



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Law Society of Kenya v Attorney General & 3 others; Casa Security Limited  
& 4 others (Interested Parties) (Constitutional Petition E314 of 2021)  
[2021] KEHC 97 (KLR) (Constitutional and Human Rights) (23 August 2021) (Ruling)**

*Law Society of Kenya v Attorney General & 3 others; Casa  
Security Limited (Interested Party) & 4 others [2021] eKLR*

Neutral citation: [2021] KEHC 97 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**CONSTITUTIONAL PETITION E314 OF 2021**

**AC MRIMA, J**

**AUGUST 23, 2021**

**BETWEEN**

**LAW SOCIETY OF KENYA ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF NATIONAL POLICE SERVICE . 2<sup>ND</sup> RESPONDENT**

**FRANCIS MUTHUI ..... 3<sup>RD</sup> RESPONDENT**

**BENSON WAMBUA ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**CASA SECURITY LIMITED ..... INTERESTED PARTY**

**MERCY KALONDU WAMBUA ..... INTERESTED PARTY**

**FLORENCE WAIRIMU MUTURI ..... INTERESTED PARTY**

**MARY MWATHI KITONGA ..... INTERESTED PARTY**

**GEOFFREY KARANI ..... INTERESTED PARTY**

**The process invoked by the Law Society of Kenya on its representation by advocates in court.**

Reported by Beryl Ikamari

*Advocates – representation - representation of the Law Society of Kenya (LSK) in court - resolutions passed by the Council of the Law Society of Kenya for purposes of representation in court - how the LSK would make a decision*



*on which advocate or firm of advocates would represent it in court - whether the court would strike out a notice of appointment of advocates for purposes of the representation of the LSK where the Council of the LSK had not passed a resolution for purposes of the representation.*

**Constitutional Law** - *interim relief- conservatory orders - where there was police interference with the operations of the Law Society of Kenya (LSK) in its premises - claim that the interference was in breach of the fundamental rights and freedoms of the LSK and its members - whether the court would grant conservatory orders against the interference.*

### **Brief facts**

The petition was instituted to enforce the fundamental rights and freedoms of the petitioner and its various members. There were two sets of advocates representing the petitioner and the issue of representation was pending in the case of Nairobi High Court Constitutional Petition No. E260 of 2021 *Borniface Akusala & Another v. Law Society of Kenya & 12 others*. Directions on the issue, according to the court, were to await the outcome in that case. A determination in the case of Nairobi High Court Constitutional Petition No. E260 of 2021 *Borniface Akusala & Another v. Law Society of Kenya & 12 Others*, on the issue of representation, had been made.

### **Issues**

- i. How did the Law Society of Kenya make decisions on its representation in court?
- ii. Under what circumstances would the court grant conservatory orders?
- iii. Whether the court would strike out a notice of appointment of advocates for purposes of the representation of the Law Society of Kenya in court where there was no resolution passed by the Council of the Law Society Kenya with respect to the representation.

### **Held**

1. The Law Society of Kenya (LSK) was established under section 3 of the Law Society of Kenya Act. As a body corporate, the LSK had four main organs that enabled it to discharge its mandate. The organs were the general meeting, the Council, the secretariat, and the branches.
2. The structure of the LSK and section 26(3) of the Law Society of Kenya Act, showed that it was the Council that made resolutions on the administration and management of the LSK. The resolutions were effected by the secretariat through the secretary. Therefore, the secretariat was an agent of the Council just like the Council was an agent of the LSK. The general meeting was the supreme authority of the LSK.
3. There were Regulations that provided for how the Council operated. Council meetings were convened for the purposes of making decisions. Council meetings were of two types- Ordinary council meetings and Extra-Ordinary council meetings. In the ordinary conduct of the business of the Council, meetings were usually convened by the secretary in consultation with the President. Notices of such meetings were issued by the secretary. In certain instances, the President of the LSK could convene Extra-Ordinary meetings. He would issue the notices for the meetings or cause the notices to be issued by the Secretary.
4. At meetings, decisions were to be arrived at unanimously, failure to which majority votes would prevail. Where there was a tie, the President made the casting vote.
5. The decisions that the Council could make included decisions about the representation of the LSK in court. A resolution on representation remained valid where it was properly captured in the minutes unless it was rescinded by another resolution of the Council or by a resolution of the general meeting. Any representation of the LSK in court outside of a resolution of a properly convened Council meeting or general meeting could not stand unless extreme and compelling circumstances dictated otherwise but it had to be in the best interests of the LSK.



6. Any notice of appointment of advocates filed in the matter without a resolution of a properly convened meeting of the LSK Council had to be struck out. The record had no evidence of any resolution passed by the Council on the representation of the LSK.
7. The grant of substantive orders was largely dependent on whether the petition would eventually be sustained or withdrawn. However, in light of the sworn dispositions and submissions, there was need for some interim orders with a view to curtailing any uncalled-for interference of the operations and affairs of the Law Society of Kenya at its premises on the parcel of land known as Land Reference No. 3734/16 by the police.
8. The issue about the representation of the petitioner had to be heard on a priority basis as it went to the root of the right to a fair hearing as guaranteed in article 50 of the Constitution.
9. It was possible for the President to call for an Extra-Ordinary meeting in instances where the relationship between the President and the secretary was at its lowest. There were circumstances where there were factions in the Council and extreme acrimonious events had been witnessed, and they involved the secretary and the President. It was almost impractical to imagine the convening of a Council meeting. Once a Council meeting was convened, chances of breach of peace or allegations thereof were highly likely to arise.

### **Orders**

- i. *The firms of Messrs. Havi & Company Advocates and Wambugu Chege & Company Advocates had to within 14 days' file affidavits on the basis of their representation of the Law Society of Kenya. The firms were also at liberty to file written submissions, if need be, within the said period.*
- ii. *Pending further orders of the court: - the President, the Vice President and Council members of the Law Society of Kenya had to have unrestricted access into the premises of the Law Society of Kenya on the premises known as Land Reference No. 3734/16; and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents whether by themselves or their servants, agents or howsoever otherwise, were restrained from entering into, remaining upon and/or in any manner whatsoever from interfering with the affairs and operations of the Law Society of Kenya on the premises known as Land Reference No. 3734/16. However, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents whether by themselves or their servants, agents had to have unhindered access into the said premises in the course of carrying out any lawful investigations or when circumstances reasonably required the restoration of law and order.*
- iii. *This matter was fixed for a mention on October 13, 2021 for further directions.*

### **Citations**

#### **Cases**

##### **East Africa**

1. *Akusala, A Borniface & another v Law Society of Kenya & 12 others* Petition 351 of 2017 [2018]eKLR — (Followed)
2. *Murigi, Kamande v Nelson Andayi Havi & another; Mercy Kalondu Wambua (Interested Party)* Petition E087 of 2020 [2020] eKLR— (Explained)
3. *Republic v Committee on Senior Counsel & another ex parte Allen Waiyaki Gichubi* Judicial Review Application E1100 of 2020 [2021] eKLR— (Explained)
4. *Republic v Parliamentary Service Commission & 2 others; Morris Kimuli & another (Interested Parties)* Judicial Review Miscellaneous Application 3 of 2021 [2021] eKLR— (Explained)

#### **Statutes**

##### **East Africa**

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) Order 9; rule 1 — (Interpreted)
2. Law Society of Kenya (General) Regulations, 2018 (cap 18 Sub Leg) rules 18,20,21,37 — Interpreted
3. Law Society of Kenya Act (cap 14) sections 3,4, 15, 16,17, 24, 27, 26 (3), — Interpreted



4. Constitution of Kenya, 2010 article 50 - (Interpreted)

#### **Advocates**

1. Mr Nelson Havi and Miss Caroline Kamende, for Messrs Havi and Company Advocates for the petitioner
2. Mr Moimbo, for the Attorney General for the 1st & 2nd respondents
3. Mr Ochiel Dudley, Counsel for the 2nd interested party
4. Mr Thuita, Counsel h/b for Mr Birir and also h/b for Mr Mwalimu for the 5th interested party
5. Mrs Guserwa, Counsel for the 4th interested Party
6. Mr Wakwaya, Counsel h/b for Mr Madialo for the 6th to 13th interested parties

### **RULING**

1. The petitioner herein, The Law Society of Kenya, instituted the current petition through Messrs Havi & Company Advocates claiming infringement of its rights and fundamental freedoms as well as those of its various members. The petitioner also filed a Notice of Motion seeking interim conservatory orders.
2. The matter was certified urgent and directed to be heard during the on-going court recess. Directions were scheduled for 18<sup>th</sup> August, 2021.
3. When the matter came up before me, the petitioner was, as in previous petitions, represented by two sets of Counsel. On one hand was Mr Nelson Havi (the President), Miss Caroline Kamende (the Vice-President), Miss Kabita, Mr Muriithi Mr Gesicho, Dr Miyawa, Miss Mmbone, M Kamau and Miss Munyeri whereas on the other hand was Mr Wambugu.
4. As this court had earlier on dealt with the issue of the representation of the Law Society of Kenya in Nairobi High Court Constitutional petition No E260 of 2021 *Borniface Akusala & another v The Law Society of Kenya & 12 others* and scheduled a ruling thereof for 19<sup>th</sup> August, 2021, the court directed that the directions in this petition do await the outcome of the issue of representation in Petition No E260 of 2021. However, parties were accorded an opportunity and addressed the court on whether any interim conservatory orders do issue.
5. Counsel tendered their respective submissions on the matter.
6. I have, by now, expressed myself in *Borniface Akusala & another v The Law Society of Kenya & 12 others* case (*supra*) on the issue of the representation of the Law Society of Kenya. I still hold that position. As such, and for the benefit of those who did not participate in Petition No E260 of 2021, I will reproduce what I stated on the issue, and as under: -

54. Section 3 of the LSK Act establishes the Society in the following terms: -

1. Establishment of Law Society of Kenya.
  - (1) There is established a society to be known as the Law Society of Kenya.
  - (2) The Society shall be body corporate with perpetual succession and a common seal and shall, in its corporate name be capable of –
    - (a) suing and be sued;



- (b) taking, purchasing or otherwise acquiring, holding, developing or disposing of movable and immovable property;
  - (c) borrowing or raising money;
  - (d) invest and deal with monies of the Society not immediately required in such manner as may from time to time be determined by the Society; and
  - (e) doing or performing all such other things or acts, which may, lawfully, be done by a body corporate.
- (3) The Society shall be the successor of the Law Society of Kenya established under the *Law Society of Kenya Act ,2014* (Cap 18), and subject to this Act, all rights, duties, obligations, assets and liabilities of the Law Society of Kenya existing at the commencement of this Act shall be automatically and fully transferred to the Society and any reference to the Law Society of Kenya in any contract or document shall for all purposes be deemed to be a reference to the Society established under subsection (1).

55. As a body corporate, the LSK has four main organs which enables it to discharge the functions and objects in section 4 of the LSK Act Part IV of the LSK Act is on the governance of the Society. The organs are provided for under section 15 as follows:-

15. Organs of the Council.

For the effective governance of the Society there shall be the following organs of the Society-

- (a) the general meeting;
- (b) the Council;
- (c) the secretariat; and
- (d) the branches.

56. In order to sustain the discussion herein with ease, I will briefly look at the above organs. The General meeting is provided for in section 16 of the LSK Act as under: -

- 1) The general meeting shall be the supreme authority of the Society which shall approve all resolutions and important decisions of the Society.
- (2) The general meeting shall consist of all the members of the Society.
- (3) The secretary shall be the secretary to the general meeting.
- (4) The expenses of the annual general meeting shall be defrayed from the general funds of the Society.



- (5) The quorum of the general meeting shall be at least five percent of all the members of the Society.
- (6) The president of the Council shall preside at the general meeting and in the absence of the president, the vice-president shall preside at the meeting.
- (7) In the absence of both the president and the vice president, the Council shall nominate one among its members to preside.

57. The nature and composition of the Council is provided for in section 17 as follows: -

- (1) The Council shall be the governing body of the society.
- (2) The Council of the Society shall consist of-
  - (a) the President;
  - (b) the Vice-President;
  - (c) three representatives of the general membership of the Society, one of whom shall be an advocate of at least twenty-five years' standing;
  - (d) four upcountry representatives, who shall be persons who do not ordinarily practise in Nairobi or at the coast and;
  - (e) three Nairobi representatives who shall be persons who ordinarily practise in Nairobi; and
  - (f) one Coast representative, who shall be a person who ordinarily practises at the coast.
- (3) The members of the Council shall be elected by all the members of the Society in accordance with this Act.

58. The branches of the Society and their mandate are provided for in section 24 as follows: -

Branches of the Society.

- (1) There shall be the following eight branches of the Society consisting of the centres set out in the Schedule -
  - (a) Coast;
  - (b) Rift Valley;
  - (c) North Rift;
  - (d) West Kenya;
  - (e) South West Kenya;
  - (f) Mount Kenya;
  - (g) South Eastern; and



- (h) Nairobi.
  - (2) The branches shall-
    - (a) deal with issues that regarding practise within their centres;
    - (b) address issues relating to the welfare of the members practising in their centres;
    - (c) inform the Council of any matters that affect members within the branches that require the Council's engagement with other stakeholders on behalf of the branch;
59. Section 27 of the LSK Act creates the Secretariat in the following manner: -
- (1) There shall be a secretariat of the Society to be headed by the secretary.
  - (2) The secretariat shall be responsible for the day to day management of the affairs of the Society.
  - (3) The secretariat shall, from time to time receive such general or specific instructions from the Council through the secretary.
60. The secretary to the Council, who is also the Chief Executive Officer of the Society, appointed under section 26 of the LSK Act is the head of the secretariat.
61. From the above governance structure coupled with the dictates of section 26(3) of the LSK Act, it is the Council which makes resolutions on the administration and management of the Society. Such resolutions are effected by the secretariat through the secretary. Section 26(3) states as follows: -
- The secretary shall be responsible to the Council for the day-to-day administration and management of the Secretariat and the affairs and functions of the Society as the Council shall determine.
62. It can, therefore, be equated that the secretariat is an agent of the Council just like the Council is an agent of the Society. All in all, the General meeting remain as the supreme authority of the Society.
63. The manner in which the Council operates is provided for in the Regulations. The decisions of the Council are usually arrived by way of resolutions in duly convened meetings. As such, it is critical that a discourse on how Council meetings are convened be undertaken.
- Convening and making decisions in Council meetings:
64. There are two types of Council meetings which may be convened under the regulations. They are the Ordinary Council meetings under regulation 18 and the Extra-Ordinary Council meetings under regulation 21. Due to the centrality of such meetings in this discussion, I will reproduce the said Regulations verbatim: -
- 18. Council meetings & Venue.
    - (1) The Council may meet for the dispatch of business, adjourn, and, subject as expressly provided by the Act or these Regulations, otherwise regulate its meetings and proceedings as it thinks fit.



- (2) The secretary is responsible, in consultation with the President, to call for a meeting of the Council by issuing to the members of the Council not less than 7 days' notice, and the notice shall include the agenda of the meeting.
- (3) All meetings of the Council shall be held in Nairobi, unless the Council considers it appropriate for a good cause to hold a meeting outside Nairobi.
- (4) The Council shall meet quarterly but may meet more frequently as may be necessary.

21. Extra-ordinary meetings:

(1) The President may convene an extra-ordinary meeting of the Council by issuing or causing to be issued a 24-hour notice to each of the members of the Council.

(2) The notice shall specify the date, the time, the venue and the agenda of the meeting.

(3) A notice for an extra-ordinary meeting may be delivered by electronic mail address provided by each of the Council members.

65. In the ordinary conduct of the business of the Council, meetings are usually convened by the secretary on consultation with the President. Notices of such meetings are issued by the secretary.

66 ...

67. There are, however, instances where the President may convene extra-ordinary meetings. In such cases, it is either the President who issues such notices or the President may cause the notices to be issued by the secretary.

68 ...

69. Once a meeting has been duly called, regulation 20 recommends decisions to be arrived at unanimously failure to which majority votes prevail. It further provides that in instances where there is a tie, the President makes the casting vote. The regulation also holds each of the members of the Council to owe a fiduciary duty to the Society. For clarity the said regulation provides as follows: -

20. Decisions of the Council.

(1) A question or issue arising during a meeting of the Council upon which a decision is required to be made shall be decided by a majority of votes of Council members present and voting, except in the case of a special resolution.

(2) Where there is equality of votes, the President shall have a second or casting vote.

(3) Despite sub-regulation (1), the Council shall endeavour to resolve a question or issue by consensus but if it becomes necessary to put any question to a vote, it shall be decided by a vote of the members present and voting, by a show of hands.



(4) Members of the Council are collectively responsible for a decision or resolution made by the Council or by the majority of the Council members.

(5) A member of the Council owes fiduciary duty to the Society.

(6) The proceedings, resolution and decision of the Council shall not be invalid merely because a person who is not a member of the Council is in attendance.

70. The decisions which the Council may make include those on the representation of the Society in court proceedings. I must add that the Council may even make a decision to be represented in court by any of its members. As long as it is a resolution of the Council on the representation of the Society which is properly minuted as provided for under regulation 37, then that decision carries the day unless the decision is either rescinded by another decision of the Council or by a resolution of the General meeting. Any representation of the Society outside a resolution of a properly convened Council meeting or General meeting cannot stand unless extreme and compelling circumstances dictate otherwise, which in any event, must be in the best interests of the Society.

71. Courts have previously dealt with the issue of representation of the Society. In Judicial Review Application E1100 of 2020 *Republic v Committee on Senior Counsel & another ex parte Allen Waiyaki Gichuhi* [2021] eKLR, the Court, upon analysing the provisions on the governance of the Council and the decision making process as laid out in the LSK Act struck out Notice of Appointment of Advocates for want of resolutions of the Council. The Court observed as follows:

64. As regards the representation of the Law Society of Kenya, which is the 2<sup>nd</sup> respondent herein, it is evident that the conflict emanates from disagreement between the President of the Law Society of Kenya and some members of the Council of the Society, as regards the Society's legal representation in this matter. As a result, various firms of advocates have filed Notices of Appointment and of Change of Advocates, starting with Nchogu Omwanza & Nyasimi Advocates that filed a Notice of Appointment dated 30<sup>th</sup> September 2020; Havi & Company Advocates that filed a Notice of Change of Advocates dated 26<sup>th</sup> November 2020; the firm of Murgor and Murgor Advocates that filed two Notices of Change of Advocates dated 3<sup>rd</sup> December 2020 and 8<sup>th</sup> February 2021; and a Notice of Change of Advocates dated 19<sup>th</sup> January 2021 filed by Ashioya Mogire and Nkatha Advocates.

65. All the aforesaid firms of Advocates, except that of Murgor and Murgor Advocates, claim to have received instruction from the President of the Law Society of Kenya, which position is also reiterated by the said President. The firm of Murgor and Murgor Advocates on the other hand referred to a letter from some Council members of the Law Society of Kenya giving him instructions to act.

66. Order 9 rule 1 of the Civil Procedure Rules required an advocate to be appointed by a party. In the case of the Law Society of Kenya, the process of appointment is regulated by the parent statute, being the *Law Society of*



*Kenya Act, 2014*. The process of decision making in the Law Society of Kenya is provided in section as follows in sections 15 to 17 of the Act, and section 15 provides for governance of the Society by the following organs—

69. It is notable in this respect that Allen Waiyaki Gichuhi and the firm of Murgor and Murgor Advocates rely on letters from some council members as the basis for their respective cases on legal representation of the Law Society of Kenya. The President of the Law Society of Kenya also claims that he can make the appointment of advocates on behalf of the Law Society of Kenya. Both of these claims and arguments have no legal basis in the *Law Society of Kenya Act, 2014* as shown by the foregoing provisions on decision making, which includes the appointment of advocates, by the Law Society of Kenya.
70. It is also notable that the resolution of the Law Society of Kenya that is the basis of the appointment of the firm of Ashioya, Mogire and Nkatha Advocates is the subject of separate court proceedings. It was in this regard orally submitted by Mr Murgor SC in Court during the hearing of the applications, and not contested by the other parties, that the said resolution has since been suspended by the High Court in the said proceedings. From the recent and current happenings in the Law Society of Kenya, it is evident that the law as regards decision making by the Society as regards appointment of its advocates needs to be better managed, and the law strictly enforced in this regard. I am therefore in agreement with the holding by Rika J in *Murigi Kamande v Nelson Andayi Havi & another; Mercy Kalondu Wambua (Interested Party)* (2020) eKLR that the most suitable forum to resolve the issues in dispute is the General Meeting.
72. Rika J, in *Murigi Kamande v Nelson Andayi Havi & another; Mercy Kalondu Wambua (Interested Party)* [2020] eKLR made the following observations: -
  13. It is clear therefore, that there is a fundamental conflict within the Council of the LSK. This conflict is not just about the appointment of a Law Firm, or Law Firms, to represent the LSK in this Petition, and related Petitions. It is about the governance of the LSK.
  14. The court will not be assisting the Parties, by endorsing Mr Kurgat, or Mr Muhoro, or other Learned Counsel, over the other, in representation of the LSK. By making a ruling for one against the other, the Court will have shown where its mind lies, with regard to the larger dispute. The court will be fanning the flames engulfing the LSK. It will be prejudicial to the Parties, to say at this stage, that the decision made by the President and his faction in the Council, or that made by the CEO and Council Members in her faction, is the right decision. It should not be the role of the Court to fan the fires of factionalism. The *Law Society of Kenya Act, 2014*, has provisions, which in the view of the Court, empower the President and /or the Council, in appointment of Lawyers, and other professionals, to act for the LSK. Both the President and the Council can appoint a Lawyer to act for the LSK. The law however, presumes that the President and the Council stand on the same platform. Their voice is meant to be a collective voice. Their decisions are meant to be collective. They are all elected by the LSK Members.
  15. The most suitable forum to resolve the preliminary and the main issues in dispute, is the General Meeting. Part 3, section 15, of the LSK Act, deals with



effective governance of the LSK. It creates 4 organs of governance: the General Meeting; the Council; the Secretariat; and the Branches. Section 16 of the Act, states that the General Meeting shall be the supreme authority of the Society.

16. The LSK Act presupposes that there is a single Council of the LSK. Throughout, the LSK Act refers to 'the Council.' There is one Council. Its decisions are made through majority vote. There is one President, who is a Member of the Council. There is one LSK. Section 3 of the Act establishes one LSK. What the disputants herein are doing, is to pluralize the LSK. The law does not contemplate a situation where the President and the Council act at cross-purposes. As it is, it is not possible to grant orders which can practicably be executed, for or against the LSK. It is not known who the LSK in the dispute is. How will the orders be enforced? One faction could compromise the Petition against the other, risking the resources of the membership at large. The LSK cannot enjoy client-advocate confidentiality with multiple, differently instructed Lawyers. It cannot have control over the litigation. No Court ought to approve this anomaly. The LSK needs to be placed in a position where it has a conventional advocate-client relationship. There is need for some coherence, which the Court is not able to hand to the Parties.
17. Should it happen that the President and the Council are involved in a dead heat, as they seem to be, the Society ought to ask for intervention of the supreme authority of the Society. The President, the Council and the Secretariat are subordinate to the General Meeting. The intervention of the Court as sought, does not result in, or promote, effective governance of the LSK. It would only fan, the fires of factionalism.

73. Further, in Machakos High Court Miscellaneous Application 3 of 2021 *Republic v Parliamentary Service Commission & 2 others; Morris Kimuli & another (Interested Parties)* [2021] eKLR the Court arrived at the following decision: -

55. Having considered the conflicting positions taken in this matter, in order to ensure that the ex parte applicant's application proceeds without being derailed by the disputes surrounding the management of the Law Society of Kenya and while not purporting to determine the said disputes, the order which commends itself to me and which I hereby make is that for the purposes of the conduct of these proceedings, and only for that purpose, the 2<sup>nd</sup> Respondent shall be represented by the Council of the Law Society of Kenya through its President, Mr. Nelson Havi or any other advocate appointed for the purpose by the Council through him.
74. To understand the rationale behind the above holding, there is need to look at the then existing circumstances. By the time the decision was rendered, the Selection Panel for the Commissioners of the Independent Electoral and Boundaries Commission was carrying out interviews for candidates for the positions of Commissioners of the Independent Electoral and Boundaries Commission. The process was time bound. There was no representation of the Society in the Selection Panel in view of the wrangles in the Council and some orders issued by Courts.



75. If the court was to order that the representation of the Society be decided by the General meeting, as so held in the two cases referred to above, then taking into account the logistics in carrying out the meeting and the limited time within which the Selection Panel had, it was very likely that the Selection Panel would have wound up its duties way before the General meeting was successfully held. In that case, the Society would not have been represented at all in the Selection Panel and that would have been detrimental to the Society more so given the nature and objects of the Society. The order was, hence, made in view of the then prevailing exceptional circumstances and in the best interest of the Society. I must, however, add that; the circumstances that prompted the making of that specific order are not prevailing as at now.
76. Having said so, this court now finds that any Notice of Appointment of Advocates filed in this matter without a resolution of a properly convened meeting of the Council must be struck out accordingly. The record, so far, has no evidence of any resolution of the Council on the representation of the Society.
77. This court has also been asked to order the Secretariat, being one of the organs of the Society, to instead appoint Advocates for the Society. I find some discomfort in that proposition. I say so because on taking judicial notice of the unfolding events at the LSK, this court notes that the secretariat is headed by the Secretary to the Council who is also the Chief Executive Officer of the Society and which secretary is also at the heart of the wangles in the Council. In fact, attempts have been made for her ouster and that is subject of some Court proceedings. Such a party cannot be designated the duty to appoint Advocates for the Society.
78. The upshot is that any representation of the Society outside a resolution of a properly convened Council meeting or General meeting cannot stand unless extreme and compelling circumstances dictate otherwise. Even in such limited instances, the representation must be in the best interests of the Society.
79. The prevailing situation of the Society calls for a more practical way on the aspect of representation. Having already ruled out the possibility of the secretariat appointing any Advocates for the Society, I will now consider three other possible scenarios in this matter. The first scenario is whether a Council meeting may be convened and resolutions passed. It is possible for the President to call for an extra-ordinary meeting in instances where the relationship between the President and the secretary is at its lowest. However, going by the factions in the Council and extreme acrimonious events witnessed of late which also involves the secretary and the President, it is almost impractical to imagine the convening of a Council meeting. Once a Council meeting is convened, chances of breach of peace or allegations thereof are highly likely to arise. I will, therefore, not take that route.



80. The second scenario is to convene a General meeting. Again, the acrimony between the President's faction on one hand and the other Council members and the secretary on the other hand is likely to forestall the logistical planning of the meeting. The petitioners have also pleaded that the operations of the secretariat have long come to a halt. Since that factual situation is yet to be rebutted, I will take it that it is the prevailing situation at the secretariat. With such a case, one wonders how any communication to the members of the Society will be made. It is, hence, impractical to order the holding of a General meeting.

81. The last scenario is to involve the Society's branches. The Society has 8 branches spread out throughout the country. Each branch is presided by a Chairperson. In light of the non-functional secretariat, a Council which is unable to meet and deliberate on the affairs of the Society and in a case where the General meeting cannot be convened, it is only the branches that may have to step into the matter. In this case, and as the only available option as at now, the Chairpersons of the branches will appoint the Advocates to represent the Society.

7. I will now deal with the aspect of the conservatory orders.

8. I am aware that the parties are yet to file their respective responses in this petition. That is partly because the firm of Messrs Wambugu Chege & Company Advocates filed a Notice of Change of Advocates to replace the firm of Messrs Havi & Company Advocates for the petitioner and also filed a Notice of Intention to withdraw the Petition.

9. Whereas this court is not dealing with the issue of withdrawal of the petition as at now, suffice to say that withdrawing a constitutional Petition filed as a public interest litigation is not a walk in the park. It has to be demonstrated pursuant to settled legal principles that the petition is for withdrawal. Such considerations may include whether substitution of the petitioner is viable so as to sustain the furtherance of the Petition.

10. Having said so, I must further state that I have carefully perused the petition and the application by way of a Notice of Motion filed by the Petitioner. I have also carefully considered the submissions made by the parties.

11. Whereas the grant of any substantive orders may largely depend on whether the Petition will eventually be sustained or withdrawn, going by the averments in the petition and the sworn disposition and the submissions, it comes to the fore that there is need for some interim orders with a view to curtail any uncalled for interference of the operations and affairs of the Law Society of Kenya at its premises on the parcel of land known as Land Reference No 3734/16 by the police.

12. As the issue of representation of the petitioner must, on priority basis, be settled as it goes to the root of fair hearing as guaranteed in article 50 of the Constitution, and in view of the other findings made by this court, the following further directions do hereby issue: -

(a) The firms of Messrs Havi & Company Advocates and Wambugu Chege & Company Advocates shall within 14 days' file affidavits on the basis of their representation of the Law Society of Kenya. The firms are also at liberty to file written submissions, if need be, within the said period.



(b) Pending further orders of this court: -

(i) The President, the Vice President and Council members of the Law Society of Kenya shall have unrestricted access into the premises of the Law Society of Kenya on the premises known as Land Reference No 3734/16; and,

(ii) The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents whether by themselves or their servants, agents or howsoever otherwise, are hereby restrained from entering into, remaining upon and/or in any manner whatsoever from interfering with the affairs and operations of the Law Society of Kenya on the premises known as Land Reference No 3734/16. However, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents whether by themselves or their servants, agents shall have unhindered access into the said premises in the course of carrying out any lawful investigations or when circumstances reasonably require the restoration of law and order, as the case may be.

(c) This matter is hereby fixed for a mention on 13<sup>th</sup> October, 2021 for further directions.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF AUGUST, 2021**

**A. C. MRIMA**

**JUDGE**

**Ruling virtually delivered in the presence of:**

**Mr. Nelson Havi** and **Miss Caroline Kamende**, Counsel instructed by Messrs. Havi and Company Advocates for the Petitioner.

**Mr. Moimbo**, Counsel instructed by the Hon. Attorney General for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**Mr. Ochiel Dudley**, Counsel for the 2<sup>nd</sup> Interested Party.

**Mr. Thuita**, Counsel holding brief for Mr. Birir for 3<sup>rd</sup> Interested Party and also holding brief for Mr. Mwalimu for 5<sup>th</sup> Interested Party.

**Mrs. Guserwa**, Counsel for the 4<sup>th</sup> Interested Party.

**Mr. Wakwaya**, Counsel holding brief for Mr. Madialo for the proposed 6<sup>th</sup> to 13<sup>th</sup> Interested Parties.

**Elizabeth Wambui** – Court Assistant.

