



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CONSTITUTIONAL PETITION NO.4 OF 2020

IN THE MATTER OF: ARTICLES 2(1) & (2), 3,10,19,20,21,22,23,25 (C) 159,

165, 258,259 AND 260 OF THE CONSTITUTION OF KENYA,2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 10,27 (1) & (2),28,29,30,35,40,47 AND 50 OF THE CONSTITUTION

AND

**IN THE MATTER OF: THE COMPANIES ACT NO.17 OF 2015, INSURANCE ACT,
CAP 487, INSOLVENCY ACT, NO.18 INSOLVENCY REGULATIONS 2015, INSURANCE
(THIRD PARTY RISKS) ACT, CAP 405 AND ADVOCATES ACT COP 9 LAWS OF KENYA**

AND

IN THE MATTER OF: FRAUDULENT; CLAIMS RUNNING DOWN PROCEEDINGS,

PARALLEL EXECUTIONS, GARNISHEE DEBITS AGAINST THE PETITIONERS

ACCOUNTS AND COMMITTAL PROCEEDINGS IN SCHEDULE A,

B AND C TO THE PETITION.

IN THE MATTER OF: FORGERY OF CERTIFICATE OF INSURANCE AND CLAIMS

BETWEEN

INESCO ASSURANCE CO. LTD.....1ST PETITIONER

PUBLIC TRANSPORT INVESTMENT CO. LTD.....2ND PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE OFFICIAL RECEIVER & LIQUIDATOR.....2ND RESPONDENT

AND

CITED THIRD PARTIES

AND

OTHER THIRD PARTIES IN ANCILLARY SUITS

RULING

1. By a Petition dated 20th January, 2020 and filed on 27th January, 2020 **Invesco Assurance Co. Ltd** and **Public Transport Investment Co. Ltd** (1st and 2nd Petitioners respectively) moved the court against **The Attorney General** and **The Official Receiver & Liquidator(Respondents)** and other **Cited Third Parties and Other Third Parties in Ancillary Suits (Interested Parties)** seeking the following orders **THAT**:

a. A declaration that the claims, legal proceedings, decrees and enforcement thereof, Garnishee Order nisi and Garnishee Order absolute by the cited Third Parties in the ancillary suits annexed in the schedules 'A,' 'B' and 'C' hereto has and /or will contravene the Petitioner's rights under Articles 10, 27 (1) and (2), 28,29,30,40,47 and 50 of the Constitution and therefore are unconstitutional, illegal, null and void

b. A declaration that winding up proceedings in schedule 'A','B' and 'C' hereto brought under the provisions other than the Insurance Act and /or involvement of the Commissioner of Insurance is unconstitutional, illegal, null and void and contravene the Petitioner's rights under article 40 of the Constitution and in particular the Petitioners rights to secure protection of the law, privacy of property, the right to peaceful enjoyment of property and the protection against deprivation and arbitrary entry of property.

c. A declaration do issue that the Petitioner owes no fiduciary duty to the cited Third Parties in the ancillary suits in schedule 'A,' 'B' and 'C' hereto and is not bound by the Insurance Act to meet any financial or Statutory obligations over fraudulent claims.

d. An Order be and hereby issued compelling the Inspector General of Police and the Director of Criminal Investigation to investigate the fraud herein and give the Respondent its findings to prosecute the Claimants in the ancillary suits under schedule 'A','B' and 'C'

e. An Order directing the taking of accounts and reconciliation of debts owed to parties cited an annexed in the schedule marked 'B' and 'C' hereto and for directions as to payment of any amounts due.

f. A permanent order of injunction do issue restraining the committals to civil jail or the summoning of directors and board members of the Petitioners' in court, issuance of decrees, warrants and/or garnishee order nisi arising from decrees and or Orders in respect of the matters specifically cited and annexed under Schedule 'A','B' and 'C' hereto.

g. An Order of certiorari quashing and or lifting the decrees, Garnishee order nisi and Garnishee Order absolute and /or winding up orders arising from and/or in respect of the matters specifically cited and annexed in the schedules hereto under schedule 'A','B' and 'C'.

h. A permanent order of injunction do issue staying any proceedings or executions arising from taxation causes and enforcement suits specifically cited in the annexed schedule marked 'B' and 'C'.

i. A declaration that the 1st petitioner is entitled and required under the law to conduct screening/validation of its outstanding claims portfolio and only settle of bonafide validated claims upon reasonable terms and conditions.

j. This Honourable Court do issue such further orders and give such directions as it may deem fit.

k. The Respondents and the cited third parties be condemned to pay costs of the Petition to the Petitioner.

2. Simultaneously with the Petition, the Petitioners filed a notice of motion dated 24th January, 2020 and filed on 27th January, 2020 seeking orders THAT:

1. THAT this application be certified urgent and be heard forthwith and service of same on the parties to the proceedings herein be dispensed with *ex parte* in the first instance.

2. THAT this Honourable Court do issue a conservatory Order staying the proceedings at any stage including warrants of attachment, taxation, Certificates of Taxations, Garnishee Order nisi or absolute and execution of Judgment and decrees subsisting or arising from any of the third party claims specifically cited under schedule 'A,' 'B' and 'C' pending the hearing and determination of the Application herein.

3. THAT the petitioners do give notice *ex parte* in the first instance of the institution of these proceedings by public

advertisement in a newspapers of countrywide supply for the notification of the cited third parties in ancillary suits in schedule 'A','B' and 'C' and other affected persons.

4. THAT this Honourable Court do issue a conservatory Order staying the proceedings, taxation, Certificates of Taxations, Garnishee Order nisi or absolute and execution of Judgment and decrees subsisting or arising from any of the third party claims against the 1st Petitioner or its insured and specifically cited under schedules 'A','B' and 'C' herein.

5. THAT in the alternative to Order 2 and 3 a conservatory Order staying the proceedings at any stage including warrants of attachment, taxation, Certificate of Taxations, Order nisi or absolute and execution of Judgment and decrees subsisting or arising from any of the third party claims specifically cited under schedule 'A','B' and 'C' pending the Petitioners' screening/validation of outstanding claims portfolio and only settle of *bonafide* validated claims upon reasonable terms and conditions.

6. THAT costs of the Application be in the cause.

3. This court on hearing the Petitioners' advocate *ex parte* on 27th January, 2020 granted prayer No. 1, 2 (*in respect of warrants of attachment*) and 3 of the application and directed that the application be heard *inter partes* on 12th February, 2020.

4. When the matter came up for *inter partes* hearing on 12th February, 2020, the following advocates appeared.

i. Mr. Kingara of M/S Gichuki Kingara & Company Advocates for the 1st Petitioner

ii. Mr. Musyoki for the Musyoki Benson & Associates for 2nd Petitioner

iii. Ms. Mwangi for M/S Mwangi Kengara & Co. Advocates appearing for 180 ancillary parties

iv. Mr. Kinyanjui for the firm of M/S Kinyanjui Njuguna & Co. Advocates, Interested Party

v. Mr. Gathogo for M/S Lesinko Njoroge & Gathogo Advocates Interested Party

vi. Ms. Kimere for the firm of Gichuki Kimere & Company Advocates for a stakeholder of the 2nd Petitioner

vii. Ms. Oluoch for M/S D.O. Oluoch & Company Advocates and M/S Staussi, Asunah & Oluoch Advocates for affected parties

viii. Ms. Kinuthia for M/S Janet, Jackson & Susan (LLP) for 2 Interested Parties

ix. Mr. Ibrahim for M/S Kibet Rop & Co. Advocates for 2 affected parties

x. Mr. Kimanga for M/S Kimanga & Company Advocates for Interested Parties

xi. Ms. Aron for M/S Okongo Wandago & Company Advocates Interested Parties

xii. Mr. Omondi for Law Society of Kenya, Interested Party

xiii. Ms. Gathu holding brief for Ms. Arati for the AG

xiv. Mr. Ojiambo for M/S Norbert O. & Co. Advocates for the Decree Holder in MERU CMCC 200 OF 2019 and also holding brief for Ms. Aketch for M/S Vivian Loice Aketch & Company Advocates for the Decree Holder in MERU CMCC 348 OF 2014

xv. Mr. Otieno Oyoo, Mr. Muhoro for the firm of M/S J.M. Kimani for 4 Interested Parties

xvi. Mr. Otieno Oyoo for M/S Otieno Oyoo & Co. Advocates for 4 Interested Parties

5. Before the commencement of the hearing, it was brought to the attention of the court that the order that was granted on 27th January, 2020 was not the order that was extracted and served on the Respondents and Interested Parties. Mr. Kingara for the 1st Petitioner conceded to that fact and shifted blame to the Deputy Registrar that extracted and signed the order. The second issue that was brought to the attention of the court is that the order that was granted affected an enormous number of parties. I will deal with these two issues later in this ruling.

6. Thereafter, I directed the parties to take a short break to enable the court deal with Criminal Cases and they came back with a consent to wit:

A. Withdrawing all matters in the Petition relating to

1. M/S. Mwangi Kengara & Company Advocates

2. M/S. Kinyanjui Njuguna & Co. Advocates

3. M/S Lesinko Njoroge & Gathogo Advocates

4. M/S Okongo Wandago & Company Advocates

5. M/S Staussi, Asunah & Oluoch Advocates

6. M/S D.O. Oluoch & Company Advocates

7. M/S Norbert O. & Co. Advocates

8. M/S Kimanga & Company Advocates

9. M/S Vivian Loice Aketch & Company Advocates

B. Costs be awarded to each of the advocates in Order A above as may be agreed or taxed

C. Travelling and hotel upkeep costs be paid to Ms. Mwangi of Mwangi Kengara & Company Advocates; Mr. Kinyanjui Njuguna & Co. Advocates; Mr. Gathogo of Lesinko Njoroge & Gathogo Advocates and Mr Ojiambo of Norbert O. & Co. Advocates at Kshs. 30,000/- (thirty thousand shillings each) by close of business on Thursday, 13th February, 2020.

7. The foregoing consent order settled the matters between the Petitioners and the parties who were represented in court and who were opposed to the Petition and the application dated 24th January, 2020.

8. The court was then left with Mr. Kingara and Mr. Musyoki for 1st and 2nd Petitioners respectively; Mr. Otieno Oyoo, Mr. Muhoro, Ms. Kinuthia and Ms. Kimere for Interested Parties who are stakeholders of the 2nd Petitioner and Mr. Omondi appearing for the Law Society of Kenya (*Interested Party*).

9. The court granted the Law Society of Kenya (*Interested Party*) leave to file a response to the Petition and the Notice of Motion dated 24th January, 2020.

10. At this stage, Mr. Omondi, counsel for Law Society of Kenya opposed extension of the conservatory orders and faulted the Petitioners' advocate for failure to disclose to the court material facts which if they were disclosed, the court would not have issued the orders as it did. Counsel submitted that the orders sought had the effect of staying processes in over 2000 cases spread from the Court of Appeal, the High Courts and subordinate courts all over the country and that the court had no jurisdiction to give such orders.

11. In addition, counsel submitted that it was not economically viable for affected parties and advocates to come all the way to Kisumu and that that explained the reason for which the Law Society of Kenya came on record to represent the affected advocates.

12. Mr. Omondi further faulted the Petitioners' advocate for what he referred to as litigating in instalments and choosing where to file suits for their failure to disclose that **Nairobi Petition No. 1178 of 2007** by the 1st Petitioner, relating to same issues as in this Petition was still pending and that orders such as the ones issued in this Petition had been discharged on 11th January, 2017.

13. It is the case of the Law Society of Kenya that the issue of fraud and any contest that the Petitioners have with regard to execution orders ought to be made in the primary suits and thus urged the court to be guided by the provisions of Sections 6, 7, 11 and 34 of the Civil Procedure Act.

14. Mr. Musyoki for the 2nd Petitioner stated that he was not opposed to extension of the conservatory orders. Mr. Otieno Oyoo responding on behalf of the advocates representing the stakeholders of the 2nd Petitioner while acknowledging that they had neither been served with the Petition nor the Notice of Motion 24th January, 2020 stated that that were not opposed to the extension of the conservatory orders.

15. I directed Mr. Kingara for the 1st Petitioner to also address the court concerning **Nairobi Constitutional Petition No. 394 of 2019** and **Kisumu Constitutional Petition No. 27 of 2019** in his response.

16. This was provoked by the fact that Hon. Justice Ochieng, Presiding Judge Kisumu High Court had sometimes on the week of 03rd and 7th February, 2019 notified me that he had handled **Kisumu Constitutional Petition No. 27 of 2019** filed by the Petitioners on similar issues as in this petition and that the same was still pending. This information and the fact that the petition was not disclosed in this petition raised my judicial antenna. Equipped with this information, I immediately called Hon. Justice Korir, the Presiding Judge, Nairobi Constitutional and Human Rights Division and asked him if he could recall having dealt with any matter where Invesco had sought conservatory orders.

17. The judge indeed confirmed that he handled such a matter and the Deputy Registrar in that Division subsequently sent to me by email, the notice of motion filed on 03rd October, 2019 in **Nairobi Constitutional Petition No. 394 of 2019**.

18. Mr. Kingara indeed conceded that **Nairobi Constitutional Petition No. 394 of 2019** and **Kisumu Constitutional Petition No. 27 of 2019** related to similar issues as in this Petition but affected only a limited number of advocates' firms and explained that this petition speaks to all the affected parties.

19. Counsel urged the court to extend the orders on the grounds that there was no application to discharge them and that the 1st Petitioner had so far settled claims amounting to over six (6) billion shillings and therefore required protection to guard it from collapsing since its supports an important sector in the country.

20. In his response, Mr. Omondi counsel for the Law Society of Kenya submitted that the court has jurisdiction to discharge its orders *suo moto* if there is evidence that it was misled.

DETERMINATION

21. I have considered submission by counsels and I have deduced the following issues for determination:

a. Existence of other related matters

b. Court's jurisdiction

c. Extension of orders granted on 27th January, 2020

Existence of other related matters

22. The pleadings in **Nairobi Petition No. 1178 of 2007** were not supplied by either of the parties and this court is therefore not in a position to know with certainty if it relates to same issues as those raised in this petition. I shall therefore not address my mind to that Petition in this ruling.

23. It has however been conceded that prior to filing of this petition, the 1st Applicant had through the firm of M/S Kibet Rop & Company Advocates filed **Nairobi Constitutional Petition No. 394 of 2019** together with a notice of motion filed on 03rd October, 2019.

24. It has also been conceded that subsequently on 18th December, 2019, the two Petitioners in this petition, through the firm of M/S Musyoki Benson & Associates Advocates filed **Kisumu Constitutional Petition No. 27 of 2019** together with a notice of notice of motion of the same date.

25. Whereas there is evidence that **Nairobi Constitutional Petition No. 394 of 2019** was subsequently withdrawn by a notice of withdrawal filed on 06th February, 2020 and **Kisumu Constitutional Petition No. 27 of 2019** by a notice of withdrawal filed on 05th February, 2020, a perusal of the three petitions discloses the following:

a. That the affidavits in support of the applications are sworn by one Paul Gichuhi who describes himself as a legal officer of the 1st Petitioner

b. That the 1st Petitioner did not in Kisumu Constitutional Petition No. 27 of 2019 disclose the existence of Nairobi Constitutional Petition No. 394 of 2019

c. That the Petitioners in this petition did not disclose the existence of Nairobi Constitutional Petition No. 394 of 2019 and Kisumu Constitutional Petition No. 27 of 2019.

d. That the orders sought in the 3 petitions include a prayer for conservatory Order staying the proceedings at any stage including warrants of attachment, taxation, Certificates of Taxations, Garnishee Order nisi or absolute and execution of Judgment and decrees subsisting or arising from any of the third party claims specifically cited in the schedules attached to those petitions.

26. With this set of facts, I do not find it difficult to agree with the submission by counsel for Law Society of Kenya that the Petitioners deliberately concealed these material facts from the court, which if they had been disclosed, this court would not have issued the orders it issued.

b. Court's jurisdiction

27. The Petitioners are accused of filing multiple suits on the same cause in different courts. It is a settled law that a litigant has no right to pursue *pari passu* two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. (See **Graham Rioba Sagwe & 2 others v Fina Bank Limited & 5 others [2017] eKLR**). The court further stated that:

“Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.”

28. It is trite law that this court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black law dictionary defines abuse as “**Everything which is contrary to good order established by usage that is a complete departure from reasonable use.**

29. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents and this includes filing a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

30. Whereas this court enjoys countrywide unlimited jurisdiction in Criminal and Civil matters except in matters reserved for the exclusive jurisdiction of the Supreme Court under this Constitution or falling within the jurisdiction of the courts contemplated in Article 162 (2), the place of hearing of any one suit will be founded on convenience to the parties and facilitation of expeditious, just, proportionate and affordable determination of the dispute as provided for in section 1A of the Civil Procedure Act.

31. A perusal of the pleadings in the 3 petitions stated hereinabove and the appearance of advocates before me disclosed that most of them are based in Nairobi while others are from as far as Meru. That may explain why jurisdiction was not contested in **Nairobi Constitutional Petition No. 394 of 2019** although it relates to cases filed outside Nairobi. I am therefore persuaded that the advantages of the Petitioners filing this petition in Nairobi far outweighs the disadvantages of filing the same in Kisumu in far as securing the just, most expeditious and least expensive determination of the petition on its merits is concerned.

c. Extension of orders granted on 27th January, 2020

32. **Equity** requires that **whoever comes** to a court of **equity** must do so with clean hands and in utmost good faith. It is also required that he who seeks **equity** must do **equity**.

33. The Petitioners herein were before obtaining the conservatory orders issued on 27th January, 2020 under an obligation to disclose to the court all material particulars within their knowledge and more particularly the existence of similar petitions but they failed to do so.

34. Even though there is no evidence that the advocates appearing for the Petitioners in the three petitions were aware of the existence of the other petitions, Mr. Paul Gichuhi, the 1st Petitioner’s legal officer without doubt had knowledge of these petitions but as stated herein above nonetheless failed to disclose them in his affidavits. This knowledge by Mr. Paul Gichuhi must have informed the withdrawal of **Nairobi Constitutional Petition No. 394 of 2019** and in **Kisumu Constitutional Petition No. 27 of 2019.**

35. Further to the foregoing, it has been demonstrated that the content of the orders served on the Respondents and Interested Parties are not the orders issued by the court and extracted by the Deputy Registrar. This inaccuracy falls squarely at the feet of the 1st Petitioner’s advocates.

36. From the foregoing, I find that the filing of a fresh petition on the ground that the other two did not speak to all the affected parties is not acceptable for the reason that the 1st Petitioner had a right to amend **Nairobi Constitutional Petition No. 394 of 2019** to include all the parties and issues in question.

37. This court is aware that the act of dismissing or striking out a suit is a draconian measure which should be exercised cautiously as it drives the party away from the seat of justice. From all that I have analysed above, this petition would not have escaped being struck out but for the withdrawal of **Nairobi Constitutional Petition No. 394 of 2019** and in **Kisumu Constitutional Petition No. 27 of 2019.** For that reason, I have deliberately avoided to consider the merits of the Petition especially the application of the provisions of Sections 6, 7, 11 and 34 of the Civil Procedure Act which would rather be addressed at the appropriate time at the hearing of the application and the petition on merit.

Final Order

38. It is hereby ordered that:

- 1. This petition be and is hereby transferred to Nairobi Constitutional and Human Rights Division for hearing and disposal**
- 2. The conservatory orders granted on 27th January, 2020 are hereby discharged**
- 3. It is recommended that the DCI investigates Mr. Paul Gichuhi concerning the averments in his affidavits in the three petitions named hereinabove to establish if he lied on oath.**
- 4. It is also recommended that the Judiciary Case Management System be improved to interconnect all court registries in a manner that would make it possible to flag out similar cases filed in different courts to avoid an abuse of the court process by unscrupulous parties**
- 5. The firm of M/S Gichuki Kingara & Company Advocates for the 1st Petitioner is directed to within 7 days from the date hereof place an advertisement in the Standard Newspaper, as it did with the initial order, first, disclosing the explicit order that was issued by this court and secondly, to bring to the attention of the Respondents and all affected parties that the said order has been discharged.**

DATED AND DELIVERED IN KISUMU 13th THIS DAY OF February, 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For the 1st Petitioner - Mr. Kingara

For the 2nd Petitioner - Mr. Musyoki

For the Respondents - Ms. Langát

For Affected Parties - Mr. Otieno Oyoo

For Affected Parties - Ms. Kimere

For LSK - Mr. Omondi