

# High Court holds that the failure of a Statutory Regulator to exercise its mandate is enforceable by those who have suffered loss or harm

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& ALLEN

**"In my view, where it is alleged that as a result of the failure by a state organ to carry out its statutory mandate, a person's rights are threatened with violation or have been violated, the matter transcends the contractual arena and enters the constitutional arena."**

**Justice G.V. Odunga in *Peter Mwau Muinde and Another v Insurance Regulatory Authority; Claimants in the Accidents (Interested parties) Petition No. 20 of 2018*.**

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## INTRODUCTION

Instances of negligence and inaction by statutory regulators are rife in Kenya. Such acts and omissions have gone unchecked for a long time, contributing to impunity and reckless abandon by some of these regulators and agencies. These Acts and the Omissions of regulators seriously impact public interest. It is in the public interest that these regulators of different sectors function optimally.

It is also truism that the acts and omissions of regulators have a widespread effect on several fundamental rights, such as the right to property, the right to fair administrative action and the right to Consumer Protection. In this petition, the High Court of Kenya at Machakos stepped in to enforce the duty of care owed by the Insurance Regulatory Authority to the insured in public interest.

The foregoing distinction in a pool of many can be lifted from the decision of the Court of Appeal sitting at Nakuru.

## FACTUAL BACKGROUND

The 1st and 2nd Petitioners owned two insured public Service vehicles involved in road traffic accidents. These accidents led to a litany of lawsuits in negligence, which led to interlocutory judgments and judgments. Invesco Insurance (the 3rd Respondent) failed to meet the claims arising from the judgments within 90 of being lodged. As expected, auctioneers started pursuing the Petitioners, seeking to attach their property.

The Petitioners sought a raft of orders seeking declaratory orders and compensation against the Attorney General and the Insurance Regulatory Authority (herein referred to as "IRA"). The Petitioners sought to compel the Insurance Regulatory Authority to pay all decretal sums and costs arising from accidents for which the Petitioners had obtained insurance covers under **Section 4 of the Insurance (Motor Vehicle Third Party Risks) Act**.

The Petitioners also sought orders compelling the Attorney General and the IRA to take adequate measures to ensure that Invesco Insurance operates within the legal and regulatory framework for insurance. The thrust of the Petitioner's argument is that the IRA failed in its mandate of supervising, monitoring and regulating Invesco Insurance and had, therefore, encouraged the company to fail to fulfil its financial obligations, in breach of their right to property and consumer rights.

## THE RATIO DECIDENDI

First, the judge dealt with the Respondents' contention that the Petitioners had not pleaded their case with sufficient particularity and precision as required by the famous cases of *Anarita Karimi Njeru v Republic [1979] eKLR* and *Mumo Matemu vs. Trusted society of Human Rights Alliance & 5 Others (2013) eKLR*. According to Justice Odunga, the rule in *Anarita* must be read in conformity with the constitutional imperative under Articles 22(3)(b) and (d) of the Constitution which requires that rules relating to constitutional petitions are not unnecessarily formal.

In this regard, the judge arrived at the correct conclusion that the Court should look at the substance rather than the form of the petition, as required by Article 159(2)(d) of the Constitution. It is noteworthy that in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR*, where the Court of Appeal held that the rules of procedure remain subservient to the Constitution and statutes, which place a heavy premium on substantive justice as opposed to undue regard to procedural technicalities. Indeed, the judge notes that the High Court is required to entertain proceedings based on informal documentation, meaning that a layperson can even petition the Court in the form of a letter.

Secondly, the judge made a finding that where it is alleged that as a result of the failure by a state organ to carry out its statutory mandate, a person's rights are threatened with violation or have been violated, the matter transcends the contractual arena and enters the constitutional arena.

The judge then considered the mandate of the Insurance Regulatory Authority under **Section 3A of the Insurance Act** and the obligation to pay the decree-holder under **Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act**. This led to an inescapable conclusion that the relationship between the insured and the insurer attaches to statutory obligations.

In concluding that the Petitioners had a legitimate expectation as the insured that the State will efficiently regulate that sector to ensure it functions optimally, the Court relied on Mativo, J in *Commission on Administrative Justice vs. Insurance Regulatory Authority & Another [2017] eKLR*, which also considered the regulatory functions of the IRA and the statutory obligations imposed on it. Mativo J held as follows concerning the duty of statutory bodies in *Commission on Administrative Justice vs. Insurance Regulatory Authority & Another [2017] eKLR*:

*"A statutory body is bound to adhere to mandate stipulated in the statute creating it and its actions must conform to the constitutional prescriptions as clearly provided in our transformative Constitution. In my considered view, Insurance regulatory law is the body of statutory law, administrative regulations and jurisprudence that governs and regulates the insurance industry and those engaged in the business of insurance. Insurance regulatory law is primarily enforced through regulations, rules and directives by state insurance departments as authorized and directed by statutory law enacted by the legislature."*

The import of Justice Mativo's judgement in the **Commission on Administrative Justice case** is that regulatory sectors such as banks, insurance and Capital markets, although primarily matters of private contract, are nevertheless of such concern to the public as a whole that it is subject to governmental regulation to protect the public's interests. This is because the interests involved are broad-based, and the matters affect a large class of the public. **Therefore, the fundamental purpose of regulatory law is to protect the public as consumers. This means every regulator is duty-bound to regulate and supervise their sector.**

Consequently, **statutory regulators must ensure that players comply with the provisions of the governing statutes** Supervision in the context of regulators also entails the following duties concerning which the regulator owes a duty of care to the public:

- Ensuring the viability of applications for licensing.
- Ensuring that all board members are fit & proper
- Ensuring that all senior management staff fit & proper.
- Ensuring that Companies don't fall below the minimum capital requirements (a requirement mostly applicable to banks, Saccos, and Insurance Companies).
- Approval of products and services for sale after considering competition and consumer protection aspects.
- Inspection.
- Investigation.
- Analysis of accounts and returns.
- Preventing fraud.
- Intervention and withdrawal of licences.

Furthermore, the judge held that considering the magnitude of people affected by insurance, it is expected that the State would also take a keen interest in how the insurance industry is being run. The judge took judicial notice of the ill management that has caused many insurance companies to collapse and the failure of the IRA to exercise its powers under **Section 67(C) of the Insurance Act** to appoint a manager to run a failing insurer.

In conclusion, the Court found that the IRA had failed in its mandate to regulate and supervise Invesco Insurance. The Court declared that the IRA had violated the Petitioners' rights and ordered them to meet and make payment of all decretal sums and costs entered against the Defendants in the cases arising from accidents for which the Petitioners had obtained insurance cover under **Section 4 of the Insurance (Motor Vehicles Third Party Risks) Act**. Lastly, the Attorney General and the IRA were directed to take measures to ensure that Invesco Insurance operates under the prevailing legal framework.

## IMPLICATIONS OF THE JUDGEMENT

This judgement is a timely reminder that **regulators have a duty of care to the general public and industry players since they exercise statutory powers conferred for a public purpose and in public interest**. The regulators also have to take their mandate seriously since the Court, in this case, held that any proven allegation of their failure to meet their statutory functions will be regarded by courts as a constitutional matter and may impute liability and declaratory orders against them for actions and inactions. **This judgement is a watershed moment in the enforcement of the duty of care of statutory regulators for their acts and omissions causing damage or loss to the public.**

The judgement is also laudable for focusing on the constitutional goal of effective remedy. The Court appreciated the meaning of the right to remedy in the context of human rights violations. The Court gave effect to article 23(3) of the Constitution, whose overarching theme is that human rights violations must not go unpunished, as was held by the Supreme Court in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR*. Courts will enforce statutory duties of regulators such as the Central Bank of Kenya, Competition Authority of Kenya and Retirement Benefits Authority by fashioning appropriate remedies as required by Article 23(3) of the Constitution and have access to redress the violation and harm suffered.

Lastly, the rule in the *Anarita Karimi Njeru* case is no longer good law. A petitioner need not plead their case with mathematical precision. This gives the Court a chance to consider the claim's substance and focus not on its form. In any case, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, under rule 10, allows one to present a petition in the form of an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

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