of [Bernard Mugo Ndegwa v James Nderitu Githae and 2 others](#) [2010]eKLR. The Applicant, alleging res judicata, must show that;
- (a) The matter in issue is identical in both suits,
 - (b) That the parties in the suit are substantially the same,
 - (c) There is a concurrence of jurisdiction of the court
 - (d) That the subject matter is the same and finally,



(e) That there is a final determination as far as the previous decision is concerned.

82. The pleadings on record confirm that MACHAKOS CMCC 223 of 2012 was a claim for general and special damages against the Defendant by the plaintiffs representing the estate of the deceased. Later application was filed to set aside Interlocutory judgment and there after application for stay of execution of the attachment of goods by the Objector. Thereafter, was/is an application to process execution through the Petitioner being committed to civil jail.
83. In the instant matter a Petition is filed where the Petitioner is challenging the Respondents on violation of his Constitutional rights with regard to the process and outcome of the trial in MACHAKOS CMCC 223 of 2012 and resulting outcome. The petitioner claims being subjected to double jeopardy, he paid all insurance premiums had an insurable interest and when a claim was filed against him on behalf of his driver driving his vehicle, the Petitioner reported the filing of the case to the 3rd Respondent, who appointed legal representative. Only to learn later that the 3rd Respondent was placed under statutory management and a moratorium in place. On the other hand, judgment was entered against the Petitioner and execution commenced both in attachment of his assets at home and place of work and the Petitioner's committal to civil jail.
84. Clearly, from the above facts set out the subject-matter is the same the civil claim against the Petitioner by the interested parties an execution of the judgment against the Petitioner. However, the issues surrounding the subject-matter are different and parties are different in the Petition as opposed to the Civil Suit judgment and decree for execution. Therefore, the doctrine of res judicata does not apply in the instant matter.

1st RESPONDENT'S STATUTORY MANDATE

85. What is the statutory mandate of the 1st Respondent in relation to Petitioner's Constitutional Right(s)?

Whether the Statutory Manager of the 3rd Respondent is liable of the alleged breaches committed against the Petitioner on behalf of 3rd Respondent?

86. The 1st, 2nd & 3rd Respondents submitted in the same/similar tenor, that the 3rd Respondent Blue Shield Insurance, 3rd Respondent following a moratorium declaration the Statutory Manager moved to court in HCC NO 465 of 2011 (O.S) and obtained express orders staying all manner of proceedings of whatever nature or form subsisting against BlueShield insurance company and or policyholders during the currency of moratorium declared by the Statutory Manager.

87. In *Wycliffe Otieno Onyango vs Statutory Manager BlueShield Insurance Co. Ltd* (2021) eKLR, in which the petitioner therein had filed a similar petition the Court held as follows:

“The Petitioner has annexed an order in Civil Suit Number 465 of 2011(O.S), Milimani Law Courts relating to BlueShield Insurance Company Ltd. The order in paragraphs 5 and 6 states;

That no statutory notices, demands or claims of whatever nature of form shall be effective against BlueShield Insurance Company (under statutory management), its property or its policyholders during the currency of the moratorium.

That the running time for the purposes of any law or limitation in respect of any notice, demand or claim by any policyholders or creditors of BlueShield insurance company



Ltd (under statutory management) is suspended during the currency of the moratorium declared by the statutory manager.

88. In *Joseph Mbutia Gichuru vs Kenya Reinsurance Corporation Ltd* (2012) eKLR, the Court elaborated the role of Statutory Manager as follows:

“ ... Applying the first consideration to the circumstances of this case, the applicant’s claim is solely against the Insurance Company with which he entered into a sale agreement. The respondent was not a party to the same. I cannot therefore see how the applicant can succeed against him. The Insurance Company was put under statutory management on or about 15th July, 2005. That is common ground. The terms of reference for the said appointment are limited to tracing, preserving and securing all the assets and properties of the company. Those duties do not include the sale or disposal of the assets belonging to the company unless the sale is initiated by the statutory manager for purposes of improving the company’s liquidity. It is also common ground that upon placing the Insurance company under statutory management, a moratorium was declared barring the settlement of all claims as against the Insurance Company pending the hearing and final determination of a winding up cause.

89. In deed in HCCC. No.748 of 2009, Re United Insurance Company Limited, Kimaru J. ordered

“ that no statutory notices, demands and claims of whatever nature or form shall be effective against United Insurance Company Limited (under Statutory Management) its property or its policy holders during the currency of the moratorium declared by the Statutory Manager on 15th July, 2005”.

90. From the above the 3rd Respondent submitted that if this be the case, there is no difficulty in finding that the moratorium protects the petitioner from execution. The difficulty that may have arisen here is that the Petitioner did not inform the Trial Court that there is a moratorium in force. If there is a moratorium in force as well as subsisting court orders barring the levying of any execution against the policyholders of BlueShield, that should be placed before the Trial Court.

91. In the same vein, the 1st Respondent reiterated that it is undisputed that the 3rd Respondent was placed under Statutory management by Commissioner of Insurance since 16th September 2011 pursuant to Section 67C of *Insurance Act* following a legal moratorium declared under Section 67 (10) of *Insurance Act*. The Commissioner filed Nairobi Milimani High Court winding up cause 238 of 2017 and the petition has not been concluded due to shareholders of the Company numerous applications. The 1st respondent asserted that the Petitioner is protected by Section 67 (11) of *Insurance Act*, that where a moratorium is declared, the policy holder is not liable to pay any claim.

92. The 1st Respondent contested the Petitioner’s claim for declaration that 1st 2nd & 3rd Respondents jointly and severally meet and make payments of all decretal sums and costs against the defendants in cases arising from accidents for which the Petitioner obtained insurance cover with 3rd Respondent under Section 4 of Insurance (Motor Vehicle Third Party Risks) Act as the crux of the issues arise from private insurance contract between the Petitioner and the 3rd Respondent Blue shield Insurance Company under Statutory Management and 1st Respondent is not party to the said contract and has no privity of contract. The 1st Respondent relied on *William Muthie Muthami vs Bank of Baroda CA91 of 2004 & Savings & Loans(K) Ltd vs Kanyenje Karangaita Gakombe & Another* [2015]eKLR.



93. The Petitioner asserted that the 1st Respondent has a legal mandate as espoused by Section 3A of the Insurance Act which provides for the objects and functions of the Authority and the Petitioner has/had legitimate expectations of protection under the contract of Insurance.

94. The Petitioner contended that the 1st Respondent is obligated to ensure that all companies that offer insurance services in Kenya are properly run and are capable of indemnifying all their policyholders in the event an unforeseen event occurs hence responsible to all Kenyans who are policyholders in all the insurance companies in Kenya including *the Petitioner as considered in the case of Commission on Administrative Justice V Insurance Regulatory Authority & Another* (2017) eKLR, the Court outlined the 1st Respondent mandate as follows;

“Insurance is characterized as a business vested or affected with the public interest. [25] Thus, the business of insurance, although primarily a matter of private contract, is nevertheless of such concern to the public as a whole that it is subject to governmental regulation to protect the public’s interests. [26] Therefore, the fundamental purpose of insurance regulatory law is to protect the public as insurance consumers and policyholders....

My reading of the provisions of the Insurance Act [28] is that the functions of the first Respondent are:- to ensure effective regulation, supervision; development of insurance in Kenya; to formulate and enforce standards; to issue licences; to protect the interests of insurance policy holders and insurance beneficiaries; to promote the development of the insurance sector; to ensure prompt settlement of claims; to investigate and prosecute insurance fraud.

In my view, regulation entails ensuring that players comply with the provisions of the Insurance Act. [29] Supervision means the oversight function the first Respondent exercises over the operations of insurance companies. Among the supervisory functions are; Ensuring the viability of applications for licensing, Ensuring that all board members are Fit & proper, Ensuring that all senior management staff Fit & proper, Ensuring that insurers have adequate Capital at all times, Approval of insurance products, inspection, investigation, analysis of accounts and returns, intervention and withdrawal of licenses among others.

95. The Petitioner attributed his deprivation of his property and livelihood contrary to Art 40 and right to privacy contrary to Article 31 and Fair and Administration Action contrary to Article 47 and Protection and equal benefit of the Law by Article 27 of the Constitution due to execution of the judgment in Machakos CMCC 223 of 2012 by attachment of properties at his business premises and matrimonial home and now committal to civil jail contrary to Art 28 & 31 of Constitution.

96. The interested parties who are parents of the accident victim have not recovered compensation of the judgment causing loss of reputation to himself. The Petitioner is suffering double jeopardy due to payments of premiums and subsequently are proclamation for attachment of his property at home and business premises and NTSC for committal to civil jail.

97. The Petitioner attributed to the 1st Respondent despite wide powers under the law and being a public body ought to perform to protect insurance industry players by early detection of liquidity problems of 3rd Respondent and acting early to protect the public by evoking payments under the Policy Holders Compensation Fund. 1st Respondent failed to advise unsuspecting consumers from taking insurance policies with the 3rd Respondent and thereafter placed a moratorium and dissolution of 3rd Respondent.



98. This Court considers that the Petitioner entered into a contract of Insurance with 3rd Respondent and insured motor vehicle Reg. KAY 229HZC5186 paid premiums and he had an insurable interest and was fully insured as exhibited by the Certificate of Insurance displayed at the time of the accident on 25/10/2009 and confirmed as recorded in the Police Abstract. It is important to note that the fatal accident occurred in 2009 and suit filed on 1/2/2012 with judgment being entered in 2019. The suit and proceedings were instituted before the moratorium declared for the 3rd Respondent in 2012. Secondly as per the Trial Court record, the Trial Court was made aware of the Moratorium against 3rd Respondent by letter of 7/05/2017.
99. The Petitioner was found culpable by being registered owner of the motor vehicle that caused the fatal accident on the fateful day 25/10/2009 by his designated driver and thus he was held vicariously liable. The issue of vicarious liability was discussed in the case of *Kansa vs. Solanki* [1969] EA 318 that;
- “Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See *Bernard V Sully* [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.”
100. Contrary to the general rule that the privity of contract doctrine dictates that only persons who are parties to a contract are entitled to take action to enforce it and that a person who stands to gain a benefit from the contract (a third party beneficiary) is not entitled to take any enforcement action if he or she is denied the promised benefit is not always true.
101. In *City Council of Nairobi v Wilfred Kamau Gitbua t/a Gitbua Associates & another* [2016] eKLR the CoA referred to *Halsbury's Laws of England*, 4th Edn. Vol. 9 (1) Para. 748 states:
- “The general rule. The doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose obligations on strangers to it; that is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits; contracts made on the basis of the memorandum and articles of a company; collective agreements, contracts with unincorporated association; and mortgage surveys and valuations.”
102. There are instances where 3rd Parties may successfully sue on performance of the contract or benefit from the contract between 2 parties contrary not being to privity to the contract. The exceptions to the rule include agency relationships, trusts, estoppel and unjust enrichment situations. Contracts of Insurance and specifically Motor Vehicle (3rd Party Insurance) Bills of Exchange and cheques.¹
103. In this case, the Petitioner obtained insurance policy to indemnify against damage loss or injury and it was by quantum of Payment to the 3rd Respondent. The 3rd Respondent upon payment of premiums and without breach of Insurance terms undertook to indemnify the Petitioner and was bound making good loss, damage or injury. In the instant case, the 3rd Party herein interested parties are bound to

¹ Principles of Commercial Law by Kibaya Imaana Laibuta; General Principles of the Law of Insurance Pg 241



- be compensated and the judgment debt paid arising from the Insurance contract made to benefit 3rd Parties.²
104. The contract of insurance is exempt from doctrine of privity of contract as the essence of the contract is to protect 3rd Party and hence the State makes it compulsory to take out 3rd Party Insurance by motor vehicle owners, drivers, public transport carriers etc to protect 3rd parties.
105. Hon Mativo, J (as he then was) in *Commission on Administrative Justice vs. Insurance Regulatory Authority & Another* [2017] eKLR similarly expressed himself as follows:
- “A statutory body is bound to adhere to mandate stipulated in the statute creating it and its actions must conform to the constitutional prescriptions as clearly provided in our transformative constitution. In my considered view, Insurance regulatory law is the body of statutory law, administrative regulations and jurisprudence that governs and regulates the insurance industry and those engaged in the business of insurance. Insurance regulatory law is primarily enforced through regulations, rules and directives by state insurance departments as authorized and directed by statutory law enacted by the legislature. Insurance is characterized as a business vested or affected with the public interest. Thus, the business of insurance, although primarily a matter of private contract, is nevertheless of such concern to the public as a whole that it is subject to governmental regulation to protect the public’s interests.
106. The 2nd issue buttressed by 1st 2nd & 3rd Respondents and extensively by legal provisions and case-law is that the 3rd Respondent is under statutory management and there is declared a moratorium and hence the Statutory Manager’s mandate is reorganization of 3rd Respondent and not liable to settle claims as by the moratorium the time stops running and no claims are paid or settled.
107. Article 10 of that *Constitution* embodies values and principles of governance which binds state officers in interpreting and applying *the Constitution* which values include upholding the rule of law, human dignity, human rights, good governance equity and social justice; transparency and accountability among others which binds all State organs, State officers, public officers and all persons.
108. It is the statutory duty of the Insurance Company under Section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act* to pay claims arising out of the judgments resulting from insurance cover taken pursuant to Section 4 of the Act & Section 203 of the *Insurance Act*.
109. Article 46 of *the Constitution* safeguards consumer rights and consumers are entitled to services of reasonable quality, protection of their economic interest and compensation for loss or injury arising from the defects in services.
110. Article 27 of *the Constitution* ensures and upholds equal benefit and protection of the law to all persons. In the instant case both/all insurance industry players, insurer and policy holders, victims 3rd parties among others are ALL protected by the law.
111. This Court notes with concern the fact of 3rd Respondent being placed on moratorium is deemed to be the ‘the be all and end all’ of all insurance /policy claims, judgments orders by Courts for the policy holders, victims and other players in Insurance sector. The moratorium according to *Black’s Law Dictionary* 2nd Edition, moratorium means “Delay in performing an obligation or taking an action legally authorized or simply agreed to be temporary.”

² ibid



112. In the England case of *Brake & Another vs Guy & Others* (2022) EWHC 2797 (CH) the Court observed at Paragraph 50 that:

“... the purpose of moratorium is to give peace of mind to the debtor by removing the threat of enforcement.”

113. From the above definition, a moratorium is a stop gap measure for a reasonable period and for specific legal processes to take place and not in effect to run ad infinitum as is alluded to be in the submissions by Respondents. The moratorium is to give the Insurance Company a breather to reorganize its assets against the liability portfolio before the decision is taken by the Statutory Manager to windup the Company. But protection cannot in all fairness be to the Insurance Company alone but to all before the law be they the Insurance Companies, Policy Holders who are left exposed to liability whilst they undertook the contract of insurance to be indemnified on occurrence of any loss, damage or injury, victims, interested 3rd parties and the Insurance sector as a whole.

114. The 3rd Respondent was placed on a moratorium in 2012 more than a decade ago with a pending winding up Nairobi Milimani High Court winding up cause 238 of 2017 that seems to address claims by shareholders only with no respite for various policy holders especially those whose suits were filed before the Insolvency Notice as in the instant case.

115. The letter dated 7/5/2012 from Statutory Manager by the 3rd Respondent to the Petitioner’s Advocates on record speaks to the issue thus;

“We refer to the above mentioned suit in which we have received the Original Summons and Plaint on 12th April, 2012.

Kindly note that Blue Shield Insurance Company Limited was placed under Statutory Management on 16th September 2011 by the Commissioner of Insurance pursuant to Section 67C of the *Insurance Act* (CAP.487) Laws of Kenya. In line with the foregoing, a Statutory Manager was appointed in accordance with the provisions of Section 67 C (2) (i) of the *Insurance Act* and with effect from the said date the appointment was duly gazetted.

Pursuant to the afore-stated appointment, the Statutory Manager obtained a Court order on 28.10.2011 in HCCC NO.465 of 2011 staying all proceedings involving it and all its policy holders and further declared a Moratorium on all payments for a period of twelve (12) months.

We attach hereto a copy of the said Order and advice that proceedings with any legal action against Blue Shield Insurance Company Limited or its Policy holders will be in contravention of the subsisting Court Order and further you may be cited for contempt of Court.

Meanwhile please note that upon completion of the task by the Statutory Manager, all stakeholders will be contacted and advised appropriately on the way forward”

116. Section 179 of the *Insurance Act* provides for a Policy Holders Compensation Fund and provides that;

- (1) The Cabinet Secretary shall, for the protection of policyholders, establish a Policyholders Compensation Fund, in this section referred to as “the Fund”, to provide compensation to the claimants of insurer placed under a manager appointed under section 67C (2) or whose license has been cancelled under the Act.



- (2) Where a Fund is established under subsection (1), the Cabinet Secretary shall appoint a board of trustees, in this section referred to as “the Board”, for the management and administration of the Fund

117. With these legal provisions in place, to cater for innocent members of the public/consumers of insurance services in the event of the Insurance Companies going under, this Court finds that Parliament intended and made provision to protect parties in the Insurance Industry however, it seems that the protection and various mechanisms have not been operationalized.
118. There are various parties with competing legal interest /rights over the subject-matter, the claim of indemnity in the contract of insurance; the Petitioner obtained mandatory 3rd party insurance and paid motor vehicle insurance premium to the 3rd Respondent vide insurance policy number 087/008297/07/06/B89 (COMP) to indemnify him of the third-party risk. Despite payment of insurance premiums, the 3rd Respondent upon Public Notice of Declaration of moratorium and being placed under Statutory Management, the Petitioner was exposed to series of execution processes of the judgment in Machakos Civil Suit 223 of 2012 of March 2019. The annexed documents to his petition attest to Proclamation of goods at his business premises, matrimonial home and imminent committal to civil jail. The Petitioner lost legitimate expectation that after compliance with insurance contract to indemnify him for loss damage or injury he was insulated from loss of property, interference and loss of business due to execution process and interference with his piracy and lack of freedom of movement and association due to imminent committal to civil jail for the judgment debt.
119. The Supreme Court in binding precedent in the case of *Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others* (2014) eKLR held as follows:
- (265) An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.
- (266) Wade and Forsyth in their work, *Administrative Law*, 10th ed (pages 446-448), discuss the relevant legal principles on legitimacy of an expectation. For an expectation to be legitimate, it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation.
120. Likewise, the 3rd & 4th Interested parties’ parents of the child who died in the fatal accident that occurred on 25/10/2009 lost their child due to no fault on their part, have pursued in the justice process compensation from 2012 to 2019 when they obtained judgment and have been pursuing compensation, fruits of the judgment against 3rd Respondent who declared a moratorium and the Petitioner who insured the motor vehicle paid premiums and now is supposed to settle the decretal sum in the midst of serial execution process.
121. With this back ground, granted there is a moratorium to halt operations of the 3rd Respondent but that does not mean that the moratorium was absolute open ended and to absolve the 3rd Respondent of any claim or liability indefinitely. Also the 1st Respondent the Regulator and the Court should not throw up hands in the air in defeat and resignation in carrying out the respective legal mandate, for 1st Respondent to regulate and supervise the Insurance industry to protect the public as insurance consumers and policyholders and the Courts to uphold rule of law. The Courts have articulated the issue of protection of consumers of insurance services in case-law over the years as follows;



122. In the case of *Kensilver Express Ltd & 3 Others v Commissioner of Insurance & 4 Others* [2007] eKLR M.A. Ang'awa J expressed herself as follows;

- (48) Its therefore certain that the Applicant/Petitioner were treated differently from other classes of Insurance policy holder, a moratorium had been declared. No execution on court proceedings should have commenced for 12 months until the Statutory Manager proceeded and completed its task. No such notice was clearly given in the process. The Applicant/Petitioner therefore claimed that they most certainly were being discriminated against. They were hounded by creditors and were not able to cope with this frequent attack on them. They all claimed to have legally paid their premiums. That the payment of such premiums amounted to a binding contract that the Insurer would meet their obligations.
- (49) Their constitutional rights were being contravened. The protection of the law had been taken away from them. They explained this on the grounds that the Commissioner of Insurance had all along known that the said insurer was not faring well. No steps were taken by the Commissioner to stop the said insurer from accepting premiums from the public. That was in essence the law in 1995 under Section 67 C 10 that at the appointment of a Manager[it] shall constitute an immediate suspension of any new Insurance contracts on the part of the insurer so affected. This exposes the new policy holders and clients who continue to renew their policies, not knowing that the Company had undergone difficulties. (emphasis mine)

“ [99.1.] Whereas the Plaintiffs constitutional rights to liberty and peaceful ownership of their property are violated or jeopardy of being violated by the third parties seeking to execute processes, decrees judgment and claims against the defendants in which United Insurance Co. Ltd had legally assumed on deemed to have assumed full responsibility to settle vide Section 10 (2) of the Insurance (3rd Party risks) Act Cap 405 as the Plaintiffs insure within the meaning of the *Insurance Act* Cap 487.

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

[99.3.] Whereas the United Insurance Company Ltd is in Statutory Management. [100.] It is hereby declared both with the Plaintiff/Victims creditors and the original defendant decree debtor's applicants' petitioners herein have had their rights infringed. [100.1] That it is hereby declared that 1st defendant,



the Commissioner of Insurance failed to take remedial measures in time to forestall a situation whereby the Applicant petitioners hold policies but are unable to have them paid and the victims hold judgment decree which they are unable to execute. [100.2]. That it is hereby declared that the appointment of Kenya Re as a Statutory Manager is null, void abinitio and illegal.

123. In HCC No. 88 of 2012 in the *Matter of Concord Insurance Company Limited* [2014] eKLR where Gikonyo J considered the issue of interested parties pursuing their claim against the insured and stated:

“As a good beginning point, I can pronounce with ease that the interested parties herein are not policyholders of or creditors to Concord Insurance Company.... Section 67C (10) of the *Insurance Act* was not intended to deny legitimate suitors of their right to institute proceedings for relief against an insured of an insurance company under receivership for tortious acts of or breaches by the insured. The said section is intended to allow the manager to discharge his duties in relation to the revival of the insurance company. In my own view, I think, the protection offered by the moratorium and court orders attendant thereto is to the company from payments by the insurer (company) of its policyholders and other creditors, and not necessarily to the policyholders or other creditors against liability from third parties. Therefore, in so far as the interested parties have cases against the insured, there is nothing to stop them from pursuing the claims to logical conclusion.”

124. Petition No 20 Of 2018 *Peter Mwau Muinde & Inter County Express Ltd vs Insurance Regulatory Authority AG & Invesco Assurance Co Ltd*, Hon G.V. Odunga J (as he then was) stated of 1st Respondent’s role in protection of Insurance Industry and players of the Insurance industry thus;

“Once the said signs become apparent, the 1st Respondent should move with speed and invoke his powers under Section 67 C.....

I am not holding that in every case where an insurance company collapses, the 1st Respondent should be held liable. Where the 1st Respondent takes the necessary steps to ensure that an insurance company operates within the law but due to matters that the 1st Respondent was unable to unearth despite exercise of reasonable diligence, the 1st Respondent would not be liable. In this case, despite being given an opportunity to explain itself, the 1st Respondent has not stated what action, if any, it took to forestall the imminent collapse of or inability by the 3rd Respondent to meet its statutory obligations as a result of which the Petitioners’ rights have been violated or are threatened with violation. Its failure to explain itself in this petition can only mean that it never performed its mandate under the *Insurance Act* and for that it is constitutionally liable.”

Disposition

126. A declaration is made that the Petitioner’s Constitutional rights to liberty, movement and association and peaceful ownership of his property are violated by third parties/interested parties’ execution processes, decrees, judgment and claims against the policy holder with the 3rd Defendant.
127. The Petitioner’s and right to privacy and freedom of movement and association and equal benefit and protection of the law are curtailed by the imminent committal to civil jail pending.



128. A declaration is made that the conduct of the civil proceedings or litigation in Machakos Civil Suit No.223 of 2012, is constitutional, the pleadings, proceedings and judgment as the fateful accident occurred before the moratorium, the suit was filed and commenced before declaration of the moratorium and the resulting judgment and decree are valid for execution after the moratorium.
129. A declaration is made that the 1st & 3rd Respondents, jointly and severally settle the judgment and decree Machakos Civil Suit No.223 of 2012 by payment to the 3rd & 4th interested parties of the indemnity arising from the Petitioner's Insurance cover with the 3rd Respondent under Section 4 of the Insurance (Motor Vehicle Third Party Risks) Act when the moratorium abates as it is not indefinite.
130. A declaration is made for the 1st Respondent to facilitate operationalization of Section 179 of the *Insurance Act*, establishment of Policy Holders Compensation Fund to settle genuine and confirmed legal claims arising out matters lodged with 3rd Defendant before the moratorium.
131. A declaration is made for permanent injunction to restrain the 3rd & 4th interested parties from executing the court judgment and decree against the Petitioner in respect of the Accident for which the Petitioner had obtained insurance Cover under Section 4 of the (Motor Vehicle Third Party Risks) Act. specifically, in Machakos CMCC 223 OF 2012.
132. The Costs of this petition are awarded to the Petitioner to be borne by the 1st & 3rd Respondents.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 13TH JULY, 2023 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

