



**Kimemia v Invesco Assurance Co. Ltd & 4 others (Constitutional Petition 137 of 2020) [2023] KEHC 22335 (KLR) (Constitutional and Human Rights) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22335 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION 137 OF 2020**

**AC MRIMA, J**

**SEPTEMBER 21, 2023**

**BETWEEN**

**EUNICE NGINA KIMEMIA ..... PETITIONER**

**AND**

**INVESCO ASSURANCE CO. LTD ..... 1<sup>ST</sup> RESPONDENT**

**FAMILY BANK INSURANCE AGENCY LTD ..... 2<sup>ND</sup> RESPONDENT**

**FAMILY BANK LTD ..... 3<sup>RD</sup> RESPONDENT**

**JOHN MUSOKI KIANGA ..... 4<sup>TH</sup> RESPONDENT**

**WYCLIFFE MUSYOKI ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Background:**

1. The Petition before this Court revolves around claimed violation of the right to property occasioned to Eunice Ngima Kimemia, the Petitioner herein by the Respondents for variously failing to disclose information on an insurance cover and to take steps to protect the Petitioner’s economic interests.
2. A synopsis of what transpired will suffice. In the year 2014, the Petitioner, through an asset financing contract (hereinafter referred to as ‘the Contract’), with Family Bank Limited was advanced a facility totalling Kshs. 3,254,510/-.
3. The Petitioner used the money to purchase a motor vehicle make Isuzu NQR 66R, registration number, KCC 532M, (hereinafter referred to as ‘the motor vehicle’). It was registered in the joint ownership of Petitioner and the 3<sup>rd</sup> Respondent.



4. The 3<sup>rd</sup> Respondent's offer letter had, among other conditions, the requirement that the Petitioner was to agree to pay for insurance policy cover for the motor vehicle.
5. To that end, the 3<sup>rd</sup> Respondent, through Family Bank Insurance Agency Limited, 2<sup>nd</sup> Respondent herein, had the Petitioner sign an Insurance Premium Finance Agreement where the 3<sup>rd</sup> Respondent would make payments of the premiums and the Petitioner would in turn pay the monies incurred in settling the premiums to the 3<sup>rd</sup> Respondent.
6. Further to the foregoing, Family Bank Insurance Agency Limited, required the Petitioner to take up an insurance cover with Invesco Assurance Company Ltd, 1<sup>st</sup> Respondent herein, and African Merchants Insurance Company Ltd (hereinafter referred to as 'Amaco').
7. Accordingly, Invesco Assurance Company Limited covered third-party risk while Amaco covered material damage to the motor vehicle.
8. As fate would have it, the motor vehicle was involved in an accident on 31<sup>st</sup> December, 2016 resulting in fatal loss of Emily Wayua Musyoki.
9. Amaco compensated the Petitioner by having the motor vehicle repaired. The 1<sup>st</sup> Respondent, covering third party claims, failed to compensate the Petitioner.
10. John Musoki Kianga and Wycliffe Musyoki the 4<sup>th</sup> and 5<sup>th</sup> Respondents herein respectively, sued as personal representatives of Emily Musyoki in Ngong Chief Magistrates Court Civil Case No. 74 of 2017(hereinafter referred to as 'the civil case').
11. Default judgment was entered on 26<sup>th</sup> April 2018 and consequently a decree and warrants of attachments issued on 8<sup>th</sup> May 2019.
12. Until the motor vehicle was attached by the auctioneers, the Petitioner claimed to have been oblivious of the civil case. He unsuccessfully challenged the auction. Subsequently, the motor vehicle was sold at Kshs. 900,000/- leaving a balance of Kshs. 1,629,895/- due to the third 4<sup>th</sup> and 5<sup>th</sup> Respondents.

**The Petition:**

13. Through the Petition dated 14<sup>th</sup> April 2020, supported by the Affidavit and further Affidavit of Eunice Ngima Kimemia deposed to on 14<sup>th</sup> April 2020 and 5<sup>th</sup> July 2021 respectively, the Petitioner sought to assert and vindicate violation of various constitutional entitlements.
14. He averred that instead of the 3<sup>rd</sup> Respondent giving him unbiased information on insurance companies that could insure his motor vehicle, through its subsidiary company, it presented the 1<sup>st</sup> Respondent only without offering information on any alternative.
15. The Petitioner, therefore, pleaded that the 3<sup>rd</sup> Respondent deliberately withheld information contrary to Article 35(1)(b) which entitles every citizen the right to access information held by another person and required for the exercise of any right or fundamental freedom.
16. She pleaded that the 2<sup>nd</sup> Respondent withheld information to the extent that there were other forms that she ought to have filled to address third party claim covered by the 1<sup>st</sup> Respondent and omission that infringed on her right to property under Article 40 of *the Constitution*.
17. It further was her case that the denial of the information breached her consumer rights to information necessary for her to gain full benefit from good and services as provided for under Article 46 of *the Constitution*.



18. The Petitioner posited that as a consumer of banking services of the 3<sup>rd</sup> Respondent, she was entitled to protection of her economic interests and to compensation for loss of injury arising from defects in goods and services.
19. It was her case that, the 3<sup>rd</sup> Respondent, having retained the log book of the motor vehicle which was in their joint names, released it to a third party without notice to her.
20. She pleaded that concealment of the material information left her in the dark and deprived her of the entitlement to protect her economic right to own property.
21. The Petitioner posited that he had legitimate expectation that the 1<sup>st</sup> Respondent was under a statutory duty under section 10 of *Insurance (Motor Vehicles Third Party Risks) Act* to satisfy judgments against persons insured.
22. It was the Petitioner's case that upon auctioning of the motor vehicle, she lost daily earnings of Kshs. 8,500/- which when computed on a monthly basis is Kshs. 204,000/- and cumulatively, Kshs.1,836,000/-.
23. On the foregoing legal and factual backdrop, the Petitioner prayed for the following reliefs;
  - A. A declaration that the 3<sup>rd</sup> Respondent was duty bound to give the Petitioner unbiased information on insurance companies that could insure the suit motor vehicle and that the non-disclosure violated the Petitioner's rights of information under Article 35(1)(b) and Article 46(1)(b).
  - B. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and or severally violated the Petitioner's consumer rights to services of reasonable quality, information necessary to gain full benefit from goods and services and protection of her economic interests as a consumer under Article 46(1)(a)(b)(c) of *the Constitution* of Kenya 2010.
  - C. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and or severally breached the violated (sic) the Petitioner's right to acquire and own property under Article 40(1).
  - D. This Honourable Court be and is hereby pleased to issue an order of mandamus compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and or severally to compensate the Petitioner for violation of her rights.
  - E. This Honourable Court be and is hereby pleased to issue an order of mandamus compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and or severally to compensate the Petitioner KShs.3,800,000/- being the market value of the motor vehicle lost by the Petitioner.
  - F. This Honourable Court be and is hereby pleased to issue an order of mandamus compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and or severally to compensate the Petitioner Kshs. 1,836,000/ being the loss of use of the suit motor vehicle.
  - G. This honourable Court be and is hereby pleased to issue an order of mandamus compelling the 1<sup>st</sup> Respondent to compensate the 4<sup>th</sup> and 5<sup>th</sup> Respondents the balance of the decretal amount being Kshs. 1,629,895/-.
  - H. This Honourable Court be and is hereby pleased to issue a conservatory order restraining the 4<sup>th</sup> and 5<sup>th</sup> respondents either by themselves, agents and or auctioneers instructed by their advocates from levying any further execution on the Petitioner with regards to Ngong CMCC No. 74 of 2017.



- I. That costs be provided for.
- J. Any other order or relief that this Honourable Court is pleased to issue in the Circumstances.

### **The Submissions**

24. In its written submissions dated 21<sup>st</sup> January 2022, the Petitioner submitted that the information on the insurance companies at the 3<sup>rd</sup> Respondent's panel were singularly held by the 3<sup>rd</sup> Respondent in violation of Article 35(1)(b) of the Constitution which would have enabled her protect her consumer rights.
25. It was submitted that part execution was done by selling the Petitioner's motor vehicle while the remainder of the decretal sum was obtained directly from the 1<sup>st</sup> Respondent, a fact that shows that the 1<sup>st</sup> Respondent had information and did not inform the Petitioner that they had paid the remainder of the decretal sum to the 4<sup>th</sup> and 5<sup>th</sup> Respondents.
26. While submitting on the Petitioner's consumer rights, it was its case that the 1<sup>st</sup> Respondent was duty bound to appoint Advocates who could defend her in the case having had notice of the same vide statutory notice of intention to sue issued by the 4<sup>th</sup> and 5<sup>th</sup> Respondent.
27. It was submitted further that the 1<sup>st</sup> Respondent went to the extent of settling the 4<sup>th</sup> and 5<sup>th</sup> Respondents the balance of the decretal sum without informing the Petitioner a fact that would have helped her gain full benefit of services it was offering her.
28. in the end, the Petitioner urged the Court to allow the Petition with costs.

### **1<sup>st</sup> Respondent's Case**

29. Invesco assurance Co. Ltd challenged the Petition through the Replying Affidavit of Paul Gichuhi, the Legal Manager, deposed to on 10<sup>th</sup> July, 2020.
30. It was the 1<sup>st</sup> Respondent's case that the Petition is fatally defective and an abuse of Court process since the cause of action arose out of insurance contract and as such the dispute ought to have been instituted in the Commercial and Tax Division.
31. It was the 1<sup>st</sup> Respondent's case that the dispute herein was raised and settled in CMCC 74 of 2017 and declaratory suit No. 149 of 2018, a fact which the Petitioner has not disclosed to the Court.
32. It was its case further that the suit is debarred by Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act for want of statutory notice and for breach of material terms of the insurance policy.
33. In response to the substance of the claim, the 1<sup>st</sup> Respondent deposed that when the accident occurred, the estate of the deceased, in a bid to get compensation for fatal loss failed to attach a statutory notice contrary to section 10(1) and (2) of the Insurance (Motor Vehicle Third Party Accident Risks) and hence their claim could not be acted upon.
34. He deposed that the estate then filed CMCC NO. 74 of 2017, John Musyoki Kianga & Wycliffe Musyoki (suing as the personal representative of the late Emily Wayua Musyoki) -vs- Ephantus Kamau & Another, where summons to enter appearance was served upon the insured by substituted service.
35. The suit proceeded undefended and judgment was entered in default of appearance and decree issued against the insured, the Petitioner herein for general damages of Kshs.2,387,437/- and interest of Kshs. 141,510/ as costs of the suit.



36. He deposed that in breach of section 10(1) and (2) of the Insurance (Motor Vehicle Third Party Accident Risks), the Petitioner failed to notify the 1<sup>st</sup> Respondent of the proceedings giving rise to the judgment for Kshs. 2,387,437 before and after judgment was issued.
37. He deposed that warrants of attachment were served upon the Petitioner herein and proceeded to instruct her Advocates who tried to stop the execution in vain. The Petitioner's motor vehicle was sold at a depreciated value of Kshs. 900,000/-.
38. It was his case that the 1<sup>st</sup> Respondent only got to learn of the foregoing proceedings through the Advocates of the decree holder on 7<sup>th</sup> May 2018, over one and a half weeks (10 days after entry of judgment in default of the provisions of section 10(1) and (2) of the Insurance (Motor Vehicle Third Party Accident Risks) which requires that an insured be notified of such proceedings at least 30 days before or after commencement of proceedings giving rise to the judgment.
39. It was his deposition further that on 22<sup>nd</sup> January 2020, the Petitioner's Advocates and the 1<sup>st</sup> Respondent's Legal Manager met with the aim of setting aside the warrants of attachments, but the Petitioner herein disappeared only to reappear with the instant Petition.
40. He deposed that thereafter, on 7<sup>th</sup> August 2018, the estate of the deceased filed a declaratory suit in PMCC No. 149 of 2018, John Musyoki Kioko and Another -vs- Invesco Assurance Company Limited to enforce the decree in the primary suit.
41. He deposed that consequently, the 1<sup>st</sup> Respondent instructed the firm of Masara & Co. Advocates to enter appearance but found out that an interlocutory ex-parte judgment had already been entered against the 1<sup>st</sup> Respondent for Kshs.2,038,500/-.
42. It was his deposition, therefore, that despite the provisions of section 10(1) and (2) of the Insurance (Motor Vehicle Third Party Accident Risks), the 1<sup>st</sup> Respondent was now faced with the claim which could have been avoided but for the Petitioner's negligence, and is now using the Court process to sanitize her own misfortune.
43. He deposed that the Petitioner is guilty of laches and of unclean hands and or contributory negligence and is disentitled to the reliefs sought, which would occasion the 1<sup>st</sup> Respondent double jeopardy, in light of the declaratory suit in PMCC 149 of 2018.
44. In the end, Mr. Gichuhi prayed that the Petition be dismissed with costs.

**The submissions:**

45. The 1<sup>st</sup> Respondent filed written submissions dated 12<sup>th</sup> October 2021 to further urge its case.
46. While relying on the doctrine, *ex turpi causa non oritur* and the decision in Kenya Pipeline Company Limited -vs- Glencore Energy (G.K) Limited, it was the 1<sup>st</sup> Respondent's position that the Petitioner cannot be allowed to benefit from her own wrong doings.
47. It was submitted according to clause 4(c) of the Insurance Policy, the Petitioner was required to inform the 1<sup>st</sup> Respondent immediately she became aware of any current or future proceedings in connection with any event for which there may be any liability under the policy.
48. With reference to the claimed sum of Kshs. 1,836,000/= as the sum she suffered for loss of use, and market value of the motor vehicle as Kshs. 1,800,000/-, the 1<sup>st</sup> Respondent submitted that there was no documentation to demonstrate how the figure was arrived at.



49. It was submitted therefore that the Petitioner had not demonstrated how her rights under Articles 40 and 46 had been violated.
50. In denying the prayer for mandamus, 1<sup>st</sup> Respondent relied on the decision in Civil Appeal No. 234 of 1996, Republic -vs- Kenya National Examinations Council ex-parte Gathenji & 8 Others and submitted that no evidence was led by the Petitioner to demonstrate that the loss she suffered was attributable to the 1<sup>st</sup> Respondent.
51. It was urged that the Petition be struck out with costs.

**The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents' case:**

52. Family Bank Insurance Agency Limited and Family Bank Limited responded to the Petition through the Replying Affidavit and Supplementary Affidavit of Sylvia Wambani, the Legal Counsel for Family Bank Limited, deposed to on 29<sup>th</sup> May 2020 and 6<sup>th</sup> October 2021 respectively.
53. It was its case that they availed all information to the Petitioner and at no point did the 2<sup>nd</sup> Respondent dictate to her the insurance company to provide the relevant policies as claimed by the Petitioner.
54. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents denied violating the Petitioner's property and consumer rights. It was deposed that contrary to the Petitioner's assertions, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are still in possession of the motor vehicle original logbook.
55. She deposed further that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are not privy to the question whether there existed a contractual relationship between the Petitioner and the 1<sup>st</sup> Respondent.
56. It was her case that despite the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents having been informed of the accident it was not their duty to process any claims arising from it. It was denied that they had any obligations in the claim process.
57. In conclusion it was urged that the Petition be dismissed with costs.

**The submissions:**

58. In its written submissions dated 22<sup>nd</sup> November 2021, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that upon receipt of loan application by the Petitioner, it drafted a Letter of Offer and the 3<sup>rd</sup> Respondent presented all documents that were relied on by the parties for the award of the loan facility.
59. It was submitted that none of the documents relied upon by the Petitioner indicates that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents dictated the Insurance companies to her.
60. It was their case that the Petitioner had fallen short the requirement in section 107 of the *Evidence Act* that requires a person to prove existence of a fact.
61. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents relied on Civil Appeal No. 22 of 2018, Milka Kemuma Kimenga -vs- Peter Gabi Nyandisi where it was observed: -

The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove her case on a balance of probability and the fact that the defendant does not adduce any evidence is immaterial.

62. In the end, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents denied any wrong doing or violation of the Petitioner's constitutional rights as claimed in the Petition.



### **Analysis:**

63. This Petition mainly looks at the interlink between consumer rights and private contractual obligations between parties. In doing so, this Court will answer the question as to whether Articles 35(1)(b), 40(1) and 46(1)(a), (b) and (c) of *the Constitution* were infringed by the Respondents.
64. A discussion on the said constitutional provisions in seriatim, therefore, follows.

### **Whether Article 46(1)(a), (b) and (c) were infringed:**

65. Regarding Article 46(1)(a), (b) and (c) of *the Constitution*, the provision speaks to consumer rights, and as follows: -

46. Consumer rights

(1) Consumers have the right—

- (a) to goods and services of reasonable quality;
- (b) to the information necessary for them to gain full benefit from goods and services;
- (c) to the protection of their health, safety, and economic interests; and
- (d) to compensation for loss or injury arising from defects in goods or services.

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

(3) This Article applies to goods and services offered by public entities or private persons.

66. To be able to ascertain any breach of the above constitutional provisions, as alleged by the Petitioner, there is need to look at the extent in which a Constitutional Court can venture into a contract between private persons.

67. Article 46(3) of *the Constitution* stipulates that the constitutional provision on consumer rights applies to goods and services offered by public entities or private persons.

68. The legislation contemplated under Article 46(2) of *the Constitution* is the *Consumer Protection Act*, No. 46 of 2012 (hereinafter referred to as ‘the Consumer Act’). The Preamble of the Consumer Act states that it is an Act of Parliament to provide for the protection of the consumer, prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto.

69. The Consumer Act provides in good details the manner in which the purposes of the Act are to be met. For instance, Section 3(4) is emphatic on the purposes of the legislation. It provides as follows: -

(4) The purposes of this Act are to promote and advance the social and economic welfare of consumers in Kenya by-

- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
- (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers;
- (c) promoting fair and ethical business practices;



- (d) protecting consumers from all forms and means of unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices including deceptive, misleading, unfair or fraudulent conduct;
- (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behavior;
- (f) promoting consumer confidence, empowerment and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;
- (g) providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
- (h) providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers.

70. In Section 3(1) and (2), the Consumer Act provides for how the legislation is to be interpreted. It states as under: -

3. Interpretation and purposes of Act:

- (1) This Act must be interpreted in a manner that gives effect to the purposes set out in subsection (4).
- (2) When interpreting or applying this Act, a person, Court or the Advisory Committee may consider—
  - (a) appropriate foreign and international law; and
  - (b) appropriate international conventions, declarations or protocols relating to consumer protection.

71. Part II of the Consumer Act is on consumer rights while Part III is on unfair practises. The legislation further and elaborately provides for various aspects in which the intended protection of the consumers and prevention of unfair trade practices in consumer transactions is to be attained.

72. Courts have also rendered on the interpretation of the Consumer Act. In *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR, Mativo, J (as he then was), had this to say on the issue: -

119. The South African Constitution and the South African *Consumer Protection Act* have provisions similar to the Kenya Constitution and our statute law protecting consumer rights. Hence decisions from South Africa Courts on the subject may offer useful guidance. The South African Court in *Natal Joint Municipal Pension Fund vs Endumeni Municipality*, [78] interpreting their *Consumer Protection Act* laid down the applicable principles. It stated that the Court is to consider the words used in the light of all relevant and admissible context, including the circumstances in which the legislation came into being, ‘...a sensible meaning is to be preferred to one that leads to insensible or un-business-like results. . .’[79] and that that the interpretative process involves ascertaining the intention of the legislature.[80]

121. Section 4 provides that the purposes of the Act are to promote and advance the social and economic welfare of consumers in Kenya. From the definition in section 2 of the Act and the Preamble and purpose of the Act, it is clear that the whole tenor of the Act is to protect



consumers. The Act must therefore be interpreted keeping in mind that its focus is the protection of consumers. Consumer rights litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the expanded Bill of Rights in our transformative and progressive Constitution by establishing its meaning through contested cases. [81]

122. This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of *the Constitution* and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and, where rights and freedoms are conferred on persons, derogations there from, as far as the language permits, should be narrowly or strictly construed. [82]
73. This Court echoes the above.
74. Having said so, there has been the argument that Courts cannot re-write a contract between private parties. That was so held by the Court of Appeal in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR when the Court expressed itself thus: -
- A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.
75. It is, however, to be noted that the decision in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* case (supra) was rendered before the advent of the 2010 Constitution.
76. In 2011, the Court of Appeal had an opportunity of considering the position in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* case (supra) in light of the 2010 Constitution. That was in *LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others* [2011] eKLR.
77. This is what the Court of Appeal stated: -
- The equitable rule is that if the borrower is in a situation in which he is not a free agent and is not capable of protecting himself, a Court of Equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so. In *VANZANT V COATES*. [1969] 14 D.L.O.R. 256 it was held that the transaction would, in the foregoing circumstances be rescinded.
- The traditional view that “if people with their eyes open wilfully and knowingly enter into unconscionable bargains, the law has not right to protect them”- as held in *Fry V Lane* 1888 40 Ch. D 312 – has long been altered. Also I would think that this old traditional view cannot any longer hold ground after the enactment of the new Constitution and the coming into effect of the new Civil Procedure Regime which introduced the principle of “overriding objective” which require all courts to swing its gates wide open in terms of being broadminded on the issue of justice in the context of the circumstances before it.
78. Later, in keeping with the foregoing new approach, the Court of Appeal in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR rendered itself as follows: -
- It is not for the Court to rewrite a contract for the parties. As this Court held in *National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd*. Civil Appeal No. 95 of 1999 “a Court



of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”

Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case...

79. In re-affirming public policy in contractual relationships, the Constitutional Court of South Africa in *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12, stated (as per Nicholls AJ) that: -

All contractual agreements between private parties are governed by the principle of *pacta sunt servanda*, unless they offend public policy. Where it is alleged that constitutional values or rights are implicated, public policy must now be determined by reference to the values embedded in *the Constitution*, including notions of fairness, justice and reasonableness. The Parent Contract, in particular clause 9.3, must stand up to scrutiny, based on the test set out in *Barkhuizen*, where this Court authoritatively stated that the application of public policy in determining the unconscionableness of contractual terms and their enforcement must, where constitutional values or rights are implicated, be done in accordance with notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into consideration the necessity to do simple justice between individuals and is informed by the concept of ubuntu. What public policy is, and whether a term in a contract is contrary to public policy, must now be determined by reference to these values. This leaves space for enforcing agreed bargains (*pacta sunt servanda*), but at the same time allows courts to decline to enforce particular contractual terms that are in conflict with public policy, as informed by constitutional values, even though the parties may have consented to them.

80. That was well-put!
81. Therefore, in light of the above, it is this Court’s finding and holding that whereas parties are at liberty to enter into private contracts, Courts will, without any hesitation, intervene and decline to enforce such contracts if they are in contravention of the Bill of Rights and/or constitutional principles and values.
82. Returning to the case at hand, the Petitioner contended that the 2<sup>nd</sup> Respondent failed to give her the names of the insurance companies in its panel for her to settle for her choice, and that the 2<sup>nd</sup> Respondent ended up choosing the 1<sup>st</sup> Respondent for her, which 1<sup>st</sup> Respondent eventually failed to honour its contractual obligations to settle the claims that arose from the accident involving the motor vehicle.
83. It is on that backdrop that the Petitioner argued that her rights under Article 46(1)(a), (b) and (c) of *the Constitution* were infringed.
84. Applying Article 46 of *the Constitution* to this matter, it comes to the fore that the 2<sup>nd</sup> Respondent was under a constitutional duty to ensure that it gave the Petitioner all the information necessary for her to gain full benefit from the services rendered. Such information included the names of the insurance companies in its panel.



85. In the event the 2<sup>nd</sup> Respondent was to choose the service provider for the Petitioner, depending on the contractual terms, then it ought to have ensured that the insurance company will be one that provides quality services and to ensure that the Petitioner's economic interests were adequately and reasonably protected.
86. The record has a copy of an Insurance Proposal Form between the 1<sup>st</sup> Respondent and the Petitioner. The Form had one of the terms as follows: -
- I/We agree that this proposal and declaration shall form the basis of the contract between me/us and Amaco and shall be deemed to be incorporated in the contract.
87. The Form was duly signed by the Petitioner. A contract between the Petitioner and the 1<sup>st</sup> Respondent was thereafter executed. A copy thereof is on the record as well.
88. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that the Petitioner was accorded all the necessary information and voluntarily entered into the contract with the 1<sup>st</sup> Respondent.
89. To this Court, therefore, having signed the proposal form and executed the contract, and in the absence of any demonstration on how the provisions of Article 46(1)(a), (b) and (c) of *the Constitution* were infringed, this Court declines to answer the issue in the affirmative. The Court finds and hold that the Petitioner failed to prove the manner in which the provisions of Article 46(1)(a), (b) and (c) of *the Constitution* were allegedly infringed in this case.

**Whether Article 35(1)(b) was infringed:**

90. Article 35(1)(b) of *the Constitution* provides as follows: -
35. Access to information
- (1) Every citizen has the right of access to-
- (a) .....
- (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
91. Having found, in the preceding issue, that the Petitioner was availed all the necessary information and thereafter made up informed decisions, the contention of violation of Article 35(1)(b) of *the Constitution* cannot hold.
92. This Court equally finds and hold that the Petitioner failed to prove the manner in which Article 35(1)(b) of *the Constitution* was infringed in this case.

**Whether Article 40(1) was infringed:**

93. Article 40 of *the Constitution* provides for the protection of right to
- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
- (a) of any description; and
- (b) in any part of Kenya.



94. Given the finding that Articles 35(1)(b) and 46(1)(a), (b) and (c) of *the Constitution* were not infringed in the circumstances of this case, it then follows that Article 40(1) of *the Constitution* was not infringed either.
95. The above discussion sufficiently answers this Petition.

**Disposition:**

96. Deriving from the foregoing, the Petitioner has not persuaded this Court that the Petition is holding.
97. In the end, the following orders do hereby issue: -
- a. The Petition is unmerited and is hereby dismissed.
  - b. The Petitioner shall bear the costs of the Petition.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

**A. C. MRIMA**

**JUDGE**

Judgment virtually delivered in the presence of:

Mr. Omaiyo, Learned Counsel for the Petitioner.

Mr. Nderitu, Learned Counsel for the 1<sup>st</sup> Respondent.

Miss Onsare, Learned Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

N/A for the 4<sup>th</sup> and 5<sup>th</sup> Respondents.

