

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CONSTITUTIONAL PETITION NO. E019 OF 2024

IN THE MATTER OF THE INSURANCE ACT, CAP 487
AND
IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS & FREEDOMS
UNDER ARTICLE 23 & 258 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF THE BREACH & THREATENED BREACH OF ARTICLES 10, 27(1),
28, 30, 40, (c), 48, 50(1), & 258 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) PRACTICE &
PROCEDURE RULES 2013, LEGAL NOTICE NO. 117 OF 2013
AND
IN THE MATTER OF THE INSURANCE (THIRD PARTY RISKS) ACT, CAP 405
AND
IN THE MATTER OF THE INSURANCE (POLICYHOLDERS COMPENSATION FUND)
(AMENDMENT) REGULATIONS, 2014
AND
IN THE MATTER OF THE INSURANCE (POLICYHOLDERS' COMPENSATION FUND)
REGULATIONS, LEGAL NOTICE 86 OF 2010
AND
IN THE MATTER OF SECTIONS 4, 5, 9, 12, 13, 14, 15 AND 84 OF CONSUMER
PROTECTION ACT, ACT NO. 14 OF 2012, LAWS OF KENYA
AND
IN THE MATTER OF A CONSTITUTIONAL PETITION

BY

ONESMUS KYALO NDAMBUKI
DAVID WAMBUA MAKAU
JOSEPH WAMBUA MUSAU (suing as the officials of
MACHAKOS MATATU OWNERS ASSOCIATION)1ST PETITIONERS
WAMASAA TRAVELLERS..... 2ND PETITIONER
MANATWA SACCO.....3RD
PETITIONER
MAKUENI TRANSPORTERS SACCO
SOCIETY LTD (MATCO).....4TH
PETITIONER
UMOWA SACCO..... 5TH PETITIONER
KAM SACCO6TH PETITIONER
MITA SACCO7TH PETITIONER
NAEKANA SACCO8TH PETITIONER

MAKATA SACCO.....	9 TH
PETITIONER	
KATCO SACCO.....	10 TH
PETITIONER	
KUBAMBA SACCO.....	11 TH PETITIONER
EBTI SACCO.. ..	12 TH PETITIONER
EASTERN BYPASS SACCO.....	13 TH
PETITIONER	
MAKAWE SACCO.....	14 TH
PETITIONER	
MSAFI SACCO.....	15 TH
PETITIONER	
GREAT VISION SACCO.....	16 TH
PETITIONER	
NAMAK SACCO.....	17 TH
PETITIONER	
KAWAMA SACCO.....	18 TH PETITIONER
EASTERN LINK SACCO	19 TH
PETITIONER	
NASAMKI SACCO.....	20 TH
PETITIONER	
KIMMA SACCO.....	21 ST
PETITIONER	
NAKISA SACCO.....	22 ND
PETITIONER	
MAKOS SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LTD	23 RD
PETITIONER	
NEWLOT SACCO.....	24 TH PETITIONER
SEMA SACCO... ..	25 TH
PETITIONER	
MAT EXECUTIVE SACCO.....	26 TH PETITIONER
KINATWASACCO.....	27 TH PETITIONER
MAPTRA SACCO.....	28 TH
PETITIONER	
CROWN BUS SERVICE LTD.....	29 TH
PETITIONER	
WEBUYE SHUTTLE SACCO LIMITED	30 TH
PETITIONER	
HOT SHOT INVESTMENTS LIMITED.....	31 ST
PETITIONER	
PLAISTROW HOLDINGS LIMITED.....	32 ND PETITIONER

NANYUKI EXPRESS CABS SERVICES.....	33 RD
PETITIONER	
CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD.....	34 TH
BENK SAFARIS LIMITED.....	35 TH
PETITIONER	
Jossey LOGISTIC LIMITED.....	36 TH
PETITIONER	

VERSUS

THE COMMISSIONER OF INSURANCE.....	1 ST
RESPONDENT	
THE INSURANCE REGULATORY AUTHORITY.....	2 ND
RESPONDENT	
THE CABINET SECRETARY, FOR THE NATIONAL TREASURY & ECONOMIC PLANNING.....	3 RD
RESPONDENT	
THE HON. ATTORNEY	4 TH
RESPONDENT	
POLICYHOLDERS COMPENSATION FUND (SUED AS THE STATUTORY MANAGER OF INVESCO ASSURANCE CO. LTD.....	5 TH
RESPONDENT	
POLICYHOLDERS COMPENSATION FUND (SUED AS THE STATUTORY MANAGER OF XPLICO INSURANCE CO. LTD.....	6 TH
RESPONDENT	
AFRICA MERCHANT ASSURANCE COMPANY (AMACO).....	7 TH
RESPONDENT	
DIRECTLINE ASSURANCE CO. LTD.....	8 TH
RESPONDENT	
POLICY HOLDERS COMPENSATION FUND.....	9 TH
RESPONDENT	
THE CABINET SECRETARY FOR MINISTRY OF INDUSTRY, TRADE AND ENTERPRISE DEVELOPMENT	10 TH
RESPONDENT	
THE NATIONAL ASSEMBLY OF KENYA.....	11 TH
RESPONDENT	
ANANTROY KAMAL BHATT (AS THE APPOINTED LIQUIDATOR OF UNITED INSURANCE CO.)	12 TH
RESPONDENT	

AND

ASSOCIATION OF KENYA INSURERS (AKI).....	1 ST INTERESTED PARTY
KIMONDO GACHOKA & CO. ADVOCATES.....	2 ND INTERESTED PARTY
KENYA CONSUMERS PROTECTION ADVISORY COMMITTEE.....	3 RD INTERESTED PARTY
KENYA REINSURANCE CORPORATION LIMITED.....	4 TH INTERESTED PARTY
LAW SOCIETY OF KENYA (EASTERN BRANCH.....)	5 TH INTERESTED PARTY
B.M MUNG'ATA & CO. ADVOCATES.....	6 TH INTERESTED PARTY
GEOFFREY WACHIRA.....	7TH INTERESTED PARTY/APPLICANT
MERCY WAWA KELI.....	8 TH INTERESTED PARTY

RULING

Introduction:

1. By a Notice of Motion application dated 23rd September 2024, filed under certificate of urgency of even date, the 1st to 28th Petitioners through the law firm of J. Harrison Kinyanjui & Co. Advocates sought for orders that:-
 - i **Spent.**
 - ii **Pending the hearing and determination of the Motion, this Honourable Court be pleased to issue a Conservatory Order by way of an injunction, prohibiting the execution of all processes levied in suits against the Petitioners' Members as policyholders of DIRECTLINE ASSURANCE COMPANY LTD such as listed in the schedule marked "A" annexed to the Supporting Affidavit of ONESMUS KYALO NDAMBUKI herein sworn on 23rd September 2024 lodged in this Petition; being the schedule of claims against the Petitioners' Members' policyholders in proceedings wherein the said DIRECTLINE ASSURANCE COMPANY LTD has expressly assumed liability to defend all the claims and settle the same on behalf of the named Petitioners' members' policyholders, and all such arising Claims, which liability ought to be fully shouldered by the said DIRECTLINE ASSURANCE COMPANY LTD, pursuant to Article 46(1)(c) of the Constitution of Kenya.**
 - iii **Pending the hearing and determination of the Petition herein, this Honourable Court be pleased to issue a Conservatory Order by way of an injunction, prohibiting the execution of all processes levied in suits against the Petitioners' Members as policyholders of DIRECTLINE ASSURANCE COMPANY LTD such as listed in the schedule marked "A" annexed to the Supporting Affidavit of ONESMUS KYALO NDAMBUKI herein sworn on 23rd September 2024**

lodged in this Petition; being the schedule of claims against the Petitioners' Members' policyholders in proceedings wherein the said DIRECTLINE ASSURANCE COMPANY LTD has expressly assumed liability to defend all the claims and settle the same on behalf of the named Petitioners' members' policyholders, and all such arising Claims, which liability ought to be fully shouldered by the said DIRECTLINE ASSURANCE COMPANY LTD, pursuant to Article 46(1)(c) of the Constitution of Kenya.

- iv Pending the hearing and determination of the Motion, this Honourable Court be pleased to issue a Conservatory Order by way of an injunction, prohibiting the execution of all processes levied in suits against the Petitioners' Members as policyholders of AFRICA MERCHANT ASSURANCE COMPANY LTD (AMACO) such as listed in the schedule marked "B" annexed to the Supporting Affidavit of ONESMUS KYALO NDAMBUKI herein sworn on 23rd September 2024 lodged in this Petition; being the schedule of claims against the Petitioners' Members' policyholders in proceedings wherein the said AFRICA MERCHANT ASSURANCE COMPANY LTD (AMACO) has expressly assumed liability to defend all the claims and settle the same on behalf of the named Petitioners' members' policyholders, and all such arising Claims, which liability ought to be fully shouldered by the said AFRICA MERCHANT ASSURANCE COMPANY LTD (AMACO), pursuant to Article 46(1)(c) of the Constitution of Kenya.
- v Pending the hearing and determination of the Petition herein Honourable Court be pleased to issue a Conservatory Order by way of an injunction, prohibiting the execution of all processes levied in suits against the Petitioners' Members as policyholders of AFRICA MERCHANT ASSURANCE COMPANY LTD (AMACO) such as listed in the schedule marked "B" annexed to the Supporting Affidavit of ONESMUS KYALO NDAMBUKI herein sworn on 23rd September 2024 lodged in this Petition; being the schedule of claims against the Petitioners' Members' policyholders in proceedings wherein the said AFRICA MERCHANT ASSURANCE COMPANY LTD (AMACO) has expressly assumed liability to defend all the claims and settle the same on behalf of the named Petitioners' members' policyholders, and all such arising Claims, which liability ought to be fully shouldered by the said AFRICA MERCHANT ASSURANCE COMPANY LTD (AMACO), pursuant to Article 46(1)(c) of the Constitution of Kenya.
- vi Pending the hearing and determination of the motion, this Honourable Court be pleased to issue a Conservatory Order by way of an injunction, prohibiting the execution of all processes levied in suits against the Petitioners' Members as policyholders of INVESCO ASSURANCE COMPANY LTD listed in the schedule marked "C"

annexed to the Supporting Affidavit of ONESMUS KYALO NDAMBUKI herein sworn on 23rd September 2024 lodged in this Petition; being the schedule of claims against the Petitioners' Members' policyholders in proceedings wherein the said INVESCO ASSURANCE COMPANY LTD had expressly assumed liability to defend the claims and settle the same on behalf of the named Petitioners' members' policyholders and which liability ought to be fully shouldered by the said INVESCO ASSURANCE COMPANY LTD now under Statutory Management by the Policyholders Compensation Fund, including all such arising claims so insured by INVESCO ASSURANCE COMPANY LTD.

vii Pending the hearing and determination of the Petition herein, this Honourable Court be pleased to issue a Conservatory Order by way of an injunction, prohibiting the execution of all processes levied in suits against the Petitioners' Members as policyholders of INVESCO ASSURANCE COMPANY LTD listed in the schedule marked "C" annexed to the Supporting Affidavit of ONESMUS KYALO NDAMBUKI herein sworn on 23rd September 2024 in this Petition; being the schedule of claims against the Petitioners' Members' policyholders in proceedings wherein the said INVESCO ASSURANCE COMPANY LTD had expressly assumed liability to defend the claims and settle the same on behalf of the named Petitioners' members' policyholders, and which liability ought to be fully shouldered by the said INVESCO ASSURANCE COMPANY LTD now under Statutory Management by the Policyholders Compensation Fund, including all such arising claims so insured by INVESCO ASSURANCE COMPANY LTD.

viii Spent

ix Leave be granted to the Petitioners herein, that the Petitioners' Affidavit sworn by ONESMUS KYALO NDAMBUKI on 23rd September, 2024 together with the exhibits thereto in Support of the Motion herein, be applied in support of the Petition herein of even date.

x Leave be granted to the Petitioners herein to represent such of similar Claimants having similar claims against the named insurance companies subject of this Petition pursuant to Article 258(2)(b), (c), and (d) of the Constitution of Kenya.

xi The costs of this Application be to the Petitioners in any event.

2. Upon considering the certificate of urgency and the application thereof, this court on 30th September 2024 issued temporary conservatory orders in terms with prayers 2, 4, 6, 9 and 10 of the application as above. The prayer for advertisement has already been implemented by the Petitioners.

3. Following the issuance of the above temporary conservatory orders, the 7th Interested Party/Applicant herein **GEOFFREY WACHIRA** (“**the Applicant**”) has moved this court by way of a Notice of Motion application dated 13th December 2024 which this ruling is to address and determine.

The Notice of Motion dated 13th December 2024 by the 7th Interested Party

4. The Applicant seeks: -
 - i. **THAT there be a stay of any further proceedings pending the hearing and determination of the application.**
 - ii. **THAT upon inter partes hearing of the instant application, this Honourable Court be hereby pleased to discharge, vary and/or set aside the ex -parte orders made on 30th September, 2024.**
 - iii. **THAT costs of the application and Petition be provided for**
5. The application is supported by the affidavit of **Mr.KINYANJUI THEURI Advocate for the Applicant** sworn on 13th December, 2024 and is premised on the grounds on the face of it as follows; on the 23th September, 2024, the Petitioners moved this honourable court vide their application of even date seeking temporary injunctive orders which the court granted; the Applicant herein has an unchallenged decree against the 29th Petitioner herein that was issued by the court upon the determination of Naivasha CMCC No. E625 of 2021; the existence of a valid and unchallenged decree emanating from a different court thus deprives this honourable court jurisdiction to grant the orders sought in the Petitioners' application dated 23rd September, 2024 in terms of Section 34 of the Civil Procedure Act, Cap 21; it is improper and an abuse of the court process for the Petitioners to seek and enjoy stay orders in the guise of a Constitutional Petition which Petition raises issues that are commercial in nature. He urged the court to grant the orders as sought.

The Petitioners/Respondents' Grounds of Objection

6. In opposing the application, the Petitioners/Respondents filed grounds of objection dated 30th January 2025 as follows, THAT:-

- 1. The 7th Interested Party's Notice of Motion dated 13th December, 2024 is frivolous, vexatious and a gross abuse of the Court process.**
- 2. The Motion dated 13th December, 2024 is legally defective as it is supported by an Affidavit by the Advocate representing the 7th Interested Party in a manner violating the Advocates' Practice and Ethics Rules, by reason of which it ought to be struck out.**
- 3. The Motion dated 13th December, 2024 is incompetently before this court as the 7th Interested Party not being a primary Respondent is not permitted under the applicable Mutunga Rules to delve into the litigation to litigate on primary issues in the said capacity of INTERESTED PARTY.**
- 4. Without prejudice to the foregoing, the Motion dated 13th December 2024 has no merit as the lawful Constitutionally entrenched mandate of this Honourable Court under both Article 23(3) of the Constitution of Kenya and the Mutunga Rules accords the Court to issue and grant conservatory Orders as were granted herein on 30th September, 2024.**
- 5. The 7th Interested Party by his Motion 13th December, 2024 has wholly misapprehended the matters raised by the Petitioners in the Constitutional Petition herein, grounded in violations and threatened violations of Article 46 of the Constitution of Kenya as read with the Consumer Protection Act, which can only be ventilated in a full trial, necessitating the issuance of the Conservatory Orders awaiting the ventilation on merits of the Constitutional issues raised.**
- 6. The jurisdiction to challenge conservatory Orders issued under Article 23(3) of the Constitution of Kenya cannot be invoked under the general powers of the Court under Order 51 Rule 1 of the Civil Procedure Rules or the Order 40 invoked in a blanket manner without specifying the specific rule founding the ground for vacating the Conservatory Orders.**
- 7. The jurisdiction to vacate the Conservatory Orders in which all the parties have participated by Consent to the point of setting the same for trial is drastic, and it is prejudicial to**

the Petitioners to be deprived of the benefit of a decision on the same on merit.

Submissions

7. Directions were given for the instant application to be canvassed through written submissions. The Applicant's submissions are dated 5th February 2025 filed by the law firm of Kinyanjui Njuguna & CO. Advocates whilst the Petitioners/Respondents' submissions are dated 3rd March 2025 together with Supplementary submissions dated 3rd September 2025 filed by the law firm of J. Harrison Kinyanjui & Co. Advocates.

Applicant's Submissions

8. The Applicant submitted that the prayers sought in the Petitioners' application dated 23rd September 2024 are an affront to the hallowed provisions of Section 34 of the Civil Procedure Act and thus the same ought to be discharged forthwith and that the purport of Section 34 of the Civil Procedure Act is to guarantee that all matters relating to a decree's execution are handled within the same court, to avert any unnecessary delays and confusion. Reliance was made to the case of **Kennedy Ooko Jacob t/a Ssebo Intel. Co. Auctioneer v John Abich Ochanda [2021] eKLR** which held that Section 34 of the Civil Procedure Act strictly bars the filing of separate proceedings to determine issues that emanate or arise from execution of decrees in a suit.
9. On whether the Supporting Affidavit by Advocate Kinyanjui Theuri renders the application defective, it was submitted that the law has always been that affidavits should be limited to matters within the knowledge of the deponent. It was a fact that matters touching upon Section 34 of the Civil Procedure Act were matters within the knowledge of Counsel as opposed to that of his client thus the proposition that the Affidavit by Advocate Kinyanjui renders the application defective is baseless and of no juridical backing. Reliance was made to the case of **Ibrahim & Another v Muhsin & another (Civil Application E058 of 2024) [2024] KECA 862 (KLR) (26 July 2024) (Ruling)**.
The court was urged to allow the application.

Petitioners/Respondents' Submissions

10. The Petitioners on the other hand submitted that the Petition herein is in the nature of a class action Petition envisaged under Article 258 of the Constitution of Kenya, and therefore properly lodged before this Court. Reliance was made to the case of **Nafisa Kanii & 10 Others V Central Bank of Kenya & Another [2019] eKLR,**

11. It was submitted that the Court in granting the Conservatory Orders on 30th September, 2024 in the Petition acted lawfully, and within the bounds of Article 23 and Rule 23 of Legal Notice 117 of 2013 as the orders sought are anchored in violations of the Petitioners' members specifically enumerated Constitutional Rights. Reliance was further placed on the cases of **Gatirau Peter Munuva vs Dickson Mwenda Kithinii & 2 Others [2014] eKLR, Amir Suleiman vs Amboseli Resort Limited [2004] eKLR; 2 KLR 589, Films Rover International vs. Cannon Films Sales Ltd [1986] 3 ALL E.R.772, George Mugoye Mbeya vs Ethics & Anti-Corruption Commission & 2 others [2020] eKLR, Standard Group Limited vs Signon Freight Limited & Another [2012] eKLR, Ezekiel Mule Musembi vs H. Young & Company (E.A) Limited [2019] eKLR,**
12. It was further submitted that the swearing of the affidavit by the advocate on record was in a manner violating the ethical standards set for Advocates to remain objective when representing clients in contested litigation and thus the said affidavit stands to be struck out to the extent that it is tendered to advance a contested position in the proceeding.
13. It was the Petitioners' conclusion that the 7th Interested Party's Motion dated 13th December 2024 is frivolous and ought to be dismissed with costs to the Petitioners.

Analysis and Determination

14. I have carefully considered the application, the grounds of objection, the rival submissions by Parties' counsel and the law. The issue that arises for determination is whether the application is merited.
15. This application arises out of a Constitutional Petition filed alongside a Notice of Motion application both dated 23rd September, 2024 brought under Articles 2(4), 19(1), (2); 20(1), (2), 3(b), 22(1); 23, 46, 258 OF THE CONSTITUTION OF KENYA, 2010, SECTION 15(1) OF THE CONSUMER PROTECTION ACT, 2012 RULE 3, 4, 5,6, 8(1), 9(1), 10, 21, & 23 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013, LEGAL NOTICE NO. 117 OF 2013. The Petitioners claim to have been violated and are in continued threat of violation, in relation to the Petitioners' members purchase of insurance services for their Public Service Vehicles as sold by Insurance Companies licensed to so sell insurance services to the Petitioners' members.
16. It is important for me to first address the issue as to whether the supporting affidavit to the instant application sworn on 13th December 2024 by

Advocate Kinyanjui Theuri, advocate for the Applicant is incompetent and in violation of the Advocates Practice and Ethics Rules, by reason of which it ought to be struck out.

17. The Applicant herein did not swear any deposition in support of the instant application or a replying affidavit or objection to the Petition herein. His failure to depose to the contested facts and issues was not explained. The Applicant's said Advocate deponent then proceeded to depose to contentious matters in the Petition herein in terms of paragraph 5 and 12 thereof that:-

Paragraph 5 states- THAT the *ex parte* orders granted are an affront to section 34 of the Civil Procedure Act, chapter 21 of the Laws of Kenya which stipulates that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution of the decree, shall be determined by the court executing the decree and not by a separate suit.

Paragraph 12 states- THAT it is improper and an abuse of the Court process for the Applicant to seek and enjoy stay orders in the guise of a Constitutional Petition which petition raises issues that are commercial in nature

18. This is impermissible of an Advocate to do in contested matters such as in the instant case. With respect, and as noted above, these are issues within the province and domain of the Applicant himself, yet he elected to remain in the shadows, and only his Advocate on record is seen by way of the impugned supporting affidavit sworn on 13th December 2024 deposing to the contested issues.
19. My view is that an advocate should refrain from swearing affidavits unless he is deposing to facts that are strictly within his knowledge and which cannot be within the knowledge of his client. It should be a last resort for an advocate to place himself in a situation where he will be called upon to be a witness, for there can be a challenge to the depositions made in the affidavit, and you would wish to avoid the unsavory scenario where the advocate is in the dock, when he is supposed to be at the bar arguing the case of his client. It should really be in cases where the client is incompetent to swear the affidavit that counsel should weigh in, and even then, it should be on facts that can only squarely be within the advocate's special knowledge. See **Mariera & Another v Ongwacho & 2 others**

**(Environment & Land Case 305 of 2016) [2025] KEELC 3151 (KLR)
(2 April 2025) (Ruling).**

20. In this case, the issue before me concerns alleged violation of the Petitioners' Constitutional and Consumer rights raised through a Constitutional Petition. I would have thought that any response to the Petition or any application therein is a selection made by the litigant after considering many factors, and therefore it is the litigant who is better placed to depose the affidavit thereof and elaborate why he/she has chosen that particular response. This case is hotly contested and needs justification through facts and evidence.
21. I therefore agree with the Petitioners that the application is supported by an incompetent affidavit that ought to be struck out. The affidavit offends rule 8 of the Advocates Practice Rules which states that:-

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear”

See **Turea Ltd T/a Dr. Mattress vs Mohammed (Civil Appl E030 of 2022) (2022) KECA 1271 (KLR) 18th November (2022) (Ruling)** and in **Kwacha Communications Ltd and another vs Pindoria Holdings Ltd & another (2022) eKLR.**

22. The supporting affidavit sworn in support of the instant application on 13th December, 2024 by Mr. Kinyanjui Theuri, Advocate for the Applicant is hereby struck out. Having struck out the affidavit the application remains unsupported, with no legs to stand on and I have no option but to strike it out.
23. Without prejudice to the foregoing, I will address the Motion dated 13th December 2024 and determine whether it is merited. The lawful Constitutionally entrenched mandate of this Honourable Court under both Article 23(3) of the Constitution of Kenya and the *Mutunga Rules* accords the Court to issue and grant conservatory Orders as were granted herein on 30th September, 2024

24. As already stated, the Petitioners/Respondent in the Notice of Motion application dated 23rd September 2024 sought for Conservatory Orders invoking *inter alia*, Article 23(3)(c) of the Constitution of Kenya. This Court by its Order dated 30th September, 2024 granted the same. It is on the basis of this orders that the Applicant has brought this application seeking that the Court does discharge, vary, and/or set aside the Orders made on 30th September, 2024.
25. It is trite that the jurisdiction of any court provides the foundation for its exercise of judicial authority. As a general principle, where a court has no jurisdiction, it has no basis for judicial proceedings much less judicial decision or order.
26. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. **John Beecroft Saunders** in “**Words and Phrases Legally Defined**”, Volume 3 at Page 113 defines court jurisdiction as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

27. The locus classicus on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR**

1. Nyarangi, JA. relying, inter alia, on the above cited treatise by **John Beecroft Saunders** held as follows:

“Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

28. The primary source of the jurisdiction of the courts is the Constitution. Article 165 of the Constitution sets out the jurisdiction of the High Court.

29. Article 165 (3) (b), (d) (ii) of the Constitution stipulates as follows:

(3) Subject to clause (5), the High Court shall have—

(a)...

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

30. The Petitioners herein brought the Petition claiming that their Constitutional rights under Article 23 & 258 of the Constitution and Consumer Protection Act had been violated and it is on that basis that this court invoked the jurisdiction under 165(3) (b) and issued the conservatory orders. The said Orders have been extended to date.

31. In the case of **Munya v Kithinji & 2 others (Application 5 of 2014) [2014] KESC 30 (KLR) (2 April 2014)** the Supreme Court stated as follows with respect to conservatory orders contemplated under Article 23(3) of the Constitution:

“Conservatory Orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory Orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory Orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public

interest, the Constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

32. In **Board of Management of Uhuru Secondary School vs City County Director of Education & 2 Others [2015] KEHC 2174 (KLR)** the court summarized the principles for grant of Conservatory Orders as including, first, the need for the applicant to demonstrate an arguable *prima facie* case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice. The second principle is whether the grant or denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory. The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
33. Section 34 (1) of the Civil Procedure Act states as follows:

“All questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

34. I find this provision not to be applicable to the instant case as what is before court is a Constitutional Petition which indeed affects the Applicant’s suit but only to the extent that this is a Class Action Petition. I am persuaded by the finding in the case of **Nafisa Kanji & 10 others v Central Bank of Kenya & another [2019] KEHC 7196 KLR** which is relied upon by the Petitioners where it was held that:-

“I have considered the opposition raised by the Respondents, in respect to Article 22 of the Constitution, and find the said opposition to have no merit. The Petitioners allege infringement and/or violation of their fundamental rights to protection of property (Article 40); to protection of consumer rights (Article 46); and to protection of fair administration action (Article 47). Because those are the reliefs they seek, they can, as provided under Article 22(2) (b) institute this Petition acting as a member of, or in interest of, a group or class of persons, that is other

depositors of the bank. This would serve to ensure the Court deals with one issue affecting many persons in one action”.

35. Such an action, which can also be said to be Class Action was discussed in the South African case in **Trustees for the time being of Children’s Resource Centre Trust & Others v Pioneer Food (PTY) Ltd & Others (050/2012) [2012] Zasca 182** as follows:

“The class action serves to bring a number of separate claims together in one proceeding. In other words, it permits the aggregation of claims. However, that is not its only function. Of equal or greater importance, as Professor Silver points out, is the fact that the class action is ‘a representational device’. It is:

“...a procedural device that expands a Court’s jurisdiction, empowering it to enter a judgment that is binding upon everyone with covered claims. This includes claimants who, not being named as parties, would not ordinarily be bound. A class-wide judgment extinguishes the claims of all persons meeting the class definition rather than just those of named parties and persons in privity with them, as normally is the case.

Judges and scholars sometimes treat the class action as a procedure for joining absent claimants to a lawsuit rather than as one that permits a Court to treat a named party as standing in judgment on behalf of them. This is a mistake... class member neither starts out as parties nor become parties when a class is certified.”

15. There can be no doubt that the aggregate public interest has been served by the Conservatory Order by preserving the subject matter rather than the disproportionate attrition of Justice in the face of the violations of Article 46 on Constitutional rights of the Petitioners' members.
16. So broad is the discretion of the Court on a Petition brought under Article 258 of the Constitution that the Court is Constitutionally-bound by the guardrails of Article 259 in considering such a Petition. Article 258 of the Constitution provides:

“(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

- (2) *In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*
- (a) *a person acting on behalf of another person who cannot act in their own name;*
 - (b) *a person acting as a member of, or in the interest of, or a group or class of persons.*
 - (c) *a person acting in the public interest or*
 - (d) *an association acting in the interest of one or more of its members. [Emphasis added]*

17. This broad-based jurisdiction of the Court was therefore properly invoked, underpinned by this Constitutional provision. In a parallel application of this principle, the Court routinely allows amendments to pleadings to bring in additional pleas in a claim in order to avoid multiplication of suits and in saving Judicial Time.
36. Were the Court to discharge the Conservatory Orders granted on 30th September, 2024 the substance and substratum of the Petition herein would dissipate and altogether be removed.
37. Under Article 165 (3) (b) of the Constitution of Kenya, 2010, the jurisdiction of the High Court includes to hear any question whether a right or fundamental freedom in the bill of rights has been violated or infringed. With that, I find that this court has the jurisdiction to issue the Conservatory Orders which were properly issued in this case and to hear and determine the Petition filed herein.
38. Lastly, I must say that the Applicant not being a primary party in the case is not permitted under the applicable *Mutunga Rules* to delve into the litigation to litigate on primary issues in the said capacity of INTERESTED PARTY. An Interested Party in a Constitutional Petition has limited role in the prosecution of the litigation.
39. Pursuant to Rule 2 of Legal Notice No. 117 of 2013, otherwise known as the '*Mutunga Rules*' - The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, an Interested Party is defined as:-

"A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation". [emphasis added]

40. In this instance, it is clear that the Applicant has taken it upon himself to be directly involved in the litigation herein when the interlocutory Motion

dated 23rd September 2024 in the Petition has not been heard on merit. See **William Odhiambo Ramogi & 3 Others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR** where the issue of Interested Parties in a Constitutional Petition such as this and their role was stated thus: -

"44. The role of an interested party in proceedings is peripheral as was expressed in *Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR, where the Supreme Court was called upon to determine whether substantive orders could be granted in a matter where a cross-petition had been introduced to a Constitutional matter by way of an affidavit by an interested party. In its majority decision, the Supreme Court stated as follows at paragraph 51-55:

[51] The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of the Constitution...

[53] ... Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in *Francis Kariuki Muruatetu & Another v. Republic & 5 Others*, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

"Having carefully considered all arguments we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties before the Court. The primary impact is on the Parties that first moved the Court. This is true. more so, in proceedings that were not commenced as Public Interest Litigation (PIL) like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its

own fresh issues or introduce new issues for determination by the Court...

[54] In like terms we thus observed in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others*, Civil Appeal No. 290 of 2012 (paragraph 24):

“A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings”.

41. The upshot is that:

- a) **The Notice of Motion application dated 13th December 2024 filed by the 7th Interested Party, GEOFFREY WACHIRA (“the Applicant”) is without merit and is thus dismissed.**
- b) **The parties are to take further directions in the matter.**
- c) **As a matter of clarification:**
 - i. **the conservatory orders issued by this court on 30th September 2024 were only made in favour of the Petitioners and their members having similar claims against the named Insurance Companies subject of this Petition pursuant to Article 258(2)(b), (c), and (d) of the Constitution of Kenya and will remain in force pending further orders of the court.**
 - ii. **There are no conservatory orders in place in this case in favour of the Insurance Companies named in this Petition hence Decree holders in competent Declaratory suits may lawfully execute the decrees in those suits. In addition, fresh suits including declaratory suits may also proceed to be heard and determined on merit notwithstanding this Petition.**
- d) **Parties will bear their own costs.**

Orders accordingly.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS THIS 29TH
OCTOBER 2025

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 29TH OCTOBER
2025

In the presence of:

1. Mr. Harrison Kinyanjui for Petitioners/Respondents
2. Mr. Ligami for 1st & 2nd Respondents
3. Ms. Nyaga for Maina Gatundu
4. Mr. Otieno for 7th Interested Party/Applicant
5. Mr. Mburu for 5th Interested Party
6. Mr. Nzuli for 7th Respondent
7. Mr. Mule for 6th Interested Party

Milly - Court Assistant