



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E005 OF 2021

BETWEEN

LEMPAA SUYIANKA1ST EX PARTE APPLICANT
CALISTOUS SHIFWOKA.....2ND EX PARTE APPLICANT
TOM KOPERE3RD EX PARTE APPLICANT
FELIX NDOLO4TH EX PARTE APPLICANT
SOFIA RAJAB5TH EX PARTE APPLICANT
MELBA KATSIVO6TH EX PARTE APPLICANT

VERSUS

NELSON ANDAYI HAVI.....1ST RESPONDENT
LAW SOCIETY OF KENYA.....2ND RESPONDENT
MERCY WAMBUA.....3RD RESPONDENT
CAROLYNE KAMENDE.....4TH RESPONDENT
GEORGE OMWANSA.....5TH RESPONDENT
HERINE KABITA.....6TH RESPONDENT
ROSELINE ODEDE.....7TH RESPONDENT
ALUSO INGATI.....8TH RESPONDENT
CAROLYNE MUTHEU.....9TH RESPONDENT
FAITH ODHIAMBO.....10TH RESPONDENT
BERNHARD NGETICH.....11TH RESPONDENT
BETH MICHOMA.....12TH RESPONDENT
NDINDI KINYILI.....13TH RESPONDENT
ESTHER ANG'AWA.....14TH RESPONDENT

RULING

The Application

1. The *ex parte* Applicants herein state that are paid-up members of the Law Society of Kenya, the 2nd Respondent herein. They have sued the 1st to 15th Respondents in their capacity as council members of the Law Society of Kenya, and joined the Caucus of Branch Chairpersons established under the Law Society of Kenya Regulations as an Interested Party.

2. The *ex parte* Applicants have filed an application by way of a Chamber Summons dated 21st January 2021, seeking the following orders:

1. This application be and is certified urgent for ex parte hearing in the first instance—with subsequent directions limiting time for filing of the main motion with submissions, and responses with submissions, to no more than 7 days for each party.

2. Despite section 9 of the Fair Administrative Action Act, 2015 Applicants be granted leave to apply for judicial review orders of:

(a) Prohibition restraining the Respondents and their subordinates or agents from implementing any of the Resolutions passed at the Special General Meeting of 18th January 2021;

(b) Certiorari to bring to this court and to quash the proceedings of the Special General Meeting of 18th January 2021 in their entirety;

(c) Mandamus compelling the Respondents to place the agenda from the Special General Meeting of 18th January 2021 before the members of the Society at the statutory Annual General Meeting scheduled for March 2021 per section 30 of the Act, or at a properly convened and fairly conducted Special General Meeting, as the case may be. The Respondents be further compelled to facilitate online polling on all agenda items and decisions at the meeting.

(d) A costs order directing each party to bear their costs in the interest of harmony within the Society.

3. Leave does operate as stay restraining the Respondents from implementing or executing any of the Resolutions made at the Special General Meeting.

3. The grounds for the application are stated in an accompanying statement dated 21st January 2021, and a verifying affidavit and further affidavit sworn on the same date by Lempaa Suyianka, the 1st *ex parte* Applicant herein. In summary, the main grounds are that the Respondents notified the *ex parte* Applicants of a Special General Meeting scheduled for 18th January 2021 to be held “at 11.00 a.m. via Zoom Platform and physically at the Law Society of Kenya Offices along Gitanga Road, Nairobi”. Further, that the *ex parte* Applicants and some other 3,000 members registered to participate in the SGM online and another 200 members were invited or otherwise managed to attend the meeting physically at Gitanga Road as COVID 19 protocols could not allow more.

4. However, that despite the online registration enabling the Respondents to attain the quorum for the meeting (a third of all members of the Society), the 1st Respondent inexplicably excluded all the online attendees from the decision-making and denied them the opportunity to vote on any issue at the Special General Meeting meeting held on 18th January 2021. The *ex parte* Applicants detailed the manner of their exclusion, and gave various examples in this regard.

5. The *ex parte* Applicants also requested to be exempted from the internal remedy provided under section 36 of the Law Society Act which states that a resolution of in a general meeting shall not be altered or rescinded within nine months after the passage of the resolution without a special resolution of the Society, as it waiting for the 9 months without respite is an exceptional circumstance meriting exemption from the exhaustion of internal remedies per section 9 of the Fair Administrative Act.

6. The *ex parte* Applicants annexed copies of the transcripts of the chat history and question and answer session of the Law Society of Kenya ZOOM Special General Meeting held on 18th January 2021, and electronic copies of the Zoom recording of the said meeting and accompanying certificate of authenticity. The *ex parte* Applicants also annexed copies of letters by the 1st Respondent implementing the resolutions made at the impugned Special General Meeting.

The Determination

7. I have considered the application dated 21st January 2021 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicants have demonstrated that this matter is urgent. This is for reason that the implementation of the resolutions made at the impugned Special General Meeting is imminent.

8. On the orders sought by the *ex parte* Applicants for leave to commence judicial review proceedings, the applicable law is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was

sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

9. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before the court, and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) I WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

10. In the present application, the *ex parte* Applicants have provided evidence of the notice of the impugned Special General Meeting, of the proceedings of the meeting, and of some of the resolutions made in the meeting. They have also advanced the grounds why they consider the Special General Meeting to have been illegally held. While ordinarily the *ex parte* Applicants have would have met the threshold of an arguable case, in the present application they have also sought to be exempted from an existing internal remedy. The Respondents and Interested Party therefore need to be heard on this request before the question of leave is considered.

11. In addition, while the *ex parte* Applicants have brought evidence to show that the impugned resolutions have already started being implemented, the entire corpus of resolutions made at the impugned Special General Meeting is not evident, nor the stages of their implementation. This information and evidence therefore needs to be disclosed by the Respondents at an *inter partes* hearing, to guide the Court in determining the issue of whether or not stay can be granted.

The Orders

12. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 21st January 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 21st January 2021 be and is hereby certified as urgent, and is hereby admitted for hearing *ex parte* in the first instance.

II. The *ex parte* Applicants shall serve the Respondents and Interested Party with (i) the Chamber Summons application dated 21st January 2021, (ii) skeletal submissions thereon, (iii) a copy of these directions, and (iv) a hearing notice, within five (5) days of today's date.

III. Upon service, the Respondents and Interested Party shall file and serve their responses to the Chamber Summons and skeletal submissions thereon within five (5) days from the date of service.

IV. The said Chamber Summons shall be heard *inter partes* before Hon. Mr. Justice Ngaah at a virtual hearing to be held on 4th February 2021 at 10.00 am, as this Court will be proceedings on leave.

V. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the Chamber Summons dated 21st January 2021 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

VI. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

VII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

VIII. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

IX. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing on 4th February 2021 at 10.00 am before Hon. Mr. Justice Ngaah

X. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the Applicants by electronic mail by close of business on Friday, 22nd January 2021.

XI. Parties shall be at liberty to apply.

13. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF JANUARY 2021

P. NYAMWEYA

JUDGE