Commissioner of Insurance v Kensilver Express Limited & 192 others (Civil Appeal 61 of 2014) [2025] KECA 1595 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1595 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 61 OF 2014

DK MUSINGA, M NGUGI & GV ODUNGA, JJA

OCTOBER 3, 2025

BETWEEN

THE COMMISSIONER OF INSURANCE ..... APPELLANT

AND

KENSILVER EXPRESS LIMITED & 192 OTHERS & 192 OTHERS & 192 OTHERS & 192 OTHERS ..... RESPONDENT

(Being an appeal from the ruling and orders of the High Court of Kenya at Nairobi Milimani Commercial Courts (Angawa, J.) delivered on 18th December 2007 in HCMisc. Civ. Suit No. 1345 of 2005 (OS)

JUDGMENT

1. This is an appeal from the ruling of the High Court at Nairobi (Angawa, J.), delivered on 18th December 2007 in High Court Misc. Civil Suit No. 1345 of 2005.

2. By way of background, this suit revolves around United Insurance Company Limited (the Company), an insurance company in the business of issuing third party insurance policies to owners of motor vehicles, and in particular public service vehicles. The Company faced liquidity problems in 1999 and the attention of the Commissioner of Insurance (the Commissioner) was drawn to this state of affairs. The Commissioner held general meetings with the Company's Board members to look into ways of salvaging the business of the Company. The major problems, the Commissioner found, were failure to separate ownership of the Company from its management, coupled with the poor and inappropriate investments by the Company.

3. It was therefore decided, firstly, that the then Principal Officer/General Manager be replaced with another person who would be identified to undertake the restructuring and, secondly, that the "massive" investment made in real estate/land would be liquidated in order to meet the claims, 80% of which were motor claims. These efforts and many more others seemed not to have yielded

fruits and the Company was eventually placed under statutory management and consequently, the Commissioner, with the approval of the Minister of Finance (the Minister), appointed Kenya Reinsurance Corporation (Kenya Re) as the Statutory Manager of the Company.

4. Upon that appointment, Kenya Reinsurance Corporation Limited, as the Statutory Manager, on 18th July 2005, declared a moratorium through a daily newspaper for a period of 12 months with effect from 15th July 2005. The effect of this declaration was that all creditors were restrained from taking any adverse action against the Company until the Statutory Manager calls for a meeting of the creditors to propose how best to pay them, by which time it would also be in a position to recommend to the Minister whether the Company ought to be revived or wound up. It is important to mention that the bulk of the insured were third party policy holders with the Company against whom judgements had been issued in various suits arising from road traffic accidents. The effect of the moratorium, as declared, was that where a person held a genuine insurance policy with the Company, they would not be provided with legal representation by the Company when sued in court and, where judgements were delivered against them, they would not be provided with funds to pay decretal sums in respect thereof.

5. Accordingly, many of the judgement debtors were compelled to settle decretal sums on their own, while those who were unable to do so were faced with execution or threat of execution against their assets, and where no assets were traceable, committal to civil jail. Amongst the judgement debtors were Kensilver Express Ltd, Simon Kimutai Chepkwony, Peter Njuguna Njatha, Nancy Wanjiku Kimani and Paul K. Tergat (the petitioners), all of whom sought the court's protection against what they perceived as infringement of their fundamental rights by the Government and the Commissioner through the Statutory Manager. Their argument was that the inability of the Company to settle judgement sums against them was a violation of their rights to liberty and peaceful ownership of their property.

6. The suit before the High was originated by way of an Originating Summons pursuant to the Constitutional of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001. These rules were established by then-Chief Justice Bernard Chunga to govern how individuals could approach the High Court to enforce their fundamental rights and freedoms under section 84 of the retired Constitution. They were popularly known as the "Chunga Rules".

7. The Originating Summons, which was dated 12th September 2025 and amended on 21st September 2005, was taken out for determination of the questions: whether the insureds' constitutional rights to liberty and peaceful ownership of their property were violated by third parties seeking to execute processes, decrees, judgements and claims against the insureds in suits which the Company had legally assumed or deemed to have assumed full responsibility to settle the decrees pursuant to section 10(2)(1) of the Insurance (Third Party Risks) Act; and whether the Kenya Reinsurance Corporation Limited, since its appointment as Statutory Manager, had diligently exercised its mandate to manage the Company in the best interest of the third parties as required under section 76C(4) of the *Insurance Act* (the Act). The originating summons was disposed of by way of affidavit evidence.

8. The petitioners' case was that they had entered into legal contracts with the Company, which at all times was licensed to carry out insurance business by the Commissioner, under which they bought third party insurance policies; that once one took out an insurance policy, in the event of an accident occurring and the Company being notified of the same, the Company would facilitate the insured's defence, whether in criminal or civil proceedings; and that the insurance company would settle liabilities arising from the civil proceedings unless such liabilities were declared by the court not to fall within the terms of the contract of insurance.

9. It was the petitioners' case: that where the insurance company is deemed to be unable to meet its commitments, the Commissioner is permitted to intervene and to place such insurance Company under statutory management, which, as opposed to winding up, is an audit by the Commissioner as to whether the Company may be revived or wound up; and that this process of audit may be by way of declaration of a 12 month moratorium which may "be applied equally to all classes of policy holders and creditors subject to such exemptions in respect of any classes of insurance as the Manager may by notice in the Gazette specify". Further, the Statutory Manager may "suspend the running of any law of limitation in respect of any claim by any policyholder or creditors of the insurer" and that the moratorium ceases "upon the termination of the Manager's appointment where upon the rights and obligations of the insurer its policy holders and creditors shall, save to the extent provided in paragraph (a), (b), be the same as if there has been no declaration under the provisions of this subsection".

10. According to the petitioners, on Monday 18th July 2005, they saw an advertisement in the local daily newspaper that the Company was placed under Statutory Management on 15th July 2005 and that Kenya Reinsurance Corporation Limited had been appointed as the Statutory Manager and further, that a moratorium had been declared. It was the petitioners' case that the said Kenya Reinsurance Corporation Limited was to take control of the Company and thereafter render reports as to whether the Company should be revived or be wound up; that instead, the Statutory Manager, between July and September 2005, proceeded to advertise sale of the company's assets, including real properties, without leave of the court, contrary to section 67C (2) (iii) and (iv) of the Act; that since all the branches of the Company around the country were closed down, there was no way in which the premiums that were due could be collected, an action which placed the Company at a risk of not being revived; that as this was going on, pending proceedings and execution of the existing judgements against the petitioners continued with some petitioners being personally executed against by way of committal to civil jail while others were being declared bankrupt.

11. In addition, the petitioners contended: that they were treated differently from other classes of insurance policy holders against whom a moratorium had been declared, yet they had duly paid their premiums; that no execution should have commenced against them during the 12 months when the statutory management was in place; that their constitutional right to protection of the law had been contravened since the Commissioner had all along known that the Company was not faring well financially but took no steps to stop the Company from accepting premiums from the public; that this omission exposed the new policy holders and clients who continued to renew their policies, not knowing that the Company had undergone difficulties, to danger of being executed against; and that the Commissioner, through the Statutory Manager, should have, under the moratorium, waived execution against the petitioners during the 12 months moratorium period in order to protect them from their creditors.

12. The petitioners asserted: that the Statutory Manager's powers were not exercised with "due diligence" and in "the interest of the public" since the Commissioner had access, prior to the appointment of the Statutory Manager, to the Company's balance sheet and knew or ought to have known that the Company was operating poorly; that the Minister failed in his duty by not exercising his power under section 179(i) of the Act to operationalize a policyholders compensation fund which was meant to regulate the amount of funds to be paid to the victims of accidents. The petitioners sought orders of accountability against the respondents in the petition and to restrain the Statutory Manager from acting in that capacity.

13. The Commissioner, the Minister and the Attorney General, who were all represented by the State Counsel, were of the view: that the issues before the court had nothing to do with the interpretation of *the Constitution*; that being judgement debtors, the petitioners' recourse lay on appeal against the decisions made against them; that there were other remedies available for redress of the petitioners'

grievances such as suing in the civil courts for breach of contract, suing for bankruptcy, suing for remedy under the *Companies Act*, or suing to wind up the Company; that both the Commissioner and the Minister are protected from any legal actions that may have been committed either through omission or commission in good faith; and that the Statutory Manager was appointed after the Commissioner had made strides to contain the insurer to meet its obligations which efforts having failed, there was no option but to place the Company under statutory management.

14. From the foregoing, the issues identified by the trial court for determination were: whether the judgement debtors were entitled to fashion their claims as a constitutional case; whether the petitioners' constitutional rights were violated; whether the Commissioner acted diligently when he placed the Company under statutory management; whether the appointment of Kenya Reinsurance Corporation Limited as statutory manager was appropriate; whether the government should pay the claims against the insured; and whether the Attorney General failed to give the Minister adequate advice.

15. In the judgement, the learned Judge found: that the constitutional reference was a public interest litigation since it touched on three groups of persons, namely the policy holders who genuinely bought insurance covers to safeguard themselves from third party risks; the insurer who sold the said policy to their clients; and the ordinary members of the public who rely on public service vehicle transportation, mainly middle class cum lower class members of the Kenyan society as well as victims of accidents; that the constitutional reference was filed by the insured or policy holders who had entered into a contract with the insurer to meet their liability when suddenly on, 18th July 2005, without due warning, they were notified that their contract no longer existed and that they had to fend for themselves; that the Commissioner is under a duty to regulate the insurance industry; and that as long as the business is sound, the Commissioner would not interfere with the running of the said company, save for receipt of reports.

16. The learned Judge noted: that an outcry on the collapse of insurance companies saw the establishment of the Hancox Commission in 1986 which recommended the formation of the motor pool to shield the insurance companies from the collapse of their business; that the said Commission recommended, inter alia, standard compensation to be awarded in order to regulate high compensatory awards given by courts; and that towards this end, a board was to be set up under Policy Holders Compensation Fund pursuant to section 179 (1) of the *Insurance Act*, but none was set up.

17. Further, the learned Judge found: that notwithstanding the fact that there were clear signs that all was not well with the Company as far back as 1999, the Commissioner took no action until 15th July 2005 when the Company was placed under statutory management; that although a Kenya Gazette notice was required to be published, apart from notices in the daily newspapers of 18th July 2005, no such Gazette notice was brought to the attention of the court; that the first serious mistake, besides the delay in placing the insurer under statutory management, was the appointment of Kenya Reinsurance Corporation Limited as Statutory Manager; and that although the Act provides that "anyone" may be a statutory manager, this does not include Kenya Reinsurance Corporation, whose task is to collect a percentage of insurance premiums from the local insurance companies which, in turn, it invests in another reinsurance company for the purposes of covering the local insurance company from any risks and or liabilities that would befall them in the event they are unable to meet their obligations.

18. The learned Judge further held: that the Commissioner ought to have been diligent since the Act gave him wide powers to be involved in the affairs of the Company, yet it was not until 2004 that its involvement became rigorous; that a year later, although the Company was unable to deliver, the Commissioner deliberately failed to take any action so as not to "alarm" the public and erode public confidence as happened when Stallion Insurance and Lakestar Insurance went under and were

placed under Statutory Management, a position which constituted an omission on his part; that upon being guided by the Court of Appeal, the Commissioner then put into motion the procedure for appointment of the Statutory Manager who, instead of reporting back to the Commissioner, embarked on selling the assets of the Company, in effect liquidating the Company without the Minister's approval, contrary to the law as it then existed.

19. The learned Judge therefore found: that the Commissioner did not act with expediency in appointing a statutory manager and placing the Company under statutory management in 1999 and that in 2004, the time had long passed for this to occur; that the appointment of Kenya Reinsurance Corporation was null and void ab initio for being in conflict of interest with the Company, in light of the report by the Company of 26th April 2004 to the Commissioner on the recoveries from Kenya Reinsurance Corporation Limited; that from the said report, Kenya Reinsurance Corporation actually made payments to the insurer for their losses and was still to make payments of Kenya Shillings 40 million per quarter thereafter, yet it was the same institution that had been appointed as the Statutory Manager; that it was most certainly biased since it had access to the running of the insurer; and that Kenya Reinsurance Corporation Limited was not just "anyone," but had a stake in the Company with respect to payment of its reinsurance premiums.

20. According to the learned Judge, the case was unique in that the issue before it was not just one of pending decrees, judgements and proceedings, but was whether the Commissioner was diligent in ensuring that members of the public were protected from insurance companies that were insolvent and could not meet their commitments. In her conclusion, both the Commissioner and the Statutory Manager acted mala fides; that whereas the law envisaged a situation where limitation to third party risk compensation would be pooled and deliberated upon by a compensation board, this had never been operationalized by the Minister; that the Attorney General failed to give the Minister adequate advice as to the urgency and or expediency of such compensation board; and that the petitioners came to court under Chapter V of *the Constitution* and the United Nations Declaration of Human Rights of 10th December 1948.

21. The learned Judge declared: that the petitioners' constitutional rights to liberty and peaceful ownership of their property were violated or were in jeopardy of being violated by the third parties seeking to execute processes, decrees, judgements and claims against the petitioners in which the company had legally assumed or deemed to have assumed full responsibility to settle vide section 10(2) of the Insurance (Third Party Risks) Act; that Kenya Reinsurance Corporation Ltd, was not qualified to be appointed as the Statutory Manager and had failed to diligently exercise its mandate to manage the Company in the interest of the petitioners as members of the insuring public as envisaged under section 67C(4) of the *Insurance Act*; that both the decree holders and judgement debtors had their rights infringed; that the Commissioner failed to take remedial measures in time to forestall a situation whereby the petitioners held policies but were unable to have them paid and the victims held judgements and decrees which they were unable to execute; and that the appointment of Kenya Reinsurance Corporation as a statutory manager was null, void ab initio and illegal.

22. The learned Judge further directed that an independent statutory manager be appointed by the Insurance Regulatory Board to look into the affairs of the Company expeditiously and in the event the board had not been constituted, it be constituted by the Minister; that the new statutory manager do report to the board within six months of his or her appointment; that an injunction be issued and be extended on all cases for execution by decree holders/creditors until a report of the intended new statutory manager is tabled on claims touching on United Insurance Company Ltd; that the Minister for Finance was under a duty to implement the policyholders compensation fund forthwith for the purpose of providing assistance to policy holders of an insolvent insurer pursuant to section 179(1)

of the *Insurance Act*; that the victims' claims be settled subject to the said compensation fund; that no judgement debtor should be subjected to civil jail as this contravenes the United Nations Conventions on the subject; that the petitioners to await the appointment of the new statutory manager and report within 6 months of the appointment; that each claim by the victims and the insured be established strictly to eliminate fraud; and that if per chance the certificate of insurance is questioned and the fault lies with the insurer, or vice versa, the same must be first determined by the board and the new statutory manager before it is forwarded to the Compensation Fund.

23. Further orders were: that the Commissioner of Insurance and the Minister for Finance be held liable for not acting with expediency; and whereas they had immunity and protection, the Government was duty bound to pay the claims under the compensation fund to be established under section 179(1) of the Act if not so already established; that the insurer be held liable and responsible according to law and subject to the Statutory Manager's report; that for clarity and avoidance of doubt, where a limited liability company is in insurance business and is duly licensed under the *Insurance Act*, no winding up proceedings are permitted to be undertaken by any party except with the approval and permission of the Board of the Insurance Regulatory Authority, formerly the Minister for Finance, under section 67C (8) of the Legal Notice No. 11 of 2006; that the person who can apply for winding up proceedings under the *Companies Act* is the Commissioner as guided by section 123 of the *Insurance Act*; that the court can wind up a company under voluntary resolution of that company pursuant to section 271 of the *Companies Act*; that applications filed by individual parties through advocates are null and void ab initio and of no effect; that the constitutional reference be mentioned within six months to confirm compliance; and that the costs of the reference be awarded to the petitioners to be borne by the 1st, 2nd 3rd & 4th respondents jointly and severally.

24. Aggrieved by the said decision, the appellant appealed to this Court raising a total of 38 grounds which we see no need to reproduce.

25. At the plenary hearing on 17th March 2025, learned counsel, Mr Kinyua Kamundi appeared for the appellant and the 7th respondent, learned counsel, Mr Harrison Kinyanjui, appeared for the 1st to 4th respondents, learned counsel, Mr Ngumbi, appeared for the 5th and 6th respondents, while Mr Charles Kasamani, an interested party, appeared in person. The rest of the parties were not represented, despite due service of the hearing notice. Learned counsel relied on their written submissions, which they briefly highlighted.

26. On behalf of the appellant, it was contended, with respect to grounds 1 to 5, 20 and 23, that the learned Judge made contradictory findings when she found, without basis, that the Commissioner: failed to take remedial measures in time to forestall a situation whereby the petitioners held policies but were unable to have them paid and that the victims held judgements and decrees which they were unable to execute; took no action to address the crisis facing the Company until 15th July 2005 when the Company was placed under statutory management; occasioned delay in placing the Company under statutory management on the ground of apprehension of erosion of public confidence.

27. According to the appellant, the learned Judge based her findings that the Commissioner did not act diligently solely on the fact that the Company was placed under statutory management, thereby substituting the decision of the regulator with that of the court without legal basis. That in so doing, the learned Judge failed to appreciate the role of the regulator as being prone to complex societal dynamics in fulfilling the interests of policyholders, insurance beneficiaries and the sector at large, and that the considerations that were taken by the Commissioner as set out in the internal memo to the Minister of Finance were valid and imperative for any regulator. That there was clear evidence before the learned

Judge that the Commissioner had taken action to address the crisis facing the Company which was disregarded by the Company.

28. On ground 23, it was submitted that there was no basis for distinguishing the case of United Insurance Company Ltd from those of Stallion Insurance Co. Ltd and Lakestar Insurance Company Ltd, hence the learned Judge took into account unverified external facts in arriving at her decision. On ground 20, it was submitted that the learned Judge, in finding that the Commissioner did not act diligently, prescribed a purely subjective standard of conduct for the Commissioner that was not premised on the Act by holding that there was no will power from the Government to stem the fraudulent claims and the high awards given by the Judiciary. That matters of fraudulent claims, large awards and high accident rates comprise aspects of public policy that the regulator would consider and bear in mind in reaching the decision to declare a statutory management of an insurer.

29. Regarding grounds 6-10, it was submitted that the court determined the appointment and legality of Kenya Reinsurance Corporation as statutory manager in a very cursory manner and failed to appreciate that the respondent could have challenged that appointment, which was made under section 67 of the Act, by way of judicial review as opposed to a constitutional reference; that there were no particulars given to support the allegations that the appointment of Kenya Reinsurance Corporation as statutory manager of the Company was mala fides, illegal, null and void ab initio and in express breach of section 67C(3) of the Act; that the learned Judge erred in finding, on one hand, that the Act permits the Commissioner to unconditionally appoint anyone as a statutory manager yet, on the other hand, finding that it was a mistake to appoint Kenya Reinsurance Corporation as a statutory manager, thereby rendering a contradictory decision.

30. As regards grounds 8 to 13, 15, 16, 18 and 19, it was submitted: that the learned Judge's finding that the Statutory Manager acted mala fides was contrary to the available evidence since it had no role in its appointment, which was done by the Commissioner in the exercise of his mandate pursuant to section 67 of the Act, and there was no evidence that the Commissioner was actuated by malice or had ulterior motives in so doing; that by relying on the self- serving report of the Company to the Commissioner dated 26th April 2004, the learned Judge exaggerated her perceived occasion of conflict of interest and incorrectly stated that Kenya Reinsurance Corporation was to make payments of over Kshs 40 million per quarter thereafter; that the finding that the appointment of Kenya Reinsurance Corporation as statutory manager was illegal and null and void ab initio was extreme and defied the doctrine of proportionality since Kenya Reinsurance Corporation was in a position to pay the disputed Kshs 40 million and in that finding, the learned Judge failed to appreciate and uphold the public interest; that the consequences of the said holding were extremely dire and difficult to fathom since it meant that everything that had been done by Kenya Reinsurance Corporation Limited as a statutory manager was illegal and attracted legal (and penal) consequences; that accordingly, there was no basis for the declaration that the Insurance Regulatory Board appoints an independent statutory manager and that the new manager reports to the board within six months of the appointment.

31. Regarding ground 29, it was submitted: that the learned Judge erred by directing that each claim by the victim and the insured be established strictly to eliminate fraud and that if the certificate of insurance is questioned and the fault lies with the insurer or vice versa, the same must be first determined by the board and the new statutory manager before it is forwarded for compensation; that this finding lacked clarity and was incapable of execution, since the learned Judge could not have prescribed how the proposed new statutory manager would exercise his or her duties and also determine which claims the Compensation Fund, which at the material time was not operational, should admit; and that this was an interference and direction by the court on how a public officer should exercise duties prescribed and governed by statute.

32. Regarding ground 17, it was submitted: that the learned Judge erred by finding that the Statutory Manager required the Minister's consent before selling the assets of the Company; that section 67C(2)(ii) does not enjoin the Statutory Manager to seek the consent of the Minister before selling the assets of the insurer and neither is the Statutory Manager barred from realizing assets of the insurer in accordance with the Act; that under section 67C(5) of the Act, the listed responsibilities of the Statutory Manager are not exclusive and that emphasis is on the preservation of the assets, the test being the diligent discharge of duties in accordance with sound insurance, actuarial and financial principles in the interest of the insurer, policyholders and the insuring public as provided in section 67C(4) of the Act; and that since over 70% of the Company's assets were tied up in land and buildings, it made statutory sense for the Statutory Manager to liquidate some of these assets with a view to recommending a revival of the Company.

33. On grounds 20 and 28, it was submitted that the learned Judge misapprehended the applicable law by finding that the law envisages a situation where limitation to third party risk compensation would be pooled and discussed by a compensation board and proceeded to find, without basis, that this had never been operationalized by the Minister, and that the Attorney General did not give the Minister adequate advice as to the urgency and expediency of such compensation board; that this holding lacked clarity, and that the learned Judge could have only interrogated the law as it was, not as it ought to have been, since there was no law that provided for pooled compensation for third party claims or compensation board for that purpose; that in any case, this was an aspect for policy direction by the Executive and was not within the ambit of judicial action; that the learned Judge erred in law by directing the Minister to implement the Policyholders Compensation Fund forthwith and that victims' claims be settled and be subject to the said compensation fund; that the direction infringed on the constitutional doctrine of separation of powers since the determination of when and how to set up the Policy holders Compensation Fund is a function of the Executive, depending on the priorities for budget set and the availability of funds for the requisite infrastructure; that the determination of the policyholders and their eligibility to benefit from the Fund was also a function of the Executive based on the Fund's Regulations; and that in any case the Regulations would not have applied retrospectively.

34. It was further submitted: that since The Insurance (Policyholders' Compensation Fund) Regulations 2004 provided, in rule 9, that every policy holder and insurance company shall be a contributor, only those policyholders who had contributed would benefit from the Fund; that since the Fund had not been implemented as at the date of filing of the Originating Summons, it may be presumed that the policyholders of the insurer and the insurer itself had not yet contributed to the Fund; and that it was unlawful for the learned Judge to direct that the petitioners' claims be settled by the yet to be implemented Policyholders' Compensation Fund since section 179(1) of the Act provides that the Fund shall provide compensation to policyholders of an insurer that is wound up under section 123(2), hence the order was premature and unlawful.

35. On grounds 21, 22, 27, 35, 36 and 37, it was submitted: that the learned Judge erred in law and in fact by finding that the petitioners had done everything correct according to the law and were in the position of defendants who were not at fault and should not suffer execution for unpaid decrees; that the learned Judge misapprehended the factual basis and the law in so holding as the Originating Summons was filed by the policyholders of the insurer and there was no privity of contract between third parties and the insurer, hence third parties who wished to execute against the insurer directly would have had to file declaratory suits and obtain judgement and decrees in respect thereof; that none of the policyholders produced such judgements before the court; that in addition, each of the policyholders would have to produce the policies and insurance certificates with respect to every insured vehicle to prove that indeed they were genuine policyholders of the Company; and that as this did not happen, the learned

Judge ought not to have presumed that each and every policyholder, in what was a representative suit, was a policyholder of the Company and proceeded to make an order favourable to them.

36. According to the appellant, the learned Judge erred in limiting the rights of decree holders to execute lawful judgements obtained in regular proceedings before courts of competent jurisdiction, yet the Insurance (Motor Vehicle Third Party Risks) Act does not exonerate or provide immunity to policyholders against liability for third party risks; that the judgement creditors have the option to directly pursue the policyholders or the insurers upon the filing of declaratory suits; that similarly, neither the Act does not the Common Law bars judgement creditors from pursuing the defendant policy holders; that the learned Judge erred by passing on the burden of settlement of claims to the Commissioner and the Government and effectively discharging the insurer, its management and shareholders from contractual liability with respect to their policyholders, which was against public policy; that the learned Judge erred in failing to find that there was evidence of collusion between the directors and policyholders of the Company to pass on liability to the Commissioner and the Government; and that the learned Judge failed to correctly uphold the public interest in her determination of the Originating Summons and arrived at a decision that negatively impacted on the insurance sector by shifting the liability of private insurance companies to the Government and taxpayers; and that the learned Judge erred by issuing an injunction restraining execution by decree holders/creditors and extending the same to all cases for execution by decree holders until a report of the intended new statutory manager was tabled on claims touching the Company, which blanket order caused confusion and an embarrassment to the courts with respect to the cases before them, an order that was incapable of enforcement.

37. The appellant's submissions on grounds 24, 25, 26 and 34 were: that the learned Judge erred by finding that there were constitutional issues to be determined and that "where action is taken immediately and due process followed, the constitutional provisions may not be available to the insurer," and that "where the Commissioner has not acted with due diligence as was in this case, it would be left with no option but to declare that the rights of the insured and the victims have been infringed"; that this finding lacked clarity and was an extension of the Bill of Rights without basis; that there was no basis for finding that the Commissioner failed to act with diligence or that he took into account factors that he ought not to have taken into account in determining when and how to address the crisis of the Company; that the learned Judge erred by declaring the petitioners' constitutional rights to liberty and peaceful ownership of their property to have been violated or in jeopardy of being violated by third parties seeking to execute the processes, decrees, judgements and claims against the defendants in which the Company had assumed full responsibility; and that no judgement debtor could be subjected to civil jail contrary to United Nations Conventions; that lawful execution of court orders cannot constitute an infringement of the judgement debtor's constitutional rights; that the learned Judge erred in declaring that the petitioners' constitutional rights to peaceful ownership of their property were violated, yet the petitioners had not specifically sought and pleaded breach of section 75 of the retired Constitution; that while the section applied to compulsory acquisition of property by the State, the circumstances of the Originating Summons could not be deemed to be compulsory acquisition by either the State or the Commissioner; that the liability of policyholders arose from private law arrangements with an insurer of their choice, tortuous liability was proved against them in proceedings before courts of competent jurisdiction and judgement creditors commenced and were entitled to pursue recovery of the fruits of lawful judgements; that the Commissioner's role was that of a regulator and not a party in contracts of insurance; and that the learned Judge erred in finding that the petitioners' freedom of movement under section 81(1), discrimination (section 82(2) and the enforcement protections in section 84(1) and (6) were available to the petitioners.

38. On ground 30, it was submitted: that the learned Judge erred by declaring that notwithstanding the immunity and protection against liability provided by the law, the Government was bound to pay the claims under the Compensation Fund that was to be established under section 179(1) of the Act; that section 168 of the Act provides that no legal proceedings shall be instituted against the Minister or Board or any person authorized by the Minister or Board for anything done or intended to be done in good faith under the Act, and no occasion had arisen that could lead to the lifting of the immunity against the Minister on the ground that the Minister had failed to execute his duties; and that there was no legal basis to establish a connection between the immunity of the Commissioner and the Minister.

39. Regarding grounds 31, 32, 33 and 38, it was submitted: that the learned Judge erred in law by determining issues that were not before the court; that the court did not have before it a winding up petition against the Company for determination, yet the learned Judge proceeded to make findings on issues that were at variance with the pleadings and which were not submitted on, such as the need to seek approval of the Minister by the Statutory Manager in order for winding up proceedings to be commenced; that in so doing, the learned Judge improperly found that the winding up proceedings against the Company were not in accordance with the law; that the Statutory Manager only makes recommendations to the Commissioner on whether or not the insurer is to be revived, who, in turn makes recommendations to the Minister; that similarly, the findings by the learned Judge that applications by individual parties for the winding up of insurance companies are null and void ab initio and of no effect was an error as this determination was not an issue before the court.

40. It was sought that the appeal be allowed with costs.

41. The firm of J. Harrison Kinyanjui & Co Advocates filed submissions dated 23rd January 2019 expressed to be on behalf of the 1st to 193 respondents. It was submitted: that the appeal is moot due to the failure by the appellant to isolate each determination as against the relevant law; that the memorandum of appeal is in breach of rule 86 (now rule 88) of the Court's Rules as restated in Nasri Ibrahim v IEBC & 2 Others [2018] eKLR; Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR and Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] KLR, all of which decried prolixity in grounds of appeal; that it was the then Chief Justice who accepted the constitutional reference and appointed the learned Judge, (Angawa, J.) to determine the same and there was no objection to the finding by the Chief Justice, hence the appellant cannot be heard to lament about whether or not the matter met the threshold of a constitutional reference; that under section 3A of the Act, it is the Insurance Regulatory Authority that is mandated to play the role of the Statutory Manager and not the Kenya Reinsurance Corporation Limited, hence the learned Judge only restated the law when she found that there was conflict of interest; that section 67C of the Act did not authorize Kenya Reinsurance Corporation to sell any of the properties of the Company; and that Kenya Reinsurance Corporation being the re-insurer of the United Insurance Co. Ltd, could not rationally be appointed as the Statutory Manager while holding funds that would have ensured the liquidity of the Company met the statutory obligations imposed on it, hence conflict of interest was properly established and held against Kenya Reinsurance Corporation.

42. On behalf of the Minister and the Attorney General, submissions were filed by Kepha Onyiso, a Senior Principal State Counsel, dated 22nd January 2019 in which it was contended: that the petitioners were not entitled to fashion their claim as a constitutional petition since their grievance was a pure contractual issue between them and the Company, and they should have invoked the law of contract to claim specific performance or damages from the Company; that on the authority of the cases of Communications Commission of Kenya and 5 Others v Royal Media Services and 5 Others Pet. No. 14, 14A, B & C of 2014, Kenya Bus Service Ltd and Others v Attorney General and Others, Nbi Misc. Civ. Suit No. 413 of 2005 and Benjoh Amalgamated Limited and Another v Kenya Commercial

Bank Limited [2007] eKLR and Maggie Mwauki Mtaleki v Housing Finance Company of Kenya Ltd [2015] eKLR, the learned Judge ought not to have dealt with the suit from a constitutional perspective; that neither the Commissioner nor the Minister or the Statutory Manager violated the rights of the petitioners since none of them was responsible for the payment of claims to third parties; that the Minister should not have been blamed for failure to establish the policyholders compensation fund which fund was not in existence at the time of the judgement but was established as a State Corporation under the Ministry of Finance through Legal Notice No. 105 of 2004; that the decision to place the Company under statutory management was carefully thought out with the intention of putting the Company on a sound financial footing after holding several meetings with the board members upon diagnosing the problem; that it was only after the restructuring efforts failed that the Commissioner with the approval of the Minister, appointed a statutory manager, hence his actions did not depict lack of diligence or bad faith; that conflict of interest between the Statutory Manager and the Company was not shown since the Statutory Manager had no interest in the Company and the fact that it was enjoined in law to give the Company funds to indemnify its insured was not a manifestation of conflict of interest; and that the learned Judge erred in ordering the Government to settle third party claims since the Government was not privy to the contract between the insurer and the insured; and that there was no basis for holding that the Attorney General failed to give the Minister adequate advice.

43. On behalf of United Insurance Company Ltd (the 7th respondent), the appeal was supported by the submissions filed by Milimo Muthomi & Co Advocates dated 26th September 2016. It was submitted, in respect of grounds 1-5 and 14: that, on the authority of the case of Minister for Finance & Commissioner of Insurance as Licensing and Regulating Officer v Lutta Kasmani T/A Kasamani & Co Advocates [2015] eKLR, under section 67C of the Act, the appellant had the discretion to decide which action to take in the circumstances and that the exercise of that discretion was not a matter in which the court could direct the Commissioner to exercise in a particular manner; that the power conferred by the said provision being supervisory in nature, the court cannot determine the appropriate mode of intervention that ought to have been taken by the Commissioner; and that the role of the court, as spelt out in subsection (3) is only to consider an application for extension of the period of the appointment of the Statutory Manager; and that from the steps taken by the appellant, he exercised his discretion judiciously, in good faith, diligently and within the law as provided under the Act.

44. Submitting on grounds 6, 7, 9, 10, 11 and 13 of the appeal, it was the position of the Company: that the power to appoint a statutory manager under section 67C(2)(i) of the Act, as expounded in the case of Sammy Makove Commissioner for Insurance v Blue Shield Insurance Company Limited & Another [2015] eKLR, lies on the appellant and that Kenya Reinsurance Corporation met the requirements of the said section; that no conflict of interest existed between the Statutory Manager and the Company since the core function of the Kenya Reinsurance Corporation is to provide re-insurance services to insurance companies in Kenya and insurance services to companies or its clients; that the responsibilities of the Statutory Manager as outlined under section 67C(4) of the Act are in no way in conflict with the responsibilities of Kenya Reinsurance Corporation under the Act or its functions; that the learned Judge erred in law by finding that Kenya Reinsurance Corporation was under an obligation to make payment of Kshs 40 million per quarter thereafter to the insurer as there was no evidentiary proof of that finding; and that the learned Judge erred in relying on unproved allegation as the basis for finding bias on the part of the Statutory Manager.

45. As regards grounds 8, 12, 16, 17, 18 and 19 of the appeal, it was contended: that the finding of mala fides on the part of the Statutory Manager was contrary to available evidence and the law as there was no evidence that Kenya Reinsurance Corporation was not diligent in discharging its duties and did not act with sound insurance, actuarial and financial principles and in the interest of the insurer, its

policyholders and the insuring public as required in section 67C(4) of the Act; and that under section 67C(2) of the Act, the Statutory Manager is authorized to exercise the powers of the board of directors of the insurer which include the selling of the assets of the insurer as was appreciated in Blue Shield Insurance Company Ltd v Alice W. Kariuki & Another [2014] eKLR; that the powers of the Statutory Manager outlined in section 67C (5) of the Act are not exhaustive and should be read together with section 67C (2)(i) and 67C (4) of the Act in order to get the intention of the legislature as was held in Blue Shield Insurance Company Ltd v Alice W. Kariuki & Another (supra); and that there was no basis for the declaration that an independent statutory manager be appointed by the Insurance Regulatory Authority.

46. The Company's submissions on ground 15 were: that the learned Judge erred by finding as suspect the Statutory Manager's report on the sole basis that a handwritten date was indicated; and that this finding had no legal or factual basis as none of the adverse parties challenged the authenticity of the report, and the mere fact that the report had a handwritten date did not make it suspect.

47. Regarding grounds 20, 28 and 30, it was contended: that the findings on non-compensation being pooled and discussed by a compensation board pursuant to section 179 of the Act had no basis as the fund had not been operationalized by the Minister, nor did the Attorney General give the Minister adequate advice as to the urgency and or expediency of such compensation board; that the Company had never been wound up under section 123(2) of the Act, hence the inapplicability of this provision as was appreciated in Stephen Kiarie Chege v Insurance Regulatory Authority & Another [2009] eKLR; that pursuant to regulation 9 of the Insurance (Policyholders' Compensation Fund) Regulation, 2004, every policyholder and insurance company is required to be a contributor to the Fund, hence the question as to whether the policyholders or the insurer were contributors would have to be determined before the compensation is done, together with the payable amounts thereof, depending on their contributions; and that the learned Judge did not address herself to this process before making the findings on the Compensation Board's establishment.

48. With respect to grounds 22, 24, 25, 26 and 34, it was submitted: that the learned Judge erred by limiting, without legal basis, the rights of the decree holders to execute for lawful judgements obtained in regular proceedings before courts of competent jurisdiction; and that in pursuing settlements or execution of the decrees, the decree holders were simply exercising their rights as opposed to seeking to unlawfully dispossess the policy holders of their properties as was appreciated in James Ngángá Njenga v Commissioner of Insurance & 3 Others [2011] eKLR.

49. As regards ground 30, it was submitted: that there was no evidence that Kenya Reinsurance Corporation, the Commissioner or the Minister failed to perform their duties or responsibilities in good faith as required under the Act; and that therefore the Government officers' immunity under the Act cannot be lifted.

50. On grounds 31, 32 and 33, it was submitted: that no determination was made as regards the winding up of the Company and winding up was not an issue for determination by the court; that the parties in the winding up proceedings were not parties to the petition and were hence not accorded a hearing; that the learned Judge therefore overstepped her mandate in crafting new issues not brought by the parties contrary to the decision in Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR; that the learned Judge misapprehended the law as the position under section 67C (6) as read with section 123(1) of the Act is that the Statutory Manager of the insurer makes recommendation to the appellant and thereafter, the Commissioner considers the report and makes recommendation to the Minister, who decides whether or not to liquidate the insurer; and that sections 121 and 132 of the Act also contemplate a situation where the winding up

proceedings can be commenced by a person other than the Commissioner of Insurance and the court respectively.

51. On ground 35, it was submitted that the learned Judge erred by passing on the burden of settlement of claims to the Commissioner and the Government, effectively discharging the insurer, its management and shareholders from contractual liability with respect to the insurer; that the woes facing the Company were due to mismanagement by the shareholders of the Company and the Government having performed its role as envisaged under the law, it was wrong for the learned Judge to pass on contractual liabilities of the Company to it; and that the learned Judge erred in failing to correctly uphold the public interest in her determination and arrived at a decision that negatively impacts on the insurance sector by shifting the liability of private insurance companies to the appellant, the Government and tax payers.

52. We were urged to find that the appeal is well grounded and allow the prayers in the appeal.

53. In our view, the issues that fall for determination are: whether the appeal as presented complied with rule 86 (now rule 88) of the Rules of this Court; whether the issues raised were properly brought by way of a constitutional petition; whether Kenya Reinsurance Corporation, the Commissioner, the Minister and the Statutory Manager failed to perform their duties or responsibilities diligently and in good faith as required under the Act; whether the Attorney General failed to give the Minister adequate advice as to the urgency and or expediency of the compensation board; whether it was proper to appoint Kenya Reinsurance Corporation as the Statutory Manager in the circumstances; whether it was in order to make orders against the Commissioner and the Statutory Manager contrary to the immunity conferred upon them; whether it was proper to impose liability on the Government for contractual liabilities of the Company;; whether it was unlawful for the learned Judge to direct that the petitioners' claims be settled by the yet to be implemented Policyholders' Compensation Fund; whether the learned Judge erred in law by directing the Minister to implement the Policyholders Compensation Fund forthwith and that the victims' claims be settled and be subject to the said fund; and whether the learned Judger dealt with issues which were not properly before her.

54. Before we deal with the merits of the appeal, we wish to dispose of the first two issues. The first is whether the Memorandum of Appeal complied with rule 88(1) of this Court's Rules. That rule provides that:

> 1. A memorandum of appeal shall concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying—
>
> a. the points which are alleged to have been wrongly decided; and
>
> b. the nature of the order which it is proposed to ask the Court to make.

55. We agree that the memorandum of appeal as drawn was prolix, containing 38 grounds of appeal. From the submissions made by the appellant, it is clear that not all those grounds were necessary, and some grounds could have been merged. The need to comply with rule 88 was emphasized by this Court in Choitram v Nazari [1984] KLR 327. (1982-88) 1 KAR 437; [1976-1985] EA 53 in which the Court decried a memorandum of appeal which it described as "a mass of jumbled conundrums which runs into thirty grounds of appeal". This Court, (Omolo, Waki and Onyango Otieno, JJ.A.) in Chumo Arap Songok v David Kibiego Rotich [2006] KECA 106 (KLR), 13 October 2006 however, clarified that the mere fact that the grounds of appeal are long does not necessarily mean that they are argumentative or narrative. It is our view that although the grounds of appeal were unnecessarily numerous, that does not render the appeal incompetent.

56. The other matter is whether the issues in the Originating Summons were properly brought as constitutional issues. The petitioners' case was that the Commissioner did not act diligently in appointing the Statutory Manager and that had he acted earlier, the placing of the Company under statutory management and declaration of the moratorium would have been unnecessary. The Minister was faulted for failing to operationalize the Compensation Fund, which would have cushioned the petitioners against their exposure to execution by third -party decree holders. The Attorney General was faulted for not undertaking his mandate of advising the Commissioner to operationalize the Fund. While the case against the Commissioner and the Statutory Manager did not clearly bring out any element of constitutional violation, the allegation that the Attorney General failed in his constitutional duty to properly advise the Commissioner brought in the element of the failure to undertake a constitutional duty. To that limited extent, we cannot fault the learned Judge for entertaining the matter as a constitutional case.

57. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions as was put more appropriately in Selle v Associated Motor Boat Co. [1968] EA 123, thus:

> "An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."

58. As can be seen above, some of the issues identified are cross cutting, while some, as contended by the appellant, were not properly before the trial court. It is therefore necessary to revisit the real dispute that was before the court as presented in the Originating Summons. It is clear that what provoked the filing of the Originating Summons was the notice published on 18th July 2005 by Kenya Reinsurance Corporation Limited titled

> " Declaration of a Moratorium" expressed to be issued in the exercise of the powers conferred on the Commissioner of Insurance. It was to the effect that:
>
> "NOTICE is hereby given that in the exercise of his powers under Section 67C(2)(i) of the *Insurance Act*, the Commissioner of Insurance has appointed Kenya Reinsurance Corporation Limited to act as Statutory Manager of United Insurance Company Limited with effect from 15th July 2005.
>
> TAKE FURTHER NOTICE that in the exercise of the powers conferred by section 67C (10) of the *Insurance Act*, the Statutory Manager of the United Insurance Company Limited declares a moratorium on the payment of the said insurer of its policyholders and all other creditors for a period of twelve (12) months with effect from the date of this Notice".

59. There was also a Notice to all Members of the Public notifying them that with effect from 15th July 2005, United Insurance Company Limited was placed under Statutory Management of Kenya Reinsurance Corporation Limited.

60. Section 67C (10) of the *Insurance Act* provides that:

> For the purposes of discharging his responsibilities, 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 policy-holders 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 policy- holder or creditor of the insurer;
>
> c. cease to apply upon the termination of the manager's appointment whereupon the rights and obligations of the insurer, its policy-holders and creditors shall, save 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 Policyholders' Compensation Fund.

61. The effect of the said declaration on the petitioners was that their insurer, United Insurance Company Limited, was barred from settling claims on behalf of the petitioners. Consequently, third party decree holders were executing decrees against the policyholders such as the petitioners. As a result, the petitioners claimed that their rights to liberty and peaceful ownership of their property were thereby violated.

62. It was the petitioners' case that the Commissioner, the Minister and the Statutory Manger did not act diligently, hence their exposure to actions that violated their aforesaid rights. According to them, the Commissioner ought to have acted earlier on to forestall a situation where the option of the appointment of the Statutory Manager and the consequent declaration of moratorium would have become unnecessary. They blamed the Commissioner for not acting diligently in order to avoid the placing of the Company under statutory management for the reason that such action would have eroded public confidence following the collapse of Stallion Insurance and Lakestar Insurance.

63. In order to deal with this issue, it is important to restate the powers of the Commissioner as set out in section 67C (2) which are, with the approval of the board, to:

> i. appoint a competent person familiar with the business of the insurer (in this Act referred to as a "manager") to assume the management, control and conduct of the affairs and business of an insurer to exercise all the powers of the insurer to the exclusion of its Board of Directors, including the use of its corporate seal;
>
> ii. remove any officer or employee of an insurer who, in the opinion of the Commissioner, has caused or contributed to any contravention of any provisions of this Act, or any regulations or directions made thereunder or to any deterioration in the financial stability of the insurer or has been guilty of conduct detrimental to the interests of policy- holders or other creditors of the insurer;

iii. appoint three competent persons familiar with the business of insurers to its Board of Directors to hold office as directors who shall not be removed from office without the approval of the Commissioner;

iv. by notice in the Gazette, revoke or cancel any existing power of attorney, mandate, appointment or other authority by the insurer in favour of any officer, employee or any other person.

64. In this case, the Commissioner, in his Internal Memo to the Minister for Finance, set out the steps he had taken since 1999 when it was brought to his attention that the Company was faced with financial troubles. These included holding of several meetings with the board members to look into ways of salvaging the Company from imminent closure. The problems identified were the need for separation of ownership and management, and the Company's poor/inappropriate investments, hence the decision for a complete restructuring of the Company, including identifying a person suitable as Principal Officer/General Manager to reconstruct the Company. Further, and as part of that process, the investments tied in massive land would be revalued, sold and reinvested in more liquid investments. As a result of these steps, pressure on the Company eased, but some acrimony brewed up amongst the shareholding directors regarding direct control of the Company, which affected top management of the Company, leading, to high turnover of Chief Executives. Upon becoming aware of this turn of events, the Commissioner explained, he held several meetings with the board of directors to address the issues of liquidity and management. He explained that his reluctance to take action against the Company was in consideration of the important role played by the Company in motor insurance, the risk of losses that the action would have posed to stakeholders, and the fact that although the Company had serious liquidity problems, it was not insolvent. The learned Judge was not impressed by the actions that the Commissioner had taken. In her judgement:

> " The present Commissioner was aware that things were not really good as far back as 1999. For five years the Commissioner is said to have been having meetings with the board of the insurer. For five years auctioneers were at the doors of United Insurance. In 2004, the Commissioner notified the Minister of Finance that there was still hope in the Company. All that was required was to have the Company restructured. This did not work. Advocates were filing winding up proceedings. The Commissioner, the Minister were being sued and even despite this, the Commissioner took no action until 15th July 2005 when he declared the insurer be placed under Statutory Management." (sic)

65. In our view, the learned Judge ought to have analysed the actions that the Commissioner took, his reasons for doing so, as well as the circumstances prevailing at the time, before arriving at the decision that the Commissioner did not act diligently. The appointment of the Statutory Manager was only one of the options that was available to the Commissioner. It was not the only or the first option to be taken. The Commissioner had a duty to the Company, the policyholders and the public at large to take an action that was in the interest of all stakeholders in the industry. One such action, which he took as a preventive measure, was the exercise of the powers under section 67C (2)(ii) upon the realization that there was need to separate ownership from management of the Company. By a letter dated 24th June 2004, the Commissioner referred to a meeting held on 10th June 2004 at which it was agreed that the board of the Company be expanded by inclusion of fresh directors appointed in consultation with the Commissioner. Various names were floated, out of which the Commissioner approved appointment of William Murungu, as well as the reappointment of Allan Ngugi, with the remaining slot left to be filled as soon as possible. These actions seemed to have temporarily stabilized the Company, but the Company's problems were compounded by the infighting amongst the shareholders and directors.

66. It is our finding that the actions of the Commissioner may only be questioned on the allegation that they were unreasonable in the circumstances. No such finding was expressly made by the learned Judge, and therefore we find no basis for the conclusion by the learned Judge that:

> "the office of the Commissioner of Insurance did not Act with expediency to appoint a Statutory Manager and place the said insurer under Statutory Management in 1999."

67. The complaint against the Minister was that he failed to operationalize the Compensation Fund that was to be set up under Section 179(1) of the *Insurance Act* Cap 487, known as the "Policy Holders' Compensation Fund". Section 179(1) of the Act, as it was then framed, provided that:

> The Minister shall, for the protection of policy holders, establish a policy holders' compensation fund, in this section referred to as "the Fund", to provide compensation to policy holders of an insurer wound up under section 123(2).

68. That section, it is true, was enacted in 1985 but was later significantly amended, and it was not until 2005 that the Policyholders Compensation Fund (PCF) began operations. We agree with the petitioners that the Minister took unjustifiably too long in operationalizing section 179 of the Act which was aimed at establishing a Board whose functions then were to:

a. provide compensation to the policyholders of an insolvent insurer;

b. monitor, in consultation with the Commissioner where necessary, the risk profile of any insurer;

c. advise the Minister on the national policy to be followed with regard to matters relating to compensation of policyholders and to implement all government policies relating thereto; and

d. perform such other functions as may be conferred on it by this Act or by any other written law.

69. The reason given, that the Policyholders Compensation Fund is a function of the executive, dependent on the priorities for budget set and the availability of funds for the requisite infrastructure, is not particularly convincing. Rule 9 of the Insurance (Policyholders' Compensation Fund) Regulations 2004 provided, in rule 9, that:

> 1. Every policyholder and insurance company shall be a contributor to the Fund and shall pay into the Fund such annual amount and at such times, as the Minister in consultation with the Board of Trustees, may determine.
>
> 2. The Board of Trustees shall serve on every insurance company a notice specifying the amount and the period, within which the amount shall be paid into the Fund by the insurance company.
>
> 3. The insurer shall collect the contribution from the policyholder and shall draw a crossed bankers' cheque to the Fund within fifteen days after end of the month to which it relates.
>
> 4. The amount of the contribution to the Fund shall be 0.25 % of the premium payable by the policyholder per insurance policy and a similar amount by the insurer.

70. Although it was submitted that there was no evidence that the above regulation was complied with, it is our view that the responsibility of ensuring the insured complies with the regulation falls on the

insured. The insured's duty is to pay the premium and it was not contended that the respondents had not done so.

71. Regarding the complaint against the Statutory Manager that it did not perform its functions diligently and in good faith, it was alleged, and found by the learned Judge, that the Statutory Manager wrongly embarked on the process of selling the assets of the Company without the approval of the Minister. Prior to 2019, the powers of the Statutory Manager were set out in section 67C (5) of the Act which provided that:

The responsibilities of a manager shall include—

a. tracing, preserving and securing all the assets and property of the insurer;

b. recovering all debts and other sums of money due to and owing to the insurer;

c. evaluating the solvency and liquidity of the insurer;

d. assessing the insurer's compliance with the provisions of this Act and regulations made or directions issued thereunder;

e. determining the adequacy of the capital and reserves and the management of the insurer and recommending to the Commissioner any restructuring or reorganisation which he considers necessary and which, subject to the provisions of any other written law, may be implemented by him on behalf of the insurer; and

f. obtaining from any former principal officer, director, secretary, officer or employee of the insurer any documents, records, accounts, statements, correspondence or information relating to its business.

72. There was no specific power given to the Statutory Manager to dispose of the assets of the insurer. Neither was there any express bar to such action in light of the operative word "includes". Section 67C(2) however empowers the Commissioner to:

> appoint a competent person familiar with the business of the insurer (in this Act referred to as a "manager") to assume the management, control and conduct of the affairs and business of an insurer to exercise all the powers of the insurer to the exclusion of its Board of Directors, including the use of its corporate seal.

73. In addition section 67C(4) of the Act provides that:

> A manager shall, upon assuming the management control and conduct of the affairs and business of an insurer, discharge his duties with diligence and in accordance with sound insurance, actuarial and financial principles and, in particular, with due regard to the interests of the insurer, its policy-holders and the insuring public in general.

74. It is in that light that we understand the High Court decision in Blue Shield Insurance Company Ltd v Alice W. Kariuki & Another [2014] eKLR that the powers of the Statutory Manager are not restricted.

75. In 2019 an express provision was introduced in the Act vide section 67C(5A) which provides that:

> For the purpose of this section, preserving the assets of the insurer shall include realization of the assets of the insurer upon the approval of the Authority.

76. Prior to this amendment, there was no express provision limiting the powers of the Statutory Manager with regard to preserving the assets of the insurer and we find no reason for the limitation imposed by

the learned Judge. In this case, one of the bottlenecks that the Company faced was the fact that its assets were locked in immovable properties which could not be liquidated in good time in order to settle the claims. Without any restrictions as to its powers, the sale of some of such assets would clearly have been "sound insurance, actuarial and financial principles and, in particular, with due regard to the interests of the insurer, its policy-holders and the insuring public in general".

77. The case against the Attorney General was that he failed to advice the Minister to operationalize the Compensation Fund. We agree that it was upon the Minister to seek the relevant advice from the Attorney General. In our view, once Parliament has enacted a law and left it to the Minister to operationalise it, unless there is a very good reason for delay in doing so, the minister should act without undue delay. It was within the knowledge of the Minister and the Attorney General that the Fund was absolutely necessary, given the state of the insurance industry in Kenya. We therefore agree with the finding by the learned Judge that:

> " The law envisage a situation where limitation to third party risk compensation would be pooled and discussed by a compensation board. This had never been operationalized by the Minister of Finance, the second defendant, nor did the Attorney General give the Minister adequate advise as to the urgency and or expediency of such compensation board."

78. Regarding the issue whether it was proper to appoint Kenya Reinsurance Corporation as the Statutory Manager in the circumstances, section 145 of the Act provides that:

> 1. Subject to this Act, every insurer shall reinsure with the Kenya Reinsurance Corporation Limited such proportion of each policy of insurance issued or renewed in Kenya by the insurer, in such proportion and in such manner and subject to such terms and conditions as are prescribed.
>
> 2. Subject to this Act, every insurer shall also place with the Company, in addition to the reinsurance specified under subsection (1), such proportion of its reinsurance business from Kenya placed in the international reinsurance market, excluding facultative reinsurance, in such proportion and in such manner and subject to such terms and conditions as are prescribed.

79. Section 2 of the Act defines "reinsurance business" as meaning "the business of undertaking liability to pay money to insurers or reinsurers in respect of contractual liabilities in respect of insurance business incurred by insurers or reinsurer and includes a retrocession. Clearly therefore, a reinsurer is under obligation, depending on the terms of the reinsurance, to pay money to the insurer in respect of the contractual liabilities. That being the case, where such liability arises, the reinsurer becomes a debtor of the insurer. In our view, appointing a person who may potentially be a debtor to the insurer raises a conflict of interest. Apart from that, section 148 of the *Insurance Act* provides that:

> An insurer required to effect reinsurance under this Part shall produce or submit to the Company all returns, statements, books, records, accounts or other documents, or true copies thereof, and shall furnish any information, which may be required by the Company for the purposes of this Part.

80. The 'Company' referred to in section 148 of the Act above is Kenya Reinsurance Corporation Limited. We are unable to understand how this statutory obligation placed on an insurer can be properly carried out where Kenya Reinsurance Corporation Ltd is also the Statutory Manager of the insurer. Whereas no incident was brought to the court's attention in which there was actual conflict of interest in the appointment of Kenya Reinsurance Corporation Ltd as the United Insurance Company Limited's

Statutory Manager, the possibility of that occurring was a reality. While the Commissioner has the power to appoint 'anyone' as a statutory manager, the person must be competent to act in that capacity and may be incapacitated by real or potential conflict of interest. We therefore agree with the learned Judge that Kenya Reinsurance Corporation Limited ought not to have been appointed as the Company's statutory manager.

81. The learned Judge in so finding delivered herself as follows:

> " That it is hereby declared that the appointment of Kenya Reinsurance Corporation Limited as a Statutory Manager is null, void ab initio and illegal."

82. We are concerned about the effect of declaring the appointment of Kenya Reinsurance Corporation Limited as a statutory manager null and voib ab initio. That holding has the effect of nullifying all the actions taken by the said statutory manager. Since under Article 1(1) of *the Constitution*, judicial authority is delegated to the court by the people, public interest plays an important role particularly in fashioning appropriate remedies. In determining which relief to grant the court ought to distinguish between illegalities and irregularities. While the former may call for nullification of the steps and actions taken consequent upon the illegal act, in cases of irregularities, such prior steps and actions may be saved where no real injustice has been occasioned as a result thereof and non-compliance was not germane to the issue at hand. In this case, no real injustice has been alleged to have been occasioned by the said appointment. Accordingly, we find that it is not in the public interest that all the actions taken by the said manager prior to the decision by the court should be rendered null and void. In arriving at this decision, we agree with Sachs, J in Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), that " in law, as in mechanics, it is never appropriate to use a steam-roller to crack a nut." In other words, not all irregularities ought to lead to nullification of the actions taken as a result thereof.

83. We call to mind this Court's pronouncement in East African Cables Limited v The Public Procurement Complaints, Review & Appeals Board and Another [2007] eKLR that:

> " We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable"

84. Consequently, while we uphold the decision that Kenya Reinsurance Corporation Limited ought not to have been appointed in that position, we set aside the declaration that the appointment was null and void ab initio in order not to nullify the actions that were undertaken by the Statutory Manager before that declaration.

85. In light of our findings above, it is unnecessary for us to pronounce ourselves on whether it was in order to make orders against the Commissioner and the Statutory Manager in the face of the immunity.

86. The learned Judge in the judgement held that:

> " ...the Commissioner of Insurance and the Minister are held liable for not acting with expediency. Whereas they are and have immunity and protection, this court declares that

the government of Kenya are duty bound to pay the claims under the compensation fund to the (sic) established under section 179(1) if not so already established...I declare that the insurer be held liable and responsible according to law and subject to the Statutory Managers report."

87. In our view, the learned Judge's decision above was unclear as to who between the government and the insurer was liable to settle the claims by or against the insurers. Whereas we hold that the Minister and the Attorney General were culpable for the failure to carry out their statutory mandate, the Government's liability is only to the extent of the failure to operationalise the Compensation Fund.

88. Regarding the issue whether the learned Judge erred in compelling the establishment of the Fund and whether that decision was premature or proper in light of the condition precedent for its establishment and the beneficiaries of the Fund, the issue was not properly before the learned Judge. What was before the learned Judge for consideration was whether the petitioners' rights were violated by the appointment of Kenya Reinsurance Corporation as the Statutory Manager of United Insurance Company Limited. It was therefore not proper for the learned Judge to have delved into that matter without proper pleadings and material in that regard.

89. We find that the learned Judge erred in directing that an independent statutory manager be appointed by the Insurance Regulatory Board to look into the affairs of the said United Insurance Company Ltd expeditiously and in the event, it had not been constituted, be constituted by the Minister of Finance and that the new statutory manager, do report to the board within six months of his or her appointment. Once the court found that the Statutory Manager was not properly appointed, it was not within the mandate of the court to direct the Commissioner on how to proceed, going forward. It may well have been that it was no longer necessary to have statutory management in place, in which event the direction by the court would have been uncalled for in a matter requiring the exercise of discretion.

90. On whether the learned Judger dealt with issues which were not properly before her, we note that the learned Judge held that:

> "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...It is hereby declared that there be an injunction to issue and duly extended on all cases for execution by decree/ creditors until a report of the intended new Statutory Manager is tabled on claims touching on United Insurance... That the victims claim would be settled and be subject to the said compensation fund... That no judgement debtor should be subjected to civil jail as this contravenes the United Nations Conventions on the subject... That each claim by the victim must be established strictly to eliminate fraud. That the claim by the insured must also be established strictly. If per chance the certificate of Insurance is questioned and the fault lies with the insurer, or vice versa, the same must be first determined by the board and new Statutory Manager before it is forwarded to the compensation fund... That for clarity and benefit of removal of doubt, where a Limited Liability Company deal in the Insurance business and is duly licensed under the *Insurance Act* Cap 487 laws of Kenya, no winding up proceedings is permitted to be undertaken by any party except with the approval and permission of the Board of the Insurance Regulatory Authority, formerly the Minister under section 67 C (8) legal Notice 11/2006. That the person who undertakes and applies winding up proceedings is the Commissioner only and would be governed by section 123 of the *Insurance Act*. Namely, the Commissioner of Insurance is the one who applies for winding up proceedings under the *Companies Act*. The court can wind up a Company under

voluntary resolution of that Company (Section 271 Company Act). Applications filed by individual parties through advocates are null and void abinitio and of no effect."

91. With due respect to the learned Judge these determinations were not based on the Originating Summons that was before her. The effect of some of the determination was to confer benefits on persons who were not parties before the court without affording those who stood to be adversely affected therewith an opportunity of being heard thereon. Conversely, some determinations had the effect of depriving third parties such as decree holders of their rights to execute their judgement in the ordinary manner when they were not parties to and were not afforded an opportunity of being heard in the suit. The learned Judge seemed to have turned the Originating Summons into a winding up cause and hence misdirected herself. We set aside these determinations.

92. In the premises, while we uphold the finding that Kenya Reinsurance Corporation Ltd ought not to have been appointed as the Statutory Manager for United Insurance Company Limited, we set aside the order that the appointment was null and void ab initio. We substitute therefor an order that only such actions, taken by the Kenya Reinsurance Corporation Ltd as the Statutory Manager for United Insurance Company Limited from the date of this judgement, will be null and void. We also declare that the Government is responsible for the losses suffered by the respondents as a result of its failure to operationalise the Compensation Fund. For avoidance of doubt, such losses, if any, must be limited to what the respondents are found to have made after taking into account any sum realisable from United Insurance Company Limited and from the Compensation Fund.

93. Save for the foregoing, we dismiss the appeal.

94. Regarding costs, we direct that each party bears own costs both before the trial court and in this Court.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR