



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL SUIT NO.57 OF 2021(OS)

**IN THE MATTER OF ACCOUNT NUMBERS 010xxxxxxxx, 010 xxxxxxxx,
010 xxxxxxxx,010 xxxxxxxx, 010 xxxxxxxx AND 010 xxxxxxxx OPERATED
BY THE LAW SOCIETY OF KENYA WITH STANDARD CHARTERED
BANK KENYA LIMITED AND IN THE MATTER OF ORDER 37,
RULE 1 OF THE CIVIL PROCEDURE RULES, 2010**

LAW SOCIETY OF KENYA.....PLAINTIFF

-VERSUS-

STANDARD CHARTERED BANK KENYA LIMITED.....DEFENDANT

RULING

1. This case reminds one of a story told of a famous farmer who owned a beautiful Castle atop a mountain in the countryside. One day, he discovered a mouse in his bedroom and his attempts to kill it were unsuccessful. He went to the nearest market, bought fuel, doused the Castle with the same and set it on fire to kill the mouse. What a bonfire! The wife and children cheered the bonfire as the Castle went up in flames killing the mouse with it. The neighbours were only left in awe.

2. When darkness fell, the farmer and his family realised that they had no roof over their heads. In the chilly night, the hitherto cheers by the family turned into shivers and the gnashing of teeth. By then, it was too late to reverse the events of the day.

3. The Law Society of Kenya (the Society) is run by a Council of 11 members. They are the heart/engine of the Society. Due to some disagreements within the Council, certain resolutions were made in a special general meeting held on 18/1/2021. The effect of those resolutions was to grind the operations of the Society to a halt. Among those hindered was the operation of 6 of the Society's accounts with the defendant for lack of enough signatories to the accounts in terms of the mandate given to the defendant.

4. In view thereof, on 29/1/2021, the Society took out an Originating Summons for various declarations including the operation of the aforesaid 6 accounts with the defendants. Together with the Summons, the Society lodged a Motion of even date wherein it sought the Court's leave to permit two of the remaining

signatories to the bank accounts, to wit, **Carolyn Kamende Daudi** and **Mercy Kalundu Wambua** to operate the said accounts outside the mandate given to the bank.

5. By a ruling made on 2/2/2021, the Court allowed the application and granted the following orders: -

“a) Pending the hearing and determination of the OS, the defendant is directed to accept cheques drawn and act upon instructions given by Carolyn Kamende Daudi and Mercy Kalundu Wambua, for the payment of monies into and out of Account Nos 010 xxxxxxxx, 010 xxxxxxxx, 010 xxxxxxxx, 010 xxxxxxxx, 010 xxxxxxxx and 010 xxxxxxxx operated by the society outside the operating mandate requiring 3 signatories.

b) The total amount to be withdrawn is capped as follows:

i) For salaries – Ksh 14 million being the salaries for the months of January and February 2021 only.

ii) Kshs 900,080/= to Grant Thornton for the audit of the Society’s accounts for the period 1st January 2020-31st December 2020.

iii) Kshs 1, 120,560/= for forensic audit

iv) Ksh 3.5 million for elections

c) No further monies should be withdrawn from the said accounts without the authority of the Council as shall be constituted after the 25/3/2021.

d) The foregoing order would only come into effect after the remaining Council Members headed by the President of the Society, executes personal indemnities guaranteeing to apply the funds for the purposes ordered for and to hold the defendant free from any harm or loss for complying with the orders of this Court to be filed with the Court and served upon the defendant.

e) The Society to file the accounts on the said expenditure with the Deputy Registrar of this Court within 45 days of the date of this ruling

f) The costs of the application is awarded to the defendant in any event”.

6. Unknown to this court, there was at the time pending before the Judicial Review Division of this Court an application challenging the resolutions of the Society of 18/1/2021 in **Petition No. E05/2021 Adriano Kamotho Njenga v LSK and others**. By a ruling delivered on 3/2/2021, Weldon, J suspended the implementation of the said resolutions until the petition is heard and determined.

7. That provoked the Motion on Notice dated 3/2/2021, which was amended by an application dated 12/2/2020, by **Ng’etich Kipkoech Bernhard** (the “applicant”). That application was brought under **Article 159 of the Constitution of Kenya, order 51(1) of the Civil Procedure Rules and Sections 1A, 3A of the Civil Procedure Act** and is the subject of this ruling.

8. In the Motion, the applicant sought leave to be joined as a respondent in this suit and for the review and setting aside of the aforesaid orders of 2/2/2021.

9. The grounds upon which the application was predicated upon were set out in the supporting affidavit of **Mr. Ng’etich** sworn on even date. These include; that the applicant is a Council member, treasurer and signatory to the subject accounts of the Society, that he has a legitimate stake and interest in this matter as he had been mentioned adversely and will be affected directly; that the orders of 2/2/2021 were obtained through material non-disclosure of facts by the plaintiff, *to wit*, the existence of the two pending suits

Petition No. E05/2021 Adriano Kamotho Njenga v LSK and others and **JR E005 of 2021 Lempaa Suyianka v Nelson Havi**; that the Plaintiff did not disclose that there was a pending ruling in **Petition E05/2021** which was set to be delivered on 3/2/2021

10. It was further contended that the ruling in the Constitutional division was delivered and suspended the resolutions passed on 18/1/2021 by the Special General Meeting of the Society pending the hearing and determination of the petition. As a result, the ruling delivered in this case on 2/2/2021 was contradictory.

11. The applicant contended that a decision of a court made with material non-disclosure of facts should be set aside and that the setting aside of the impugned orders will not prejudice anyone as there is no dispute as to the payment of salaries.

12. The plaintiff opposed the application vide a replying affidavit sworn on 11/3/2021 by **Carolyn Kamende Daudi**, the **Vice President** of the plaintiff and **Chair of its Staff, Budget and Finance Committee**. She deposed that, as a signatory to the accounts of the plaintiff, the applicant could not bring a claim inconsistent with that of the plaintiff as the latter was a body corporate capable of suing and being sued under the Law Society of Kenya Act. That in the premises, the applicant had no *locus standi* for joinder in the matter.

13. That the applicant had erroneously interpreted and used the wrangles in the leadership of the plaintiff as creating two centers of power purportedly enabling him to run a parallel Council of the plaintiff and act as its spokesperson; that the joinder application should be determined first before consideration of the issue of whether or not the orders made on 2/2/2021 should be reviewed on the grounds espoused by the applicant.

14. It was further contended that the applicant had not established any of the three grounds upon which a review may be sought under **Order 45 of the Civil Procedure Rules, 2010**. That the pendency of **Petition No E025 of 2021 and JR No E005 of 2021** was not relevant or material to this suit under **Order 37, rule 1 of the Civil Procedure Rules, 2010** by which the orders of 2/2/2021 were made.

15. **Ms. Jan Mohamed S.C** made oral submissions on behalf of the applicant while the plaintiff filed written submissions dated 15/2/2021. These were ably adumbrated orally by **Mr. Havi**, Learned Counsel for the plaintiff.

16. Having considered the depositions on record and the able submissions of Learned Counsel, the issues for determination may be summarised as follows: -

(i) Whether substantive orders can be sought before joinder of a party;

(ii) Whether the applicant has met the conditions necessary to be enjoined as a respondent in this suit; and

(iii) Whether the orders of 2/2/2021 should be reviewed and/or set aside.

17. On the first issue, the plaintiff submitted that the joinder application should not have been sought together with another substantive order. The cases of **J. M. Njenga & Co. vs. Francis Chege Maina & others [2020]Eklr** and **County Assembly of Mandera County v. Governor, Mandera County & Another [2020] Eklr**, were relied on the proposition that it was imperative for an applicant to first obtain orders for leave to join proceedings before seeking any other orders.

18. In response, the applicant submitted that the first prayer was for a certificate of urgency, then joinder then the substantive order for review/setting aside of the orders made on 2/2/2021. That since this suit is by way of Originating Summons, it should not be complicated and that one of the cases relied on by the plaintiff, to assert the fact that a joinder application should not be made together with any other substantive application, was an election petition which has different rules altogether.

19. The Court has appreciated the decisions relied on by the respondent. However, under the **Civil Procedure Act**, the overriding objective under **Sections 1A and 1B** obligates courts to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

20. In light of this, and based on the nature of this suit, the Court finds that it is not prejudicial for a party to seek joinder and then simultaneously with that order seek other substantive prayers. This not only minimises costs but it saves the Court time instead of joining a party and then requiring him to make a fresh application for the substantive orders that he may be seeking. In this regard, the Court rejects that submission and will determine all the prayers seriatim.

21. I hold the view that a party therefore can make an omnibus application, i.e having a joinder order with other substantive prayers. All that the court will do is, in making its decision will first deal with the prayer for joinder before proceeding to the other prayers. If the prayer for joinder fails, the rest of the prayers collapses.

22. On the second issue, **Order 1 Rule 10(2) of the Civil Procedure Rules** provides: -

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

23. The plaintiff submitted that the applicant is not a necessary party for the determination of the real issues before court. In response, the applicant retorted that the applicant is a necessary party in order for the court to decide the matters before it. This is so because he was a signatory of the account before 18/1/2021 when the resolution to suspend him was made. As, such he claims to have a right to explain to the court the matters in issue.

24. Further, the plaintiff submitted that the applicant lacks *locus standi* to seek joinder as he cannot have a claim inconsistent with the plaintiff as the plaintiff is a body corporate with power to sue under **section 3 of the Law Society of Kenya Act**. Reliance was placed on the cases of **Omondi & another v National Bank of Kenya Ltd & 2 others (2001) KLR 579** and **Elizabeth Nyambura Njuguna & another v E.K Banks Limited & 2 others [2019] Eklr**, for the proposition that a member of a body corporate cannot be joined in proceedings instituted by the body corporate to support or oppose its cause before the court.

25. I will first deal the issue of *Locus standi*. **Section 3 of the Law Society of Kenya Act** provides that the Law Society of Kenya is a body corporate with perpetual succession and a common seal and shall in its corporate name be able to sue and be sued.

26. **Jan Mohamed SC** Learned Counsel for the applicant submitted that the cases relied on by the plaintiff were not applicable. That they relate to corporate bodies in the sense of companies with shareholders. That their respective decisions emphasized the fact that only a company has capacity to take action to enforce its legal rights. That although the Society is a body corporate with its own legal personality, it is not a company *per se* nor does it have shareholders.

27. I agree with the submissions of Senior Counsel Jan Mohammed as regards the nature of the cases relied on by Mr. Havi. However, the spirit in those decisions remain the same. That where a body corporate, including a statutory body, has a legal personality, no single member thereof can purport to sue on its behalf. In company law, such a party must bring a derivative suit he so wishes. In the case of a statutory body, I opine the same principles will apply.

28. In the premises, I agree with the plaintiff that the applicant lacks *locus standi*. He cannot join a suit brought by the society and purport to take a contradictory position from that of the society.

29. I will now deal with the issue whether the applicant is deserving joinder. This suit was commenced by way of an Originating Summons dated 29/1/2021. It sought declarations to have **Carolyn Kamende Daudi** and **Mercy Kalondu Wambua** to be allowed to operate 6 bank accounts with the defendant held by the Society.

30. The issue before Court was whether in the prevailing circumstances, the defendant should act and accede to payment instructions by two of the four signatories mandated by the Society. The reason was because one of the signatories had resigned while the applicant had been suspended on 18/1/2021.

31. As at that time as is now, the Court will not require any input either from the applicant or any other party to determine the issues before it. It is quite clear that, no orders or reliefs were sought by the Society against the applicant. Further, in seeking to be enjoined, the applicant has not afforded any material on how he will contribute to the Court arriving at a just decision on the issues before it.

32. My understanding of **Order 1 Rule 10 of the Civil Procedure Rules** is that, the party to be joined must be a necessary party for the determination of the issues in dispute in a suit. There may or may not be reliefs prayed against or by such a party but in the event there be that is an added advantage that militates in favour of joinder. In order for the Court to make a just determination of the dispute before it, such a party must be necessary for the Court to achieve that goal.

33. In the present case, apart from the applicant having been a treasurer of the Society and one of the signatories to the subject account, there is nothing more he intends to add to the proceedings.

34. One of the matters that must be had in mind is that, these proceedings were originated and prosecuted as a stop gap measure. The membership of the Society was expected to meet at a foreseeable future to make the relevant resolutions that will obviate the pendency of this suit. In the premises, I decline to grant the prayer for joinder.

35. Being of that frame of mind, the other prayers do not fall for consideration. They are accordingly dismissed.

36. Be that as it may, it has come to the notice of this court that the orders made herein on 2/2/2021 are parallel to the orders made on 3/2/2021 by Weldon J in Petition No. E 05 of 2021 Adrian Kamotho Njenga vs LSK & Others and JR E005 of 2021 Lempaa Suyianka vs Nelson Havi. Those orders suspended the resolutions of 18/1/2021. Pending the hearing and determination of the petition.

37. I am alive to the submissions by Mr. Havi Learned Counsel for the plaintiff that the orders have been appealed against. That *per se* does not stay the operation of the said orders. As it were, the full council of the society is in place by virtue of the said orders.

38. As it stands now, there are two conflicting decisions by this Court. One sustaining the signatories, by the suspension of the resolutions of 18/1/2021 in the case before the Judicial Review Division, and the other one in this case allowing the operation of the accounts of the Society by two signatories assuming that the other signatories do not exist. It is an embarrassing position which should not be allowed to subsist.

39. On its own motion, the court hereby sets aside the orders of 2/2/2021 in order to bring to an end the said conflicting positions. In any event, the orders must have served their purpose as they were intended to be in the interim.

40. At the beginning of this ruling, the Court averted to the story of the famous farmer who set on fire his beautiful Castle to kill a mouse. By now it is clear that the Council of the Law Society of Kenya fits perfectly in the shoes of the farmer, the membership of the Society led by the Senior Counsels of the Society represent the family of the farmer. The farmer, read the Council, should not have set the Castle ablaze in order to get rid of a mere mouse. It rendered his family homeless. The Council has decided to renege and abandon its obligations under **section 4 of the Law Society of Kenya Act** and abandoned

Kenyans in the pursuit of the Society's objectives under that section.

41. The Council, as the engine of the Society, should find a sensible way of dealing with the mouse in its midst than bring the society down. The society is not only for its membership, although that its principal objective, but to the larger Kenyan Society. The earlier it dawns on those concerned that they are letting down Kenyans, the better.

42. On the foregoing, I find that the application to have no merit and I dismiss the same. However, since it has come to the notice of the existence of the orders of **Weldon J** of 3/2/2021, I hereby set aside the orders made on 2/2/2021 in their entirety. Each party to bear own costs.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 25th day of March, 2021.

A. MABEYA, FCI Arb

JUDGE