REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO E005 OF 2021

LEMPAA SUYIANKA.....1ST APPLICANT

CALISTOUS SHIFWOKA.....2ND APPLICANT

TOM KOPERE.....3RD APPLICANT

FELIX NDOLO.....4TH APPLICANT

SOFIA RAJAB.....5TH APPLICANT

MELBA KATSIVO.....6TH APPLICANT

-VERSUS-

NELSON ANDAYI HAVI.....1ST RESPONDENT

LAW SOCIETY OF KENYA.....2ND RESPONDENT

MERCY WAMBUA.....3RD RESPONDENT

CAROLYNE KAMENDE.....4TH RESPONDENT

GEORGE OMWANSA.....5THRESPONDENT

HERINE KABITA.....6TH RESPONDENT

ROSELINE ODEDE.....7TH RESPONDENT

ALUSO INGATI.....8TH RESPONDENT

CAROLYNE MUTHEU.....9TH RESPONDENT

FAITH ODHIAMBO.....10TH RESPONDENT

BERNHARD NG'ETICH.....11TH RESPONDENT

BETH MICHOMA.....12TH RESPONDENT

NDINDA KANYILI.....13TH RESPONDENT

ESTHER ANG'AWA.....14TH RESPONDENT

RIZIKI EMUKULE.....15TH RESPONDENT

CAUCUS OF LSK BRANCH CHAIRPERSONS....INTERESTED PARTY

RULING

The subject of this ruling are two preliminary objections whose notices are respectively dated 30 January 2021 and 3 February 2021; they have been filed by the 1st and 14th respondents respectively and both object to the applicant's chamber summons dated 21 January 2021.

The chamber summons itself is filed under sections 7, 8, 9, 11, and 14 of the Fair Administrative Actions Act, No. 4 of 2015; Sections 8 and 9 of the Law Reform Act, Cap 26; and, Order 53 of the Civil Procedure Rules, 2010. It is mainly seeking for leave to file prerogative orders of certiorari, mandamus and prohibition against the respondents; the prayers for these orders, among others, have been expressed as follows:

> **"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 of 18th January 2021, pending hearing and determination of the main Motion."**

The application was at the first instance placed before Nyamweya, J., more particularly on 22 January 2021, for the learned judge's consideration. In her ruling delivered on even date, the judge, among other things, certified the application as urgent but since she was proceeding on leave, she directed that the application be heard before me on 4 February 2021.

It is on this particular date that I directed that the two preliminary objections be heard and determined *in limine* before the application for leave could be considered.

The objections are, more or less, based on similar grounds; these grounds are as follows:

> 1. Contrary to Order 53, rule 7(1) of the Civil Procedure Rules, 2010, the applicants have not filed copies of the impugned decision(s) and proceeding(s) for which the order of certiorari is sought without giving any satisfactory reason.
>
> 2. The applicants have neither invoked nor exhausted the alternative dispute resolution mechanisms provided in Regulations 95 and 96 of The Law Society of Kenya (General) Regulations, 2020 considering that the alleged dispute is between members of the Law Society or between these members and the President of and the Law Society of Kenya.
>
> 3. The applicants have not pleaded or particularized the common law grounds of judicial review which are illegality; irrationality; and procedural impropriety; neither have they pleaded any of the statutory grounds set under Section 7 of the Fair Administrative Action No 4 of 2015.
>
> 4. The applicants intend to use the prerogative Orders of prohibition, certiorari and mandamus to disrupt the operations and the constitutional functions of the Law Society of Kenya, more particularly those functions in Article 171 (2) (f) of the Constitution of Kenya; the Society's statutory functions prescribed in Sections 16, 19, 25, 30, 31, 32, 33 and 36 of Law Society of Kenya Act No. 21 of 2014; and, its administrative functions detailed in Part VIII of The Law Society of Kenya (General) Regulations, 2020.

Parties made relatively lengthy submissions either supporting or opposing the preliminary objections. The issues that emerged from these submissions are as clear as the grounds themselves. Considering the question at hand, it would not be prudent for me to reproduce the arguments put forth for the more than twenty parties but I will only make reference to them as far as they are relevant in answering the questions raised; these questions are firstly, whether the proceedings and the decision (s) impugned ought to have been exhibited or filed alongside the applicants' chamber summons; secondly, whether the applicants ought to have exhausted the alternative dispute resolution

mechanisms in compliance with Regulations 95 and 96 of the Law Society of Kenya (General) Regulations, 2020; thirdly, whether the applicant have pleaded the traditional grounds for judicial review of illegality, irrationality and procedural impropriety; and, finally, whether the applicants application is mala fides.

The law on Order 53 rule 7(1) of the Civil Procedure Rules has largely been settled. In **Independent Electoral and Boundaries Commission (IEBC) versus National Super Alliance (NASA) Kenya & 6 Others (2017) eKLR** the Court of Appeal discussed several decisions where the question whether or not it is mandatory to attach the impugned proceedings or decision in an application for the judicial review order of certiorari. The court came to the conclusion that failure to omit the proceedings or the decision is not fatal to an application for leave or even the motion itself because, depending on the circumstances of each particular case, it may not even be necessary to attach to an application any of these documents. In its words the court said:

> **"104. In this appeal, we have considered the submission by the 6th Respondent and the reasoning by the trial court in declining to find that the 1st Respondent's application was fatal for failure to attach the decision to be quashed. The legal issue for our determination is whether there are exceptions to the general rule that the decision to be quashed must be attached. In our considered view, the exceptions include when leave is granted by the trial court to lodge the decision before the final determination of the case. This is the exception revealed by the decisions in amongst others Ashraf Savani & Another -v- Chief Magistrate's Court Kibera & 4 Others [2012] eKLR and Republic -v- The Commissioner of Lands ex-parte Lake Flowers Limited Nairobi HCMISC App. No. 1235 of 1998 and Republic -V- Chairman District Alcoholic Drinks Regulation Committee & 4 Others Ex-Parte Detlef Heier & Another [2013].**
>
> **105. In the present appeal, the record shows that the 1st Respondent neither attached the decision to be quashed nor applied for leave to attach the same. The trial judges observed that it was not in dispute that a decision had been made by the Appellant to adopt direct procurement method. It is our considered view, that the learned judges did not err in observing that a decision had in fact been made by the Appellant and the court did not err in failing to strike out the Application as incompetent for failure to attach the decision to be quashed. The record shows that there was no dispute that a decision had been made and that the decision existed; there was no dispute as to the nature of the decision. In our view, depending on the peculiar circumstances of each case where it is clear, uncontested and definite that a decision has been made and the nature of the decision is not disputed, a court can either take judicial notice of the decision or the parties can by consent record the nature of the decision. In such cases, the need to attach or produce the decision to be quashed can be waived. We are of this view cognizant of the provisions of Article 159 (2) (d) of the Constitution which enjoins courts to administer justice without undue regard to technicalities. (Emphasis added).**

This pronouncement is self-explanatory and I need not say anything more save to say that the 1st and 14th respondent's objection to the applicants' application on this ground is contrary to what has been acknowledged as the correct and proper interpretation of Order 53 Rule 7(1) of the Civil Procedure Rules.

On the question of exhaustion of internal remedies, again I need not look any further than the Court of Appeal decision in **Fleur Investments Limited versus Commissioner of Domestic Taxes (2018) eKLR** where the court said:

> **"23…Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.**
>
> **24. Accordingly, the court is perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice. See Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC MISC. APPL. No. 81 of 2002 [2002] 1 KLR 486; [2008] 2 KLR (EP) 393. If the discretion is used arbitrarily and unreasonably, the court may step in to remedy the situation. As was held by this Court in Republic vs. Commissioner of Co- Operatives, Kirinyaga Tea Growers Co-operative & Savings & Credit Society Ltd. Civil Appeal No. 39 of 1997 [1999] 1 EA 245;**
>
> > **"it is axiomatic that statutory power can only be *exercised validly if exercised reasonably and not arbitrarily or in bad faith*."**

The question that concerned the court in this case was the exercise of discretion but the overarching principle is that as bastions of justice, courts may, in appropriate cases, intervene even where other alternative dispute resolution mechanisms have not been exhausted. I suppose it is this principle that is now espoused in section 9 (4) of the Fair Administrative Actions Act. Perhaps to understand it better it is necessary to produce the entire section here; it reads as *follows:*

> **9. Procedure for judicial review.**
>
> **(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.**
>
> **(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal. (Emphasis added).

I would regard the applicants' case as one such case that not only merits the exemption contemplated in section 9(4) of this Act but also deserves the intervention of this court notwithstanding the alternative dispute resolution mechanisms provided in Regulations 95 and 96 of the Law Society of Kenya (General) Regulations, 2010.

Looking at the applicants' and first respondent's own affidavit, it is clear that the Law Society of Kenya is mired in squabbles that threaten to tear it down the middle. Regrettably, the row is not just between the members of the Council which, according to section 13 of the Law Society Act is the top most organ of the Society but it is a row that also pits the upper echelon of the Society's leadership, or a section of it, against a section of the Society's membership. I gather from the 1st respondent's own affidavit that at least one member of the Council has resigned, apparently as a result of these squabbles.

At this stage of the proceedings, the court is not prepared, and indeed it cannot be seen to apportion blame to any of the parties in this dispute; it would be premature to do so. But one thing is clear, if the rival depositions made by parties in their respective affidavits is anything to go by; that, the atmosphere at the Society is toxic at least to the extent that it is not conducive enough to engage any of the means provided in the Regulations to settle this dispute amicably, outside court.

This does not in way suggest that the protagonists will not agree in future; all I am saying is that the possibility for such an agreement at the moment is remote. It is for this reason and, of course the law that would apply to the circumstances in which the parties find themselves and to which I have made reference, that I would exempt the applications from the requirement of exhausting the alternative dispute mechanisms provided under Regulations 95 and 96 of the Society's General Regulations; by the same token, I am persuaded this is a case that deserve the intervention of a judicial review court.

The third preliminary ground against the applicants' does not appear to have any substance. The respondents allege that the applicants have not pleaded the common law grounds for judicial review which are illegality, irrationality, and, procedural impropriety; and that neither have they pleaded any of the statutory grounds set under Section 7 of the Fair Administrative Action No 4 of 2015. These grounds have clearly been pleaded in the applicants' statutory statement dated 21 January 2021. Besides those traditional grounds, the applicants have also pleaded constitutional grounds; these latter grounds go beyond the usual common law and statutory grounds upon which an application for judicial review orders may be grounded. They are grounds that embrace the spirit that according to our constitutional dispensation judicial review has a footing in the Constitution besides the common law and the statutes. (See **Independent Electoral and Boundaries Commission (IEBC) versus National Super Alliance (NASA) Kenya & 6 Others (2017) Eklr (supra).**

Finally, the argument that the applicants are intent on employing the prerogative Orders of prohibition, certiorari and mandamus to disrupt the operations of the Law Society of Kenya does not carry much weight because in applications for these orders all that the court is concerned with is whether an applicant has demonstrated, and the court is satisfied that grounds for such reliefs not only exist but they are necessary in order to meet the ends of justice. At any rate, the argument by the respondents cannot be used as reason to deny the applicants or any other person for that matter leave to file an application for judicial review orders.

I would dismiss the 1st and the 14th respondent's preliminary objections for the foregoing reasons.

Turning back to the applicants' chamber summons, I am minded that I had directed that the preliminary objections be addressed first before the summons can be considered. The summons for leave is normally heard ex parte and, more often than not, the court would grant leave even without hearing the applicant if it is satisfied that the applicant has made out an arguable case.

Indeed, this appears to have been the case when this application was first placed before Nyamweya, J. on 22 January 2021; the learned judge was convinced that the applicants merited leave but the lingering question was whether they could be exempted from exhausting the Society's internal mechanisms for resolution of disputes; this is what the learned judge said:

"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 (sic) 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."

My reading of this part of the learned judge's ruling is that everything being equal, she would have granted leave but for the question of whether the applicants could be exempted from the alternative dispute resolution mechanisms before they could approach the court.

If I have to say anything more on this question of leave, I would reiterate that the leave stage of the judicial review proceedings is not to determine whether or not the applicant's case will succeed but whether is arguable.

Lord Diplock as explained put this way:

> **"Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived. (See IRC V National Federation of Self-Employed and Small Businesses Ltd (1982) 617, (1981) 2 ALL ER 93).**

Thus the purposes identified for leave are one, - to save the court's time and, two, so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed.

In the same case, Lord Scarman saw the need for leave as '*an essential protection against abuse of legal process'*. In his words *'It enables the court to prevent abuse by busybodies, cranks and other mischief makers'*. (At page 653).

When I consider the applicants' pleadings and affidavits I would not regard them as busy bodies with misguided or trivial complaints of administrative error; neither do they appear to me as 'cranks and mischief makers.'

Having reached this conclusion, it is unnecessary, as indeed it is ordinarily unnecessary in many other applications of this nature, to call upon the parties to address me on the question on whether or not the applicants deserve leave. I need not cite any further authority on this point but if it is necessary I find the words of Lord Diplock in **IRC V National Federation of Self-Employed and Small Businesses Ltd** (supra) to be quite apt; the learned judge said as follows:

> **"if on a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."**

Based on the reasons I have given and the decisions I have cited, I hereby allow the applicants' application in terms of prayer (2) of the Chamber Summons dated 21 January 2021. I make no order as to costs. Orders accordingly.

Signed, dated and delivered on 26th February 2021

Ngaah Jairus

JUDGE