



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 622 OF 2014

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 2,3,27,43,46 AND 47

AND IN THE MATTER OF THE VIOLATION OF FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER THE CONSTITUTION OF KENYA

**AND IN THE MATTER OF THE INSURANCE ACT, THE INSURANCE AMENDMENT ACT
NO. 11 OF 2006 AND CIRCULAR NO. I.C. 07/2009 DATED 20/11/2009 CONTAINING MOTOR
INSURANCE UNDERWRITING GUIDELINES**

BETWEEN

THE COMMISSION ON ADMINISTRATIVE JUSTICE.....PETITIONER

VERSUS

THE INSURANCE REGULATORY AUTHORITY.....1ST RESPONDENT

THE HON. THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

The Petitioners case

The petitioners' case is that the first Respondent's statutory mandate is to regulate and prescribe standards for the Insurance Industry in Kenya under the Insurance Act^[1] and the Insurance Amendment Act^[2] and this entails discipline, quality, prevention of dishonest practices and professionalism and that the said statutory powers do not and cannot include the prescription of mandatory prices and underwriting price

guidelines for the Insurance industry.

It is averred that in purported exercise of its statutory powers, the first Respondent issued to all Insurance and Reinsurance Companies circular No. IC 07/2009 dated 20/11/2009 headed "Motor Insurance Guidelines" giving varied and wide ranging directive setting prices of premiums which all commercial insurance companies in the insurance industry will charge the Kenya Public in respect of all forms of Motor Vehicle Insurance Cover and services provided.

The petitioner avers that the effect of the said directive was to make the pricing of insurance motor cover a monopoly and to convert the industry into a cartel without any supporting legislation and contrary to existing legislation and that in terms of prices and for the provision of motor insurance covers there is no computation thereby killing the incentive in the provision of quality and affordable services and that the guidelines contravene the economic, social and consumer rights of Kenyans provided for under Articles 43 and 46 of the constitution and the right to fair administrative action as provided in article 47 of the constitution and also discriminatory to the extent that they give special rights, privileges and treatment to one commercial interest group.

It is averred that the guidelines complained of offend articles 2, 3, 27, 43, 46 & 47 and schedule VI of constitution and that the Insurance act and the Insurance Amendment Act[3] does not give the first respondent power to prescribe price guidelines and that the guidelines in question have never been gazetted to acquire any legal validity, hence they are unlawful, unconstitutional, null and void. It is also averred that schedule VI of the constitution requires that all existing laws, rights, obligations shall be construed so as to comply and conform to the constitution, hence the guidelines in question do not meet the said threshold.

It is also averred that this matter was the subject of Mombasa High Court Misc App No. 89 of 2010. The Respondent filed a notice of preliminary objection dated 9th April 2015 stating that the issues raised herein are *res judicata*. The preliminary objection was heard and dismissed on 5th April 2016 paving the way for the hearing of this petition.

The Respondents' case

On 4th October 2016, the Respondents filed their Replying affidavit sworn by Sammy Makove, the Commissioner of Insurance in which he averred *inter alia* that industry price regulation aimed at stabilizing the industry to the benefit of consumers is neither a consumer right under part 11 of the Consumer Protection Act[4] nor an unfair practice under Part 111 thereof and that the Competition Act[5] has not been pleaded in this case nor does it apply in circumstances of this case by dint of section 5 (1) of the act because the first Respondent does not engage in trade.

He also averred that the first Respondent is not a competitor or active provider engaged in underwriting of insurance business, but a statutory regulatory body established under section 3A of the Insurance Act[6] whose mandate is ensuring effective administration, supervision, regulation and control of insurance and reinsurance business in Kenya and that guidelines cannot be considered as a strategy to restrict competition but they are set minimum premium rates to be charged by insurance companies to mitigate against underwriting losses and risk exposures due to application of the previous motor vehicle insurance rating based on a flat rate, and avoiding undercutting resulting in loss to the underwriting industry.

The first Respondent further avers that the alleged violation of the constitution is imprecise[7] and that articles 27, 43, 46 and 47 alleged to have been contravened do not have a retrospective effect and application since the challenged guidelines came into force before the promulgation of the constitution of Kenya, 2010[8] and also cited its mandate under section 3A of the Insurance Act[9] which include the power to control, formulate, regulate and enforce standards for conduct of insurance and reinsurance business in Kenya as well as to issue supervisory guidelines and prudential standards and that its statutory powers are wide enough to include managing, curb, superintend, restrict, regulate, govern, administer or oversee the general operations of the industry and cited a 2008 actuarial investigation in the Kenyan Motor Vehicle Industry which recommended *inter alia* underwriting guidelines to be documented and

captured in writing and that the other challenge facing the industry included *inter alia* undercutting premiums, hence the basis for the guidelines stipulating minimum premiums for individual and fleet rates, extra benefit rating, policy excess guidelines, structure for no claim discounts, and introduction of certificate of no claim discount and the benefits include stabilizing the industry, reduction of premium rates, lower premiums for safe drivers and an effective reward system for safe drivers, hence the guidelines were justified and were made with both short term and long term benefits for policyholders and insurers in mind and that the guidelines were lawfully made and in the wider public interest, that they have stabilized the industry, increased business, performance and without them a statute like the Insurance (Motor vehicles Third Party Risks) Act would be rendered nugatory.[\[10\]](#)

As early as on 24th March 2015, the court had directed the Respondents to file their responses to the petition within 21 days from the said date. A similar order was made on 15th April 2016 and as at 4th July 2016, no response had been filed as ordered. The court directed the parties to file their submissions. Again on 9th August 2016, the respondents had not filed their submissions and the court granted them a further seven days to comply. When the matter came up again in court on 5th October 2016, no submissions had been filed and a mention date was taken for 6th October 2016 and a date for highlighting of submissions was fixed for 14th December 2016. Apparently on that day nothing happened.

When this matter came up before me on 28th February 2017, the Respondents had not filed their submissions despite the previous orders of this court highlighted above. I nevertheless directed the Respondents to file their submissions within fourteen days from the said date and reserved a judgement date. However, as at the close of business on 14th March 2017, no submissions had been filed, hence I proceeded to write this judgement.

Petitioners Counsels submissions

Counsel submitted that the first Respondent purports to draw its powers to issue the guidelines from the provisions of section 3A of the Insurance (Amendment) Act[\[11\]](#) which section relates to regulating the industry and not determining prices and argued that a power to determine prices must be specific and that Article 46 of the constitution guarantees citizens rights to goods and services of reasonable quality which means allowing reasonable competition in a market place economy to enable citizens to sample goods and services of various different qualities and prices, hence enabling the citizens to obtain the best goods and services available in the market at the most affordable prices.

Counsel submitted that to actualize Article 46, Parliament enacted the Consumer Protection Act[\[12\]](#) which sets elaborate safeguards against monopolies, price fixing, price control and cartel behaviour.

Counsel submitted that the guidelines in question mean that insurance companies cannot charge a price other than the one in the guidelines as per premium and that setting prices for one category of industries is discriminatory and contrary to Article 27 of the constitution and in support of this position cited the decision rendered in *Ahmed Isaack vs Auditor General*.[\[13\]](#) Counsel further submitted that the guidelines are contrary to section 13 of the Consumer Protection Act[\[14\]](#) which was enacted in furtherance to Article 46 of the constitution and that the said guidelines also contravene section 13 (a) in that the consumer may not defend himself and also under section 13 (b) the consumer will be subjected to undue pressure to enter into the transaction and that the consumer has no choice since the price has already been set.

In counsels submissions, the guidelines offend Article 47 of the constitution to the extent they involve fixing of the price yet the public did not participate in the process[\[15\]](#) and that even though the guidelines came into force prior to the promulgation of the constitution of Kenya 2010, Schedule 6 Part 2, section 7 of the constitution provides that "all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions and necessary to bring it into conformity with the constitution" and that all laws must meet the mandatory constitutional requirements[\[16\]](#) and that section 3A of the Insurance Act does not empower the first Respondent to set prices nor does the word "regulatory" include determining prices and in any event the guidelines have not been gazetted hence they are of no legal effect.

Application of the constitution of Kenya 2010

The Respondent avers that the challenged guidelines came into force prior to the promulgation of the 2010 constitution and that the law does not apply retrospectively. In my view, Part two of the sixth schedule which was correctly cited and interpreted by the petitioners counsel is entitled "Existing Obligations, Laws and Rights." Rule 7 (1) provides that:-

(1) *"All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."*

(2) *If, with respect to any particular matter—*

(a) *a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and*

(b) *a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer,*

the provisions of this Constitution prevail to the extent of the conflict.

The above provisions are clear. All law must conform to the Constitutional edifice. It follows that the Respondents' action now the subject of this petition must meet constitutional threshold prescribed by the constitution. In *The Law Society of Kenya vs The Kenya Revenue Authority & Another*^[17] I observed that 'our Constitution is highly valued for its articulation. One such astute drafting is the fact that the Constitution of Kenya gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law.'^[18]

Jurisdiction

On jurisdiction **Article 165(1)** of the Constitution establishes the High Court and vests in it vast powers including the power to 'determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened' and the jurisdiction 'to hear any question respecting the interpretation of the Constitution.' **Article 23** provides that; "23. (1) *The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*"

Article 165 (6) provides that "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function." Article 165 (7) provides that "For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

Article 2(1) of the Constitution provides that '*This Constitution is the Supreme Law of the Republic and binds all persons ...*'**Article 260** defines person to include company, association or other body of persons whether incorporated or unincorporated. **Article 259** of the constitution enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. This court is obliged under **Article 159 (2) (e)** of the constitution to protect and promote the purposes and principles of the constitution. Also, the constitution should be given a purposive, liberal interpretation. The provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.^[19]The Constitution of Kenya gives prominence to national values and principles of governance. Article 10 (2) of the Constitution provides the national values and principles of governance which include integrity, transparency and accountability.

Still on jurisdiction, I find it fit to recall the words of Atkin, L.J. who summed up the law on this point in *Rex vs. Electricity Commissioners*^[20] when he said:-

“Whenever anybody or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.”

On reliefs available from this court, Article 23 (3) provides that the court may grant appropriate relief including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right, compensation and an order of judicial review.

Thus, judicial review is available as relief to a claim of violation of the rights and freedoms guaranteed in the constitution. The constitution has expressly granted the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47, or the right to natural justice under Article 50.

Any decision making process that does not adhere to the **constitutional tests** either on constitutional rights or on procedural fairness, cannot stand court scrutiny. The Supreme Court of Kenya recognized that the power of any judicial review is now found in the constitution in the case of *C.C.K. vs Royal Media Services Ltd*^[21] where it painted the clearest picture of the evolved nature of judicial review in Kenya. In that case, the Supreme Court held that the power of judicial review in Kenya is found in the Constitution, as opposed to the principle of the possibility of judicial review of legislation established in *Marbury v Madison*^[22]. The Court cited Articles 23(3)(d) and 165(3)(d) of the constitution. Also, the Constitution has entrenched the right of fair administrative action under Article 47 of the Constitution.

Comparative jurisprudence

The concept of judicial review under the Constitution of Kenya is similar to that under the Constitution of South Africa where it was held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others*^[23] that “[t]he common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts. The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

Expanded scope of judicial review

As can be seen, the entrenchment of the power of judicial review, as a constitutional principle should of necessity expand the scope of the remedy. Parties, who were once denied judicial review on the basis of the public-private power dichotomy, should now access judicial review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. An order of judicial review is one of the reliefs for violation of fundamental rights and freedoms under Article 23(3)(f). I strongly hold the view that court decisions should show strands of the recognition of the Constitution as the basis of judicial review.

Our courts need to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on this front. Our courts must develop judicial review jurisprudence alongside the mainstreamed “theory of a holistic interpretation of the Constitution. Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the

prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

Applying the law to the facts of this case

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.[24]

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.

From the foregoing explanation derived from my interpretation and understanding of the provisions of the statute on what regulation and supervision entails, I find nothing to suggest, even in the slightest manner that regulation and supervision entails setting prices. I find no express or implied mandate in the statute to suggest that the first Respondent had powers to issue the said guidelines.

As **Sedley J** put it in *R vs Somerset CC Ex parte Dixon(COD)* [30]:-

"Public law is not about rights, even though abuse of power may and often do invade private rights; it is about wrongs-that is to say misuse of public power."

Broadly, in order to succeed, the applicant will need to show either:-

- a. *the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; **or***

b. a decision or action that has been taken is **'beyond the powers'** (in latin, 'ultra vires') of the person or body responsible for it.

Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be **"illegal."** Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers. As explained above, I find that the first Respondent acted outside its powers as stipulated under the law.

Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, and the decision must conform with the provisions of article 47 of the constitution. The decision in question must not be arrived at arbitrarily and must meet the constitutional threshold or fairness. I find that the decision complained of does not meet the foregoing constitutional threshold and that it cannot meet the **rationality** and **proportionality** test.

Courts must intervene to quash a decision if it is considered to be demonstrably unreasonable as to constitute **'irrationality'** or **'perversity'** on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of **Lord Green** in *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*[31]:-

"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."

The above grounds were reiterated in the case of *Pastoli vs Kabale District Local Government Council and Other*[32] and that such grounds are incapable of exhaustive listing.[33]

Judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in **illegality, irrationality, impropriety** of procedure and become the most powerful enforcement of constitutionalism, one of the greatest promoters of rule of law and perhaps one of the greatest and most powerful tools against abuse of power and arbitrariness. [34]

The role of the court is to ensure that public bodies do not exercise their powers unlawfully. Considering the facts of this case, the law and the authorities as enumerated above, I find that the first Respondent acted outside its statutory powers. Further, it has not been disputed that the guidelines in question have never been gazetted, hence they cannot have the force of law. I find that this petition has merits, hence I allow the petition and enter judgement as follows:-

a) A declaration be and is hereby issued declaring that that Motor Insurance Underwriting Guidelines issued by the first Respondent under circular No. IC 07/2009 dated 20/11/2009 are illegal, unconstitutional and therefore null and void for all purposes.

b) A declaration be and is hereby issued declaring that that the first Respondent had no legal, statutory and or constitutional mandate to issue Motor Underwriting Guidelines under circular No. IC 07/2009 dated 20/11/2009 or any other similar Guidelines.

c) A order of certiorari be and is hereby issued from this court to quash the Motor Insurance Underwriting Guidelines issued by the first Respondent under circular No. IC 07/2009 dated 20/11/2009.

d) That the first Respondent shall pay the costs of this petition to the petitioner.

Orders accordingly.

Dated at Nairobi this 20th day of March 2017

JOHN M. MATIVO

JUDGE

[1] Cap 487, Laws of Kenya

[2] Act No. 11 of 2006

[3] Supra

[4] Act No. 46 of 2012

[5] Act No. 12 of 2010

[6] Supra

[7] Citing Anarita Karimi Njeru vs R {1976-1980} KLR 1272

[8] Citing Kalpana H. Rawal vs Judicial Service Commission & 4 Others {2015}eKLR

[9] Supra

[10] Cap 405, Laws of Kenya

[11] Act No. 11 of 2006

[12] Supra

[13] {2006}eKLR

[14] Supra

[15] Counsel cited Kenya Human Rights Commission vs N.G.O Board {2016}eKLR

[16] Ibid

[17] Pet No. 39 of 2017

[18] Article 10 (1) (a)-(e)

[19] See Tinyefunza vs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

[20] 1924-1 KB 171 at p.205 (C)

[21] {2014}eKLR

[22] 5 U.S. 137 (1803).

[23] 2000 (2) SA 674 (CC) at 33,

[24] Mayhall, Van, III, [Insurance Regulatory Law: Defined, Insurance Regulatory Law](#). Retrieved 2017-15-03.

[25] Morgan Stanley Mortgage Capital, Inc v. Insurance Commissioner of the State of California, 18 F.3d

790, Bankr. L. Rep. P. 75,755 (9th Cir. 1994).

[26] Ibid

[27] Klein, Robert W. (2008), An Overview of the Insurance Industry and Its Regulation, [Center for Risk Management & Insurance Regulation](#), Georgia State University.

[28] Supra

[29] Ibid

[30]{1997} Q.B.D. 323

[31] {1948} 1 K. B. 223, H.L.

[32] {2008} 2EA 300

[33] See JR NO. 112 of 2011, High Court, NBI, Seventh day Adventist church , applicant and PS Ministry of NBI Metropolitan Dev

[34] See Ondunga J in J R 112 of 2011 cited above in note 3