



**Kariuki v Principal Magistrate's Court Mavoko & 3 others; Mulwa (Interested Party)  
(Petition E022 of 2024) [2025] KEHC 18170 (KLR) (4 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18170 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
PETITION E022 OF 2024**

**EN MAINA, J**

**DECEMBER 4, 2025**

**IN THE MATTER OF THE COSTITUION KENYA 2010, ARTICLES 10, 19 (2)20  
(1) (2)(3) & (4), 21(1), 23 (3), 27 (1), 40 (3), 46, 47 (1), 48, 50 (1) 258 (1) AND 259 (1)**

**AND**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL REGISTRY RIGHTS  
AND FREEDOMS UNDER SECTION 22 (1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER ARTICLES 19, 20, 21,  
22, 23, 25(C), 40(1), 40(3), 50(1), 48, 159, 258 AND 259 OF THE CONSTITUTION  
OF KENYA, 2010 TO WITH SECTION AND 3A OF CIVIL PROCEDURE ACT,  
SECTION 20(8) AND (3) AND (4), SECTION 23 (1) AND (3), SECTION 27 (1),  
29(A)ANDIN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION  
OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT  
OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF SECTION 203 OF THE INSURANCE ACT CAP  
487 LAWS OF KENYA & THE POLICYHOLDERS COMPENSATION  
FUNDANDIN THE MATTER OF SECTION 4, 10 OF THE INSURANCE  
(MOTOR VEHICLE THIRD PARTY RISKS) ACT CAP 405 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE INSOLVENCY ACT NO. 18 OF 2015**

**BETWEEN**

**JOHN MBUGUA KARIUKI ..... PETITIONER**

**AND**



PRINCIPAL MAGISTRATE'S COURT MAVOKO ..... 1<sup>ST</sup> RESPONDENT  
ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT  
THE INSURANCE REGULATORY AUTHORITY ..... 3<sup>RD</sup> RESPONDENT  
POLICY HOLDERS COMPENSATION FUND ..... 4<sup>TH</sup> RESPONDENT  
  
AND  
  
BEATRICE NDUKU MULWA ..... INTERESTED PARTY

## JUDGMENT

1. The amended Petition before this court is dated 28/03/2025, the Applicants seeks the following orders that;
  - a. A Declaration do issue that the Petitioner is duly and statutorily protected from personal liability in light of 510 (1) of CAP 405 and the *Insurance Act* Cap 486 and the Provisions of *the Constitution* of Kenya
  - b. A declaration that fundamental rights and freedoms of the Petitioner have been violated by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
  - c. A declaration that the Petitioner's Constitutional rights to liberty, movement and association and peaceful ownership of his property are violated by third parties/interested parties' execution processes, decrees, judgment and claims.
  - d. The Petitioner's and right to privacy and freedom of movement and association and equal benefit and protection of the law are curtailed by the imminent committal to civil jail pending in execution of judgment.
  - e. A permanent injunction do issue to restrain the interested party by herself or through her agent and/or lawyers from executing against the petitioner, the decree in Mavoko PMCC 860 of 2015 between Beatrice Nduku Mulwa vs John Mbugua.
  - f. The Honourable court do cite the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent for malfeasance of public office.
  - g. The court do issue a mandatory injunction directing the interested party to pursue payment from the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondent.
  - h. A declaration and order that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, jointly and severally meet and make payments of all decretal sums and costs against the Defendants in the cases arising from accidents for which the Petitioner had obtained Insurance cover with the 3rd Respondent under Section 4 of the Insurance (Motor Vehicle Third Party Risks) Act.
  - i. An order for permanent injunction to restrain the Interested Parties from executing the court judgment and decree against the Petitioner in respect of the Accident for which the Petitioner had obtained insurance Cover under



Section 4 of the Motor Vehicle (Third Party Risks) Act. specifically, in Mavoko PMCC 860 of 2015 between Beatrice Nduku Mulwa vs John Mbugua).

- j. That the court do issue any other and further orders convenient so as to meet the ends of justice.
  - k. That costs be in the cause awarded to the Petitioner”
2. The Application is supported by the affidavit of the Petitioner sworn on an even date wherein he contends that he is the registered owner of Motor vehicle registration number KAA 688Y that was insured by Concord Insurance Company (hereinafter referred to as the “insurance company”) and got into an accident on 16/01/2006. That he reported the accident to the insurance company who in turn appointed the firm of Mwaniki Gachuka & Co Advocates to represent them against the 27 claims that arose until the Insurance Company was put under statutory management. He then received a notice to withdraw without any notice and the matters proceeded without his attendance until he appointed the firm of M/S S.W Ndegwa & Co Advocates. He indicated that his petition raises weighty constitutional issues and that the execution has commenced in some of the matters causing his family to be subjected to psychological trauma due to numerous attachments.
3. The Petitioner avers that the duty of an insurer to meet judgment awards is also recognized under Section 203 of the *Insurance Act* where the insurer is required to meet claims within 90 days of them being lodged subject to extensions that may be issued by the Commissioner of Insurance; Further, Article 46 of *the Constitution* safeguards consumer rights and consumers are entitled to services of reasonable quality, protection of their economic interest and compensation for loss or injury arising from the defects in service. That he is suffering double jeopardy as he paid premiums and now proclamation of attachment of his property. The 2nd and 3rd Respondent failed to advise unsuspecting consumers from taking insurance policies with Concord Insurance Company Limited while the later is obligated to ensure that all companies that offer insurance services in Kenya are properly run and are capable of indemnifying all their policyholders in the event an unforeseen event occurs,
4. Further, that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have also violated the national values and principles under Article 10 of *the Constitution* for failing to be accountable for all the players in the insurance sector. The 2nd 3rd and 4th Respondent bear the burden of satisfying the interested parties decree for failing to fulfill its obligations as the insurance sector regulators.
5. The Petition was opposed by a reply to Petition files by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent through an affidavit dated 23/05/2023 by Godfrey K Kiptum, the Commissioner of Insurance and Chief Executive officer of the 3<sup>rd</sup> Respondent. He contended that pursuant to section 23, 41 and 203 of the *Insurance Act*, they had numerous engagements with the Insurance Company with an aim to rectify its non-compliance but it was unable to meaning that claims payable were not settled thus exposing policy holders and the public to immense risk. In exercise of its powers under section 67 (2) (iii) of the *Insurance Act*, it appointed 3 people to the Board of Directors of the Insurance company and when they conducted an onsite inspection on 1/02/2013, they found that the head office was closed and not accessible to the public and this was confirmed by a letter from the insurance company dated 5/02/2013 who admitted that it was closed following attachment by auctioneers.
6. The Board of directors then decided to place the Insurance company under Statutory management and the 3<sup>rd</sup> Respondent appointed Mr. Charles Osoro Makone as the Statutory Manager to act in the best interest of the public vide a Press statement dated 06/02/2013. That vide a letter dated 07/02/2013 the public was informed of this position and vide Petition 6 of 2016, in the matter of Concord



Company Limited, an official receiver was appointed as the provisional liquidator in the judgment dated 27/01/2020 by Justice Majanja. The court was urged to dismiss the Petition as it was vexatious and incompetent on the grounds that the 3<sup>rd</sup> Respondent exercised its statutory mandate as required, it was not a party to the contract between the Petitioner and the insurance company and cannot be made to meet obligations that arise from a private agreement as this would be in violation of Article 201 (d) of *the Constitution* of Kenya, 2010 and that it offends the provisions of the *Insolvency Act* as the Petitioner has not sought leave as per section 432 (2) of the *Insolvency Act*. Lastly it was deposed that the Petition does not meet the standard set out in the case of Anarita Karimi Njeru vs Republic (1979) KLR 154.

7. The Petition was dispensed with by way of written submissions. As at the time of writing this judgment, the 1<sup>st</sup> and 4<sup>th</sup> Respondents had not filed submissions nor responded to the Petition.
8. The Petitioner in submissions dated 13/05/2025 submitted on two issues. He contended that the Petition had met the threshold for a constitutional petition under the Anarita Karimi Njeru rule and Mutunga Rules. It was submitted that Article 46 of *the Constitution* had been infringed as he is a consumer of insurance services that he has paid for and the insurance regulatory authority exists to regulate insurance services which he never enjoyed. He contended that he had set out with a reasonable degree of precision the complaint, the provision infringed and the manner in which the infringement was done.
9. That where there is a conflict between procedural dictates and constitutional principles especially with regards to the Bill of rights then Constitutional provisions prevail. That as a result of the state organ to carry out its statutory mandate, his rights were threatened with violation or have been infringed. In support of this position, he relied on the following cases; Ian E Donovan vs. Kenya Power & Lighting Company [2021] e KLR, Mark Ndumia Ndung'u vs Nairobi Bottlers Limited and Another [2018] eKLR, Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009, Nation Media Group Limited vs. Attorney General [2007] 1 EA 261 and CNM vs WMG (2018) e KLR, Commission on Administrative Justice vs. Insurance Regulatory Authority & Another [2017] e KLR.
10. Secondly, it was submitted that the Petitioner is entitled to the orders sought. That his property had been impounded several times and his house broken into without a court order and his efforts to contact the regulator and policy holder compensation fund have not been successful. It was submitted that his properties are at risk of being auctioned, that he is suffering double jeopardy due to payment of premiums and proclamation of attachment of his property at home and business premises and NTSC for committal to civil jail. He faulted the 4<sup>th</sup> Respondent and the statutory manager for extending the moratorium of 12 months on the insurance company over the years and for failing to monitor and take note of insurance companies facing liquidity at early stated to protect the public's consumer rights in a timely manner. He also faulted the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents for failing to discharge its mandate as a regulator in the insurance sector.
11. On privity of contract, it was submitted that the contract of insurance is exempted from this doctrine as the essence of the contract is to protect 3<sup>rd</sup> Party and hence the state makes it compulsory to take out 3<sup>rd</sup> Party Insurance by motor vehicle owners, drivers, public transport carriers to protect third parties. In support of its position, the Petitioner relied on the cases of Machakos High Court Constitutional Petition No. 20 of 2018 Peter Mwau Muinde & Anor vs Insurance Regulatory Authority & 2 Others, Commission on Administrative Justice V Insurance Regulatory Authority & Another (2017) eKLR, Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others (2014) eKLR, City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another



[2016] e KLR and Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.

12. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed submissions dated 17/05/2025 but upon perusal, it raised issues that were not related to what is before the court but in relation to Kitui Constitutional Petition E003 of 2023. The court could not thus consider them.
13. The interested party filed submissions dated 18/06/2025 and raised four issues. First, it was submitted that the Petition does not disclose a constitutional question capable of redress under Article 22 and 23 of *the Constitution* of Kenya and has not demonstrated how the interested party has violated his constitutional rights to liberty, movement and association and peaceful ownership of property. In support of this contention, reliance was placed on the following cases; Anarita Karimi Njeru (Supra), Gabriel Mutava & 2 Others -vs- Managing Director Kenya Ports Authority & Another (2016) eKLR, CNM -vs- WMG alias HN (Constitutional Petition No. 586 of 2017), Papinder Kaur Atwal -vs- Manjit Singh Amrit (Nairobi Petition No. 236 of 2011) and Communication Commission of Kenya & Others -vs- Royal Media Services Limited & 5 Others (2014) eKLR.
14. Secondly, it was submitted that the interested party cannot be compelled to enforce a contract that it was not a party to as it was merely a beneficiary of a judgment in Mavoko PMCC 860 of 2015. That the Petitioner has not claimed inability to settle the decretal sum and should therefore satisfy the decree then pursue indemnity through the statutory channels applicable under the *Insurance Act* and Policy Holders compensation fund regulations. Lastly, it was submitted that the Petition was an abuse of the court process as there exists clear, adequate and effective statutory mechanisms to address the issues in contention. In further support of its submissions, reliance was placed on the cases of Agricultural Finance Corporation -vs- Lengetia Ltd & Another (Civil Appeal No.104 of 1984), George Mbugua Ng'ang'a -vs- Concord Insurance Co. Ltd & Policyholders Compensation Fund (2022) eKLR, Patrick Nyaga Muriithi -vs- Peter Githinji Maina (2022) eKLR, Isaac Juma -vs- Charles Kiplagat & Another (2018) eKLR, Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR, and Communication Commission of Kenya & Others -vs- \*Royal Media Services Limited & 5 Others (2014) eKLR.

### **Analysis and Determination**

15. I have considered the Petition, the rival affidavits as well as the submissions on record and I have noted that parties do not dispute that concord Insurance Company Ltd was placed under statutory management vide Gazette Notice No.2194 on 6th February 2013 and declared a moratorium for a period of 12 months. They also do not contest that there is a statutory manager who was appointed on 27/01/2020 in a judgment delivered by Justice Majanja. As regards the interested party, the decree extracted from Mavoko PMCC 860 of 2015 is not disputed. The questions that thus are thus left for this court to determine are;
  - a. Whether the Constitutional threshold for a Constitutional Petition have been met
  - b. Whether the Petitioner has exhausted all remedies available to him
  - c. Whether the 3<sup>rd</sup> Respondent fulfilled its obligations under the law
  - d. Whether the rights of the Petitioner to liberty, movement and association and peaceful ownership of his property have been infringed
  - e. Whether the Petitioner is entitled to the orders sought.



16. A constitutional petition must thus satisfy threshold of precision by citing the provisions of *the Constitution* that are alleged to have been violated and a descriptive account of the said violation. Mere regurgitation of the constitutional provisions followed by general statements is not enough. This was affirmed by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance* [2014] eKLR which cited with approval the locus classicus case of *Anarita Karimi Njeru v Republic* (1979) KLR 154. A Petitioner must identify the provisions that are alleged to be violated and show how the said provisions were violated from the facts and evidence of the case.
17. In this case, the Petitioner contends that his right to rights of the Petitioner to liberty, movement and association and peaceful ownership of his property have been infringed. He avers that he stands to suffer by deprivation of his property and livelihood contrary to Art 40 and right to privacy contrary to Article 31 and Fair and Administration Action contrary to Article 47 and Protection and equal benefit of the Law by Article 27 of *the Constitution* due to execution of the judgment in *Mavoko PMCC 860 of 2025* by attachment of properties at his business premises and matrimonial home and now eminent committal to civil jail contrary to Art 28 & 31 of Constitution. This he says, is due to the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent who should regulate the insurance sector have failed to do so and as such there is a decree which should be satisfied by the insurance company because he paid premiums but now will have to pay from his own pocket.
18. I therefore find that the threshold for a Constitutional Petition has been met and I am persuaded by the finding of Justice Odunga, as he then was, in the case of *Muinde & another v Insurance Regulatory Authority & 2 others; KBU 400 A & 2 others (Interested Parties)* [2022] KEHC 568 (KLR) where the court rendered itself as follows;
- “In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of, would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former.”
19. The second issue is whether the Petitioner has exhausted all remedies available to him. From the pleadings and annexures on record, the Petitioner has not demonstrated any steps he took towards approaching the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent or the statutory manager before approaching this court for the remedies sought.
20. In *Mumo Matemu supra*, the court went ahead to state that a person should not merely allege violation of a right or contravention of *the Constitution* without proper factual foundation and without showing that other alternative legal remedies are inadequate or ineffective.
21. Section 169 of the *Insurance Act* establishes the 4<sup>th</sup> Respondent and provides as follows;
- “(1) The Cabinet Secretary shall, for the protection of policyholders, establish a Policyholders’ Compensation Fund, in this section referred to as “the Fund”, to provide compensation to the claimants of insurer placed under a manager



appointed under section 67C(2) or whose license has been cancelled under the Act.

- (2) Where a Fund is established under subsection (1), the Cabinet Secretary shall appoint a Board of Trustees, in this section referred to as "the Board", for the management and administration of the Fund.
- (2A) The functions of the Board shall be to—
  - (a) provide compensation to claimants of insurers as provided under subsection (1);
  - (b) monitor, in consultation with the Commissioner where necessary, the risk profile of any insurer;
  - (c) advise the Cabinet Secretary 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) participate in the statutory management of an insurer placed under statutory management by the regulator;
  - (e) liquidate an insurer as may be ordered by a court;
  - (f) perform such other functions as may be conferred on it by this Act or by any other written law.”

22. The 4<sup>th</sup> Respondent is a State Corporation under the National Treasury that was established through the Legal Notice No.105 of 2004 and commenced its operations in January 2005. The Insurance (Policyholders' Compensation Fund) Regulations regulations under regulation 14 (1) provides that;

“A policyholder who is eligible for compensation may make a claim for compensation in the prescribed form and shall submit the form to the Managing Trustee.”

23. In this case, there is no evidence that this was done and therefore the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents cannot be found to have infringed on the Petitioner's rights. The purpose of advertisement in the gazette and newspaper is usually to inform the public of the steps that have been taken and to allow for any stakeholders including creditors and insured in this case to approach the right forum and state their claim.

24. The third issue is whether the 3<sup>rd</sup> Respondent fulfilled its obligations under the law. Section 3A of the *Insurance Act* of the *Insurance Act* Cap 487 Laws of Kenya outlines the objects and functions of the 1st Respondent to include the supervision of regulated entities within the insurance market by ensuring that the highest standards of insurance are upheld. The Petitioner avers that the 3<sup>rd</sup> Respondent did not fulfil its mandate. This mandate is found under section 67 C of the *Insurance Act* which provides for the power of the Commissioner to intervene in management and provides as follows;

“

- “(1) This section applies and the powers conferred by subsection (2), may be exercised in the following circumstances—
  - (a) if the insurer is found to have failed to meet the capital adequacy ratios required under section 41 of the Act;



- (b) if the insurer has failed to submit any of the accounts, returns, statements, actuarial valuations or other reports under Part VI for over six months after the end of the financial year to which they relate;
- (c) if the insurer having failed to comply with any requirement of this Act, has continued that failure, or having contravened any provision of this Act, has continued that contravention for a period of six months after notice of such failure or contravention has been given to him by the Commissioner;
- (d) where, having regard to the financial circumstances of the person licensed, the Commissioner is satisfied that the person cannot carry on the business, or any part of the business, for which he is licensed, as the case may be, in a satisfactory and efficient manner;
  - (e) if an amount due by the insurer under a judgement entered into in an action in Kenya arising out of a policy of insurance issued by the insurer or a contract of reinsurance entered into by a reinsurer, has remained unpaid for three months after the date of the final adjudication in that action;
- (f) if the business of the insurer is wholly or is unproportionately reinsured with another person;
- (g) if an insurer is unable to pay its debts within the meaning of section 384 of the [Insolvency Act](#) (Cap. 53);
- (h) if the insurer is found to have made adequate reserves or to have understated the level of his liabilities;
- (i) if the insurer is discovered to have submitted or provided any accounts, returns, statements, books, records, correspondence, documents or other information relating to his business which is false or misleading; or
- (j) if the Commissioner discovers, whether on an inspection or otherwise, or becomes aware of any fact or circumstance which, in his opinion, warrants the exercise of the relevant power in the interests of the insurer, its shareholders, policy-holders, or reinsurer or in the public interest.
- (2) The Commissioner may, with the approval of the Board—
  - (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.
- (3) The appointment of a manager shall be for such period, not exceeding twelve months, as the Commissioner shall specify in his instrument of appointment and may be extended by the High Court, upon the application of the Commissioner if such extension appears to the High Court to be justified.
- (4) 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.
- (5) 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) 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.
- (5A) 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.
- (6) The Manager shall, within a period of twelve months from the date of his appointment, prepare and submit to the Commissioner a report on the financial position and the management of the insurer with recommendations as to whether—
  - (i) the insurer is capable of being revived; or



- (ii) the insurer should be liquidated.
- (7) The Commissioner shall, after taking into account the report of the manager, make appropriate recommendations to the Board, who shall then take a decision on the matter.
- (8) Where the Board decides that the insurer should be liquidated, the provisions of section 123 shall apply.
- (9) Neither the Commissioner or any other officer or employee of the Commissioner, nor the manager nor any other person appointed, designated or approved by the Commissioner under the provisions of this Part shall be liable in respect of any act or omission done in good faith in the execution of the duties undertaken by him.
- (10) 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.(11)For the purpose of this section, where a moratorium is declared under subsection (10), a policyholder shall not be liable to pay any claim not payable by the insurer due to the moratorium.”

25. From the annexures to the Response to the Petition filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, it has been demonstrated that they did comply with the above section by;
- a. Appointment of three (3) persons to the Board of Directors of Concord Insurance Company Limited (under liquidation).
  - b. Conducting an on-site inspection of Concord Insurance Company Limited on 1st February, 2013 and noted that its Head Office was closed and not accessible to the public.
  - c. Making a decision by the Board of Directors of the 3rd Respondent herein to place Concord Insurance Company Limited (under liquidation) under Statutory Management.
  - d. Appointment of Mr. Charles Osoro Makone as the Statutory Manager of Concord Insurance Company Limited to act in the best interest of the public vide a Press Statement dated 6th February, 2013.
26. I therefore find that the 3<sup>rd</sup> Respondent fulfilled its obligations under the Act.



27. The last issue is whether the Petitioner is entitled to the orders sought. Now turning to the Interested Party, I note that there is imminent danger of the property of the Applicant being proclaimed and the insurance Act does protect the Petitioner. I reiterate section 67 (C ) (10) of the Insurance Act that provides that;

“a policyholder shall not be liable to pay any claim not payable by the insurer due to the moratorium.”

28. The Petitioner is thus protected until the moratorium is lifted. Incidentally, the Petitioner takes issue with the moratorium which is what is shielding him from execution. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent should now finalize on management of the insurance company in conjunction with the statutory manager and the 4<sup>th</sup> Respondent and satisfy the decree which the insurance company ought to have paid. Justice should not be delayed at the expense of decree holders such as the interested party. Section 3A (2) of the Insurance Act indicates that the objects of the supervision of insurers and reinsurers by IRA shall be—

- “ a. to promote the maintenance of a fair, safe and stable insurance sector;
- b. to protect the interest of the insurance policyholders and beneficiaries; and
- c. generally to promote the development of the insurance sector.”

29. The Court of Appeal in Commission on Administrative Justice vs. Insurance Regulatory Authority & Another [2017] eKLR in discussing the above section stated as follows;

“A contextual interpretation of the term regulation is therefore necessary in light of the objectives of the said section and of the Insurance Act, which is to regulate the business of insurance. Three means of insurance regulation are identified in an article on “Principles for Insurance Regulation: An Evaluation of Current Practices and Potential Reforms” by Robert W Klein published in The Geneva Papers, (2012) Vol 37, at pages 175–199. The first is solvency regulation, which is justified by the fact that it is costly for consumers to properly assess an insurer’s financial strength in relation to its prices and quality of service, and insurers can also increase their risk after policy-holders have purchased a policy and paid premiums, which is a “principal-agent” problem that may be very costly and difficult for policy-holders to control.

20. The goal of optimal insurance solvency regulation therefore is to minimise or limit the social cost of insurer insolvency within acceptable parameters. The social cost in this respect is more than the lost equity of the insurer, and includes the effects on policy-holders and third parties who may be creditors of insurers. Regulators potentially limit insolvency risk by requiring insurers to meet a set of financial standards and taking appropriate actions if an insurer assumes excessive default risk or experiences financial distress...”

30. In this case, the Appellant has only demonstrated that his property are faced with a threat of being auctioned but this court cannot be able to determine if indeed he had paid the premiums to date and whether the policy covered the interested party. Those are issues that can only be determined in a different forum, not this court at this juncture. The court cannot issue declarations on who should pay the decretal sum without full facts.



31. The issues raised in this petition ought to be litigated under the *Insurance Act*. They are not purely constitutional issues. It is now trite that where parties can resolve their disputes under statute they ought not to approach the court by way of constitutional petitions. The petition does not also meet the test in the Anarita Karimi case See the supreme court decision in the case of Communication Commission of Kenya & Others v Royal Media Services Limited & 5 Others [2014] eKLR where the court stated:

“Not every legal complaint merits a constitutional question. Where statutory remedies exist they must be exhausted first before invoking the court’s constitutional jurisdiction”

32. Similarly in the case of Gabriel Mutava & 2 others v managing Director Kenya post Authority & Another [2016] eKLR the court stated:-

“Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation. Indeed, in the case of Harrikissoon v Attorney General [1980] AC 265, the Privy Council held that:-

“...The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to individual by Chapter 6 of *the Constitution* is fallacious. The right to apply to the High Court under Section 6 of *the Constitution* for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for normal proceedings for invoking judicial controls of administrative action.....”

33. This petition is clearly not merited and it is dismissed with costs to the Respondents.

Orders accordingly.

**JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 4<sup>TH</sup> DAY OF DECEMBER, 2025.**

**E. N. MAINA**

**JUDGE**

In The Presence Of:

Ms Mumo for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Mr. Mulinge for the Petitioner

Geoffrey – Court Assistant/Interpreter

