



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
PETITION NUMBER E017 OF 2021

COLLINS ODHIAMBO ODUNDO 1ST PETITIONER

JOHN OCHOLA OUMA..... 2ND PETITIONER

VERSUS

NELSON HAVI 1ST RESPONDENT

CAROLYNE KAMENDE..... 2ND RESPONDENT

MERCY KALONDU WAMBUA 3RD RESPONDENT

LAW SOCIETY OF KENYA.....4TH RESPONDENT

DR MAXWEL MIYAWA..... 5TH RESPONDENT

JANE ODIYA 6TH RESPONDENT

GEORGE KAMAU 7TH RESPONDENT

BONBEGI GESICHO8TH RESPONDENT

CLARISE MMBONE 9TH RESPONDENT

EMMANUEL KYOBICA10TH RESPONDENT

JAMLICK MURIITHI11TH RESPONDENT

LEVI MUNYERI 12TH RESPONDENT

RIZIKI EMUKULE1ST INTERESTED PARTY

GEORGE OMWANSA.....2ND INTERESTED PARTY

ALUSO INGATI.....3RD INTERESTED PARTY

CAROLYNE MUTHEU 4TH INTERESTED PARTY

FAITH ODHIAMBO5TH INTERESTED PARTY

BETH MICHOMA 6TH INTERESTED PARTY

NDINDA KANYILI	7 TH INTERESTED PARTY
BERNARD NGETICH.....	8 TH INTERESTED PARTY
LAW SOCIETY OF KENYA, COAST BRANCH	9 TH INTERESTED PARTY
LAW SOCIETY OF KENYA, RIFT VALLEY BRANCH	10 TH INTERESTED PARTY
LAW SOCIETY OF KENYA, NORTH RIFT BRANCH.....	11 TH INTERESTED PARTY
LAW SOCIETY OF KENYA, WEST KENYA BRANCH	12 TH INTERESTED PARTY
LAW SOCIETY OF KENYA, SOUTH WEST KENYA BRANCH	13 TH INTERESTED PARTY
LAW SOCIETY OF KENYA, MOUNT KENYA BRANCH	14 TH INTERESTED PARTY
LAW SOCIETY OF KENYA, SOUTH EASTERN BRANCH.....	15 TH INTERESTED PARTY
LAW SOCIETY OF KENYA, NAIROBI BRANCH	16 TH INTERESTED PARTY
LAW SOCIETY OF KENYA, KENYA COMMERCIAL BANK LIMITED.....	17 TH INTERESTED PARTY
ABSA BANK KENYA LTD.....	18 TH INTERESTED PARTY
STANDARD CHARTERED BANK KENYA LIMITED.....	19 TH INTERESTED PARTY
SBM BANK KENYA LIMITED.....	20 TH INTERESTED PARTY
SAFARICOM PLC.....	21 ST INTERESTED PARTY

RULING

1. Vide a Notice of Motion dated 15th July 2021 brought under **Articles 1, 2, 3, 19, 20, 21, 22, 23, 24, 25(c), 28, 32, 36, 47, 48,50(1), 159, 165(3)(d), 258, 259 of the Constitution of Kenya and Rule 4, 23,and 24 of the Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013,section 9(4) of the Fair Administrative Action, 2015**, the Petitioners herein sought the following orders:

i. Spent

ii. That the Honourable Court be pleased to exempt the Petitioners from the requirements of Section 9(2) of the Fair Administrative Actions Act 2015, Regulations 95 and 96 of the Law Society(General) Regulations 2020 and all other legal provisions requiring them to first exhaust internal dispute resolution mechanisms before filing the instant petition

iii. That pending the inter partes hearing of this application the court do issue a conservatory order staying and suspending the implementation and/or continued implementation of all the resolutions and decisions of the Special General meeting convened on the 26th June 2021.

iv. That pending the hearing and determination of this application the court do issue a conservatory order staying and suspending the implementation and/or continued implementation of all the resolutions and decisions of the Special General Meeting convened on the 26th June 2021.

v. That pending the hearing and determination of this Petition the court do issue a conservatory order staying and suspending the implementation and/or continued implementation of all the resolutions and decisions of the Special General meeting convened on the 26th June 2021.

vi. That the costs of this application be provided for.

vii. Any order that the court may deem fit and expedient to grant

2. The Notice of Motion was accompanied by a Petition of even date seeking orders;

a. A declaration that the Special General Meeting convened on the 26th June 2021 was convened in contravention of the Law Society Act 2014 and the Law Society of Kenya (General) Regulations 2020

b. A declaration that all the decisions and resolutions made by the Special General Meeting convened on the 26th June 2021 are unconstitutional and in violation of the fundamental rights and freedoms of the Petitioners under Article 25 (c) 28 , 36(1) 47,48 and 50(1) of the Constitution of Kenya 2010

c. As an ALTERNATIVE to prayer b. above a declaration that Resolution no. 6 ,10 and 11 made by the Special General Meeting convened on the 26th June 2021 unconstitutional and in violation of the fundamental rights and freedoms of the Petitioners under Article 25 (c) 28 , 36(1) 47,48 and 50(1) of the Constitution of Kenya 2010.

d. An Order compelling the 17th and 18th Interested Parties to reinstate the 8th interested party and the 3rd respondent as signatories to all the bank accounts in the name of the Law Society of Kenya.

e. A declaration that the 1st Respondent is unfit to hold the Office of the President of the Law Society of Kenya or any Public Office within the Republic of Kenya.

f. The Petitioners be paid costs of this Petition.

3. The Petitioners challenged the manner in which the Special General Meeting was convened, the manner in which the Agenda was drawn, the manner in which resolutions were passed, the effects of the implementation of those resolutions on the running of the affairs of the 4th respondent by the 1st, 2nd, 5th to 12th Respondents.

4. That in particular the right to fair hearing, the right to fair administrative action of the 1st to 8th Interested Parties was violated as the Special General Meeting resolved to remove them as Council members of the 4th Respondent and to replace them with the 5th to the 12th Respondents as ‘caretaker council’ of the 4th respondent.

5. The Petitioner’s position was that the convening of the Special General Meeting had been suspended by the High Court in Nairobi **HCJR no E1146 of 2021 Republic vs Nelson Andayi Havi & Others Ex parte Gad Anguko**, that the court in its Judgment of 21st May 2021 referred the matter to arbitration, which arbitration never took place.

6. Due to the enumerated violations the Petitioners have taken the position that the issues at hand are weighty and ought to be subjected to the court process and not the arbitration processes provided for by the Law Society Act, hence the prayer for exemption from the requirements of **Section 9(2) of the Fair Administrative Action Act 2015 and Regulation 95 and 96 of the Law Society(General) Regulations 2020** that require that they first exhaust the internal dispute resolution mechanisms before filing the instant petition.

7. The 1st, 2nd, 4th and 5th to 12th Respondents vide an application dated 18th July, 2021 brought under **the inherent power of the court** sought for the following orders;

1. Spent.

2. The Petition dated 15th July, 2021 be and is hereby struck out with costs on account of sub judice, res judicata, abuse of the process of the Court and for want of jurisdiction.

3. In the alternative to hereinabove the Petition dated 15 July, 2021 be and is hereby transferred to the Constitutional and Human Rights Division of the High Court in Nairobi to be heard together with Petition No E 260 of 2021, Akusala A Boniface & Collins Odhiambo Odundo v Law Society of Kenya & others.

4. The costs of this Application be provided for.

8. The main ground for the application was that there was pending before the Constitutional & Human Rights Division of the High Court in Nairobi Petition **E260 of 2021 Akusala A Boniface & Collins Odhiambo Odundo vs Law Society of Kenya & Others** reiterating similar grievances. That the 4th respondent had raised a Preliminary Objection in that matter. That the Petitioners are litigating by instalments as they were at all times aware of the matters upon which that Petition was founded at the time they filed this Petition on 15th July 2021.

9. Further that a challenge in the manner in which the Special General Meeting of the members of the 4th Respondent was requisitioned was dealt with by this court in **HCJR E1146 of 2020**.

10. That in any event the Petitioners had not exhausted the alternative dispute resolution mechanism available to them in the Law Society of Kenya statute.

11. The hearing date set for the application dated 18th July 2021 was declared a public holiday and the matter found itself before the duty judges during the August recess. It landed in my docket for hearing inter partes hearing.

12. The grounds on the face of the Application were reiterated in the annexed Supporting Affidavit and the Replying affidavit both sworn on 18th July 2021 by Caroline Kamende Daudi, the 2nd Respondent.

13. The Petitioners opposed the application through the Replying Affidavit sworn on 24th July, 2021 by Collins Odhiambo Odundo. He

acknowledged the filing of **Petition No. E 260 of 2021** filed on 5th July 2021 and deponed that therein the issue was that the 1st, 2nd respondents and 1st to 8th Interested Parties *'had due to their personal wrangles brought to a halt the services the 4th Respondent provides to members*. With regard to the present Petition he reiterated the grounds on the face of the Petitioners Notice of Motion and Petition dated 15th July 2021, whilst adding details with regard to the personality of the 1st respondent, his actions and those of the 1st to 8th Interested Parties. He pointed out that at the time of filing **E260 of 2021** there was no caretaker council.

14. Regarding the prayer for transfer he deponed that the High Court was the same, with the same jurisdiction regardless of its locus, and that there was no first class High Court in Nairobi.

15. He further deponed that because the Petition seeks to have the 1st Respondent declared unfit to hold office does not make this Petition and Petition **E260 of 2021** similar. That consequently the assertion that the Notice of Motion and the petition herein are *sub judice* is nothing more than a delaying tactic by the Applicants. That the Petition is also not *res judicata* because in Nairobi JR No. E1146 of 2020 the *ex parte* applicant was not challenging the manner of requisitioning and holding of the Special General Meeting but challenging the objects/agendas that were to be deliberated at the Special General Meeting.

16. That since the said Special General Meeting was to be held on 5th December, 2020 but the court stopped the same, it was imperative that before and while convening the Special General Meeting on 26th June, 2021, the 1st and 2nd Respondents adhere to the procedure as set out in the **Law Society of Kenya Act, 2014** but the same was not done hence forming the basis of this petition.

17. The Application was canvassed through both written and oral submissions which I have carefully considered and need not reproduce the same verbatim herein.

18. The Applicants' filed their written submissions together with a List and Bundle of Authorities, both dated 30th July 2021. They raised four (4) issues for determination.

- a. Whether the Petition was Sub judice E260 of 2021,
- b. whether it is Res Judicata E1146 of 2021,
- c. whether the Petitioners ought to first Exhaust the internal dispute resolution mechanism and
- d. whether the matter ought to be transferred to Nairobi to be heard together with Petition E260 of 2021.

19. They submitted that the Petition dated 15th July 2021 is *sub judice* for the reason that there are five cases pending determination at the High Court in Nairobi, namely, **Nairobi ELRC Petition No E087 of 2020, Murigi Kamande vs Nelson Andayi Havi & Law Society of Kenya, Nairobi ELRC Petition No E090 of 2020 Mercy Kalondu Wambua vs Nelson Andayi Havi & Law Society of Kenya, Nairobi High Court Constitutional Petition No E025 of 2021, Adrian Kamotho Njenga vs Nelson Andayi Havi & others, Nairobi High Court JR No E005 of 2021 Lempaa Suyianka & others vs Nelson Andayi Havi & others and Nairobi Constitutional Petition No E260 of 2021, Akusala A Boniface & Collins Odhiambo Odundo vs Nelson Andayi Havi & others.**

20. That in **Nairobi ELRC Petition No E090 of 2020**, the issue pending is the legality of the removal of the 3rd Respondent as Secretary of the Council and Chief Executive of the 4th Respondent on 19th October 2020. That in the said case, the 3rd Respondent challenged the resolutions made at the Special General Meeting through an application for contempt dated 8th July, 2021 and the same had been fixed for hearing on 24th September, 2021. That a similar application had also been filed in **Nairobi ELRC Petition No E087 of 2020** and will be heard on the same date. The Applicants therefore argued that the determination of these applications would determine the issue of resolutions relating to the 3rd Respondent.

21. The Applicants also submitted that the question on quorum and voting in respect of the Special General Meeting was pending determination in **Nairobi High Court Petition No. E025 of 2021**, the implementation of the resolutions made thereafter having been suspended by the Orders of 3rd February, 2021. That the matter together with **JR No, E005 of 2021** which seeks similar reliefs have been fixed for directions on 20th September, 2021. They contended that the final determination of the two claims would impact the challenge made against the resolutions of the Special General Meeting held on 26th June, 2021.

22. They also contended that the 1st Petitioner herein, Collins Odhiambo Odundo is the 2nd Petitioner in **Nairobi Constitutional Petition No. E260 of 2021** filed on 5th July 2021, which was filed ten (10) days after the holding of the Special General Meeting. That the filing of that Petition was not disclosed in the Petition herein.

23. They argued that the prayer to declare Nelson Andayi Havi unfit to hold office in the 4th respondent and any public office was replicated in **Nairobi Constitutional Petition No. E260 of 2021**, in which there was a prayer to determine jurisdiction based on the doctrine of exhaustion.

24. They relied on **Section 6 of the Civil Procedure Act** on the issue of *Res Sub Judice* and contended that the issue of *sub judice* is tied to the issue of *res judicata* under **Section 7 of the Civil Procedure Act**. They were of the view that the addition of John Ochola Ouma to this petition and the expanded reliefs sought could not shield the Petitioners from the doctrine of *sub judice*. They relied on the writings of **Richard Kuloba in Judicial Hints on Civil Procedure (LawAfrica, 2005)** on the guard against attempts to evade the *sub judice* doctrine.

25. They also relied on the case of **Nishith Yogendra Patel vs Pascale Mireille Baksh & Another [2009] eKLR** where the court held that pursuing the same remedies in parallel courts is an abuse of the court process. They cited the case of **Kenya Planters Co-operative Union Limited v Kenya Co-operative Coffee Millers Limited & another [2016] eKLR** where it was held that a matter pending before court, undecided or still unconsidered was *sub judice*.

26. The Applicants also cited the case of Joel **Kenduiwo vs District Criminal Investigation Officer Nandi & 4 Others [2019] eKLR**, where it was held that the filing of a case in the pendency of a similar case was an abuse of the court process and **Republic vs Paul Kihara Kariuki, Attorney General & 2 Others Ex Parte Law Society of Kenya [2020] eKLR** where the High Court struck out a claim for contravening the *sub judice* rule.

27. On the second issue, the Applicants submitted that the present petition offended the doctrine of *res judicata* for the reason that the judgment delivered on 7th May, 2021 in **Nairobi JR No. E1146 of 2020 Republic vs Nelson Havi Andayi** Ex parte Gad Aguko finally determined all the questions relating to the requisitioning of the Special General Meeting earlier scheduled for 5th December, 2020 and the subsequent one of 26th June, 2021. That the High Court held that it had no jurisdiction over the same as it was an internal issue of the 4th Respondent.

28. The Applicants cited **Section 7 of the Civil Procedure Act** and the necessity of the doctrine as expounded in **Richard Kuloba's Judicial Hints on Civil Procedure (LawAfrica, 2005)**. They also cited various authorities on when *res judicata* becomes applicable including **Henderson vs Henderson [1843-60] ALL ER 378**, **T Horne vs J Usher Jones [1913-14] 5KLR 157**, **Mburu Kinyua vs Gachini Tuti [1976-80] 1KLR 790**, **Jairo Angote Okonda vs Kenya Commercial Finance Company Ltd [2000]eKLR** and **Godfrey Kinuu Maingi & 4 Others vs Nthimbiri Farmers Co-operative Society [2014] eKLR**.

29. On the third issue, the Applicants submitted that the Petitioners had not exhausted the internal dispute resolutions mechanisms under **Regulation 95 and 96 of the Law Society of Kenya (General Regulations)**. They contended that the High Court had previously declined its jurisdiction to adjudicate over internal disputes of the 4th Respondent in **Mark Ndungu Ndumia vs the Law Society of Kenya, Petition No. 94 of 2019** to wit the dispute arising out of the nomination for the 4th Respondent's representatives to the Judicial Service Commission. Additionally, they argued that the High Court already struck out a challenge to the manner and conduct of the 4th Respondent's Special General Meeting.

30. They also cited the case of **County Government of Turkana vs National Land Commission, Attorney General & Jackson Ekaru Nakusa & 32 others [2020] eKLR**, where the Court of Appeal held that the provisions for Alternative Dispute Mechanisms ought to be exhausted before a party seeks to litigate a matter.

31. They opposed the Petitioner's argument that the internal dispute resolution mechanisms were not effective and reiterated the **provisions of Regulation 95 and 96 of the Law Society of Kenya (General Regulations)**.

32. In the alternative, the Applicants prayed that this matter be transferred to the High Court in Nairobi. They argued that this is to avoid the Petitioner's forum shopping intentions. They relied on the case of **Mwongela Isaiah Mbithi vs Hon Lady Justice Philomena Mbete Mwilu & Others, Petition No. E002 of 2021**, where the court applied the overriding objective principle in directing that two cases be heard together.

33. Parties highlighted submissions on 16th August, 2021.

34. In his highlights Mr. Havi for the Applicants reiterated the and urged the court to guard against the imminent danger that contradictory decisions could likely arise out of the state of affairs occasioned by the filing of this and other Petitions. He urged the court to uphold the internal dispute resolution mechanisms of the Law Society of Kenya as provided by statute and the **Constitution of Kenya at Article 159** and find that this court did not have jurisdiction. That both **E260 of 2021** and this Petition the management of the Law Society of Kenya was being impugned, with an addition prayer to declare him unfit to hold Public Office; that certain issues raised herein were determined with finality in **HCJRE1146 of 2021**.

35. The Petitioners in response argued that they met the conditions requisite for granting the orders sought, that this court was clothed with jurisdiction to hear the instant petition and that they had a case for exemption from the requirements of **Regulations 95 and 96 of the Regulations**.

36. On the issue of *sub judice*, they submitted that the said principle did not apply in this matter. They cited the case of **Kenya National Commissions on Human Rights vs Attorney General, Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) [2020] eKLR** where the court held that a party that seeks to invoke the doctrine of *res sub judice* must establish that; firstly, there is more than one suit over the same subject matter; secondly, that one suit was instituted before the other; thirdly, that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

37. It was submitted for the Petitioners that the subject matter in the instant Petition was based on how the Special General Meeting was convened and the resolutions that were passed therein. That however, in **Nairobi Petition No. E260 of 2021**, the subject matter was based on the fact that; firstly, the 4th Respondent is unable to serve its members due to endless personal wrangles between the 1st and 2nd Respondents and the 1st to 8th Interested Parties. Secondly, that there were various violations of the Constitution since the members of the 4th Respondent were unable to practice law. Lastly, that the Petitioners were seeking declaratory and mandatory orders against the 1st and 2nd Respondents and the 1st to 8th Interested Parties herein in relation to the services the 4th Respondent. The Petitioners argued that in the instant petition, they were seeking declarations that the Special General Meeting was illegally convened and that the resolutions passed therein were illegal and in any case null ab initio hence not similar.

38. It was submitted further for the Petitioners that the prayer that the 1st and 2nd Respondents together with the 1st to 8th Interested Parties be declared unfit to hold any public office as sought in **Nairobi Petition No. E260 of 2021** was because they had brought to a halt the services the 4th Respondent offers to its members due to the personal and endless wrangles, while in the instant Petition, the prayer sought that the 1st Respondent be declared unfit to hold office is based on the fact that him being an advocate of the High Court of Kenya, qualified to be appointed a judge of the Supreme Court of Kenya, still chaired a general meeting that was convened illegally and allowed illegal and unconstitutional resolutions to be passed.

39. On the issue of their petition being *res judicata*, the Petitioners submitted that the Applicants position was misguided. They placed reliance on **Section 7 of the Civil Procedure Act** and the Supreme Court case in **Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another [2016] eKLR** where the court held that whenever the question of *res judicata* is raised, a court will look at the decision claimed to have settled the issues in question and that the court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. That the said test was summarized in the case of **Bernard Mugo Ndegwa vs James Nderitu Githae & 2 Others, [2010] eKLR**.

40. It was submitted for the Petitioners that from the decision in **Nairobi JR No. E1146 of 2020**, it was clear that the ex-parte Applicant Gad Aguko, was not challenging the manner of requisitioning and holding of the Special General Meeting but rather some the objects/agendas that were to be deliberated at the Special General Meeting. That he was also challenging the actions of the 4th respondent under **section 31(3) of its Act**, of trying to convene the Special General Meeting as a one-man-council of the 4th Respondent. That the instant Petition, on the other hand, challenged the manner of convening the Special General Meeting and whether they followed the right procedure under **Section 31 (4)** of the aforementioned Act.

41. It was submitted further for the Petitioners, that at the time **Nairobi JR No. E1146 of 2020** was filed, the Special General Meeting had not been convened but steps had been taken to convene the same. On the other hand the instant petition was filed after the Special General Meeting was convened on 26th June, 2021 and resolutions passed. That in these special circumstances this court could not find this Petition to be *res judicata* as no one could have foreseen that the Special General Meeting would still be convened illegally and illegal resolutions passed. That further, new facts had arisen since **Nairobi JR No. E1146 of 2020** was filed. They placed reliance on the cases of **Nathaniel Ngure Kihui vs Housing Finance [2018] eKLR** and **Henderson vs Henderson 843-60 ALL ER 378**.

42. It was also argued for the Petitioners that the instant petition should not be transferred to the Constitutional and Human Rights Division of the High Court in Nairobi to be heard with **Petition No. E260 of 2021**. That **Article 165 (1)** establishes the High Court and not the High Court at Nairobi or anywhere else. That further the High Court, no matter where it is located or who presides over it, is still the High Court and that the Petitioners were also advocates based in Nakuru.

43. On the issue of whether the Applicants were entitled to the prayers sought therein, it was submitted for the Petitioners that the Applicants were not entitled to the prayers sought in their application dated 18th July, 2021 as the same was a non-starter, frivolous, hopeless, vexatious, and forlorn and an abuse of the process of the court.

44. For the highlights, Mr. Koigi appeared alongside Mr. Collins Odundo the 1st petitioner for the Petitioners. Mr. Koigi submitted that the applicants were not disputing the applicability of the doctrine of exhaustion as set out in **Regulations 95 and 96 of the Law Society Regulations** but their position was that there was an exemption whereby the Petitioners had the Constitutional Right under **Article 22** to bring these proceedings herein claiming violation of fundamental rights and freedoms highlighted as there were grounds to demonstrate that the petitioners rights were violated and these violations could not be the subject of arbitration. Further that they were challenging the convening of the Special General Meeting, the resolutions made pursuant thereto and their subsequent implementation. That these were not issues for arbitration as it was evident by the unfolding events within the 4th respondent that arbitration would not yield any fruits. He cited the case of **Adrian Kamotho vs LSK** and submitted that this court ought to clothe itself with jurisdiction in order to do justice.

45. Mr. Odundo referring to **Petition E1146 of 2021** argued that this was a Constitutional Court with powers to deal with violations. Citing the 17th to 21st interested parties he argued that these were not subject to **regulations 95 and 96**. On *sub judice* he argued that this petition arose from a different set of facts from **E260 of 2021** but converged on the prayers though the violations are different. He went on to submit that the petition is not *res judicata* as it is not similar to **E1146 of 2020**. He read from **Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another [2016] eKLR** and emphasized that the *ex parte* applicant in **E1146 of 2021** was not challenging the requisitioning and holding of the Special General Meeting but challenged some of the agendas that were to be deliberated at the Special General Meeting. That even after the determination of a matter circumstances change and a party is not estopped from filing suit. He urged the court not to transfer the matter.

46. Mr. Ochiel Dudley submitted that he was opposing the application on the three grounds; citing **John Florence Maritime Services vs the Cabinet Secretary [2015] eKLR** he argued that the petition is not *res judicata* as it was challenging the *Kamukunji* of 26th June 2021 while Aguko challenged the convening of a Special General Meeting; that the parties were different as there were now eight (8) imposters (his own words), different reliefs and a different cause of action. Referring to **E1146 of 2021** he submitted that the 1st respondent read the referral to an arbitration as a permit to hold the Special General Meeting and to preside over matters that were to be subject of the arbitration. That on the issue of exemption, this petition was *dejavu* as '*members had been allowed to challenge Havi*'.

47. Mr. Charles Mwalimu for the 9th to 16th Interested Parties adopted both Mr. Odundo's and Ochiel's submissions on *sub judice* and *res judicata*. He submitted on the application of **regulation 95 and 96**. He expressed surprise that on 26th June 2021 "*Havi and the Kamukunji send the 3rd respondent on leave. He now requires parties to deal with regulation 95 which requires disputes to be referred to the Secretary. Which Secretary? Mr. Havi says she is on compulsory leave*". Based on this he urged the court to find that the Petitioners had satisfied the requirements for exemption under **Section 9(4) of the Fair Administrative Action Act**.

48. In his rejoinder the 1st respondent argued that the question that needed to be answered was whether the High Court can ignore **section 16**

of the Law Society of Kenya Act or put aside section 33 of the said Act, regulations 95 and 96 and Article 159 of the Constitution and determine an internal dispute of the Law Society of Kenya. That there is a clear distinction between the right to fair trial and an impartial tribunal, that article 159 recognised Alternative Dipute Resolution as an avenue where one could go so as to have a fair trial. He distinguished some the cases relied on by the Petitioners. He drew the court's attention to Mr. Dudley Ochiel's submission in support of the Petition where his client is a Respondent. Regarding the non LSK parties he submitted that what the court needed to look at and to consider were the prayers sought.

49. He urged the court to keep in mind that there was a pending ruling in **E260 of 2021** and there was the risk of contradictory decisions resulting in abuse of the court process.

50. Having looked at the application, affidavits and submissions by the parties, the following issues arise for determination:

a. Whether the instant petition is *res sub judice*;

b. Whether the instant petition is *res judicata*;

c. Whether this Petition is fit for transfer to Nairobi to be heard together with Petition E260 of 2021

51. The key ingredients of *sub judice* as provided for under **Section 6 of the Civil Procedure Act** which states:

“6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

52. A court is barred from dealing with a case that falls within these prescriptions. This is elucidated in **Joel Kenduiwo vs District Criminal Investigation Officer Nandi & 4 others [2019]eKLR** that it is an abuse of the court process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times.

53. To determine whether this petition is *sub judice* requires perusal of the prayers sought in the two petitions. It reveals the following:

1. In Petition No. **E260** of 2021, prayers (ii), (iii) and (iv) are worded as follows:

(ii) A DECLARATORY ORDER, that the action of the Respondents to disable the portal used for Application of Practicing Certificates, and halting the issuance of Supporting Documents necessary for Practice of Law, is a violation of the Petitioner's and other Legal Practitioners rights enshrined in Articles 10, 20, 21, 22, 23, 24, 25, 27, 28, 29, 35, 36, 41, 43, 46, 47, 48, 49, 50, 159, 165, 232 and 258

(iii) A DECLARATORY ORDER, that any inhibition of Advocates' right to represent their clients and disabling the Advocates' Search Engine by the Respondents contravenes the citizens' constitutional rights, under Articles 10, 22, 23, 35, 47, 48, 49, 50, 165, 232 and 258.

iv) A DECLARATORY ORDER. that the 2nd, 3rd, 4th, 5th, 6th, 7th, 7th, 8th, 10th, 11th, 12th and 13th Respondents have jointly and severally acted contrary to the Constitution and as such they are unfit to hold office within the Law Society of Kenya and any public office.

2. In the present petition, prayers b, c and e are worded as follows:

b) A declaration that all decisions and resolutions made by the Special General Meeting convened on the 26th day of June 2021 are unconstitutional and in violation of the rights and freedoms of the Petitioners under Article 25 (c), 28, (1), 47, 48 and 3Q(1) the Constitution of Kenya, 2010;

c) AS AN ALTERNATIVE TO prayer (b) above, a declaration that Resolution no 6, 10 and 11 as made by Special General Meeting convened on the 26th day of June 2021 are unconstitutional and in violation of the rights and freedoms of the Petitioner under Article 25 (c), 28, 36 (1), 47, 48 and 50 (1) of the Constitution of Kenya, 2010.

e) A declaration that the 1st Respondent is unfit to hold the office of the President of the Law Society of Kenya or any public office within Kenya.

54. The sameness of the prayers is there to see but in particular the fact that the court will be required to consider constitutional issues arising out of the actions of some of the respondents.

55. On the same issue of *sub judice*, the two Petitions are brought under more or less the same provisions of the Constitution *inter alia* **Articles 1, 2, 3, 19, 20, 21, 22, 23, 24, 25(c) 28, 32, 36, 47, 48, 50(1), 159, 165(3)(d), 258, 259 the Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013, and the Fair Administrative Action, 2015.**

56. With regard to the parties, they may appear different on the face of the pleadings but consideration of who they represent brings them into the purview the prescription given by **Section 6 of the Civil Procedure Act: of between parties under whom they or any of them claim.**

57. As regards time, the **Petition E260 of 2021** was filed before the instant Petition. Hence as at the time the Petitioners were filing the current Petition they were aware of its contents, and in particular the 1st Petitioner who is a petitioner in the first Petition. He ought to have placed all his issues in that one at that time.

58. Considering the main argument against this ground that this is indeed a different cause of action arising from a different set of facts; the question is how does one draw a line between the alleged grounding of 4th Respondent's services and the Special General Meeting and its resolutions? Where do you draw the line to demarcate these? How does one draw a line between the alleged violations of the Fundamental Rights and Freedoms in the Bill of Rights by the 1st 2nd , 5th to 12th Respondents in this Petition and the other earlier Petition? I think that would be splitting hairs.

59. The issue of *sub judice* and the exhaustion doctrine appear intertwined here. I will show how. The central argument of the Petitioners and even the 3rd Respondent as was evident from Mr. Ochiel's submissions was that the Petitioners had made a case for exemption. It became clear that the Petitioners key issue was to ensure that these matters did not get to arbitration due the prevailing circumstances in the management of the 4th Respondent as they would not allow that arbitration to take place, and if it did, it would not produce an effective remedy.

60. This was clear from the letter addressed to Deputy Registrar High Court of Kenya at Nakuru and brought to my attention during the pendency of this Ruling. I found it prudent to mention it here. The letter is dated 23rd August 2021 from the firm of Odundo Odhiambo Advocates. It is indicated that all parties were copied vide their respective emails. The letter is written to disclose that the Ruling in **E260 of 2021** was delivered by the Hon. Justice Mrima on the 19th August 2021. Annexed to the letter was the **Ruling no. 2 - Nairobi High Court Constitutional Petition no. E260 of 2021, Mrima J.** The letter is headed:

Nakuru Constitutional Petition E017 of 2021

Collins Odundo Odhiambo & Another vs Nelson Andayi Havi & Others

Duty to Disclose as an Advocate of the Court

61. The author who is the 1st Petitioner states that the purpose of the letter is not to open the matter for another hearing but rather to disclose to this court, so as to avoid any conflict and overlapping decisions from court of concurrent jurisdictions. Counsel points out in the letter that during the hearing of the application *inter partes*, parties submitted that the Ruling in would have an impact on the outcome of this matter. WHY? Because **both courts were called upon to adjudicate on similar questions of the law, to wit, the exhaustion doctrine, and the jurisdiction of court in the face of ouster arbitral provisions under Regulations 95 and 96 of the Law Society of Kenya (General) Regulations 2020.** He proceeds to cite **paragraphs 38 to 40 of the Ruling** where the Judge stated:

“38. The issues raised in the petition are of serious nature. They call for the interpretation of the Constitution, determination as to whether the Constitution is breached, whether the rights and fundamental Freedoms in the Bill of Rights have been violated, denied, infringed or threatened and whether the Respondents ought to hold any public office. Such issues transcend the purview of an arbitrator. There is no doubt the arbitrator (s) will have no jurisdiction over the issues raised in the Petition. The issues in the Petition are those contemplated under article 165 (3) of the Constitution to be within the exclusive Jurisdiction of the High Court.

39 The Court hence satisfied that the Petition primarily seeks to enforce fundamental rights and freedoms and it is not demonstrated that the claimed constitutional violations are mere ‘bootstraps’ or merely framed in Bill of Rights language as a pretext to gain entry to the court.

40. The Petition is therefore not barred by the doctrine of exhaustion.”

62. Reading through the ruling raised a sense of *deja vu*, not because I had made a similar decision but because it became evident the issues raised therein are issues raised herein as well. While I am not bound by his decision I do agree with him because in that Petition as it is in this Petition the key issue is whether or not the circumstances require the Petitioners to first exhaust the alternative dispute resolution mechanism available to them. In my considered view the Ruling has settled that issue. This is because just like in that Petition, the Petitioners herein cite violations of fundamental rights and freedoms occasioned by the Respondents in a variety of ways. These are the weighty matters that the Petitioners have earnestly urged this court to take Jurisdiction and deal with in the interests of justice. These are the same matters that are before *Justice Mrima*. All the others are sub issues flowing from that to be determined in that Petition. To my mind that means the Petitioners ought to have had that in mind while filing this Petition. From the tone of the letter it is clear that they are satisfied with the court's finding on the exhaustion doctrine. The question to pose to them is why they would file two Petitions the (10) days apart asking two different judges to determine the same issues? Reeks of forum shopping hoping seeking a favourable outcome. If that be the case, it is something we in the justice system ought to frown upon, to refrain from, to save ours and judicial time, and to have matters dealt with in one forum so we can apply all our energies there for the best out in the interests of justice.

63. The contents of the letter are further evidence that the matters herein are *sub judice* **Petition E 260 of 2021.**

64. On the issue of *res judicata*, this doctrine has found statutory expression under **Section 7 of the Civil Procedure Act** as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

65. It was argued that this Petition is *res judicata* in particular *vis a vis* **E 1146 of 2021**. I have perused the decision in **E1146 of 2021** made on 7th May 2021. The *ex parte* Applicant’s Notice of Motion application dated 7th December, 2020 was found to have been incompetently filed before the Judicial Review Court and was struck out. That cannot be said to have determined the issues therein conclusively.

66. In the Ruling the dispute that was before the court, regarding the procedure for convening 4th respondents general meetings by the 1st Respondent was referred to arbitration in accordance with the provisions of **Regulation 96 of the Law Society of Kenya (General) Regulations**. In addition the stay and suspension orders against the holding of the meetings granted herein on 3rd December 2020 were vacated. That issue was not determined. In arriving at that disposition the learned Judge stated:

“50. I am persuaded by and in agreement with the holdings in the foregoing. It is in this regard not in contest that the dispute herein principally involves the *ex parte* Applicant as a member of the 3rd Respondent and some members of the 3rd Respondent’s Council on one side; and the 1st Respondent who is a member and President of the 3rd Respondent, and some its Council members on the other side; as regards the convening of the Special General Meeting of the 3rd Respondent. It is thus a dispute involving members of the Law Society of Kenya qua members, and also in relation to actions of its President and Council members.

51. In addition, the Law Society of Kenya Act in section 16 provides that the general meetings are the supreme authority of the Society, which shall approve all resolutions and important decisions of the Society. A dispute as regards the convening of a general meeting is therefore one that touches on the management of the 3rd Respondent, as well as the rights of its members in this regard, and is amenable to arbitration pursuant to Regulation 95 of the Law Society (General) Regulations. Regulation 95 also provides that parties to such a dispute may attempt to reach settlement by negotiation; conciliation; or mediation.

52. The *ex parte* Applicant has urged that this case ought to be exempted from the alternative dispute resolution mechanisms owing to the circumstance of this case and the level of public interest involved. **The *ex parte* Applicant did not however particularise, nor explain how and why the circumstances of this case and the public interested qualify it from exemption from the proceedings provided.**

53. It is my view that it is in the public interest that the members of the 3rd Respondent be given the opportunity to resolve the apparent differences amongst themselves using all laid down procedures, before seeking the intervention of this Court. **In this respect it is notable that in the event that the available alternative mechanisms are not utilized or are not efficient and effective, aggrieved parties still have recourse to the Courts... (Emphasis added)”**

67. From the foregoing it is clear that the dispute placed before the court in **E 1146 of 2020** was a dispute involving members of the Law Society of Kenya as members, and also in relation to actions of its President and Council members on the convening of the Special General Meeting. The question is whether that is the same issue before this court to warrant the application of the doctrine of *res judicata*. Having considered the same it is my view the Petitioners are right. The issue raised by the *ex parte* applicant was not conclusively determined but was referred for arbitration, something that the parties never took up. The meeting of 26th June 2021 was not in issue. The manner in which it was conducted, the resolutions made were not in issue. What is clear is that since that matter was determined the circumstances changed, and that decision is not a bar to the Petitioners to bring this petition. In any event from the goings on within the 4th respondent it is doubtful that the arbitration would work. But more importantly there is now the ensuing alleged violation of fundamental rights of the petitioners and some of the interested parties, matters outside the jurisdiction of the arbitrator.

68. Going by the **Civil Procedure Act**, and case law this petition is not *res judicata*.

69. That brings us to the final question whether this Petition ought to be transferred to be heard together with **Nairobi Petition E260 of 2021**. I have in the foregoing demonstrated that I am persuaded the matters herein are *sub judice* the matters in **Nairobi Constitutional Petition No E260 of 2021, Akusala A Boniface & Collins Odhiambo Odundo vs Nelson Andayi Havi & others**. I am persuaded and in agreement with the Ruling and findings of *Justice Mrima* that the issues raised in that petition are the issues contemplated by Constitution to be within the Jurisdiction of this court.

70. The learned Judge by his holding, has as the Petitioners put it *clothed himself with the jurisdiction to deal with those issues*. I am certain that the both petitions address constitutional issues arising from the affairs of the 4th Respondent following the Special General Meeting of 26th June 2021. I have already expressed myself on the propriety of us in the justice system using our resources well in the interests of justice. It would be prudent to transfer the matter to Nairobi. But, I read in one of the depositions that the application to transfer this case to Nairobi was an insult to this court sitting in Nakuru. That the application seeking the transfer suggested that that Nairobi City County holds first class High Courts and this court is second class. Counsel also deponed that he was based at Nakuru.

71. I must point out that I found that deposition to be misplaced, and misdirected. First, I do not know how an application to transfer a case can be considered an insult to the court. While it was evident that there was some acrimony lurking in the air during the *inter partes* hearing, it was not proper for an officer of the court to attempt to bring the court to that fight. If anything it is that deposition that is an insult to the court as it is not intended to address the legal mind of the court but to draw the court into the arena of conflict. *Hakuna siku*. In any event as the people to whom Wanjiku looks upon to protect our ideal of justice, as held in our Constitution, we are bound to always remember that how we deal with disputes among us may destroy any confidence that the Wanjiku may have in us. Decorum even in the language of drafting. All I am saying is that an application for transfer of a matter from a court to another cannot be opposed on the ground that it is an insult to the court merely because the transfer sought is to a court of concurrent jurisdiction.

72. Secondly, our Constitution speaks. It seems like we do not hear. At **Article 165** it says that ;

“(1) There is established **the High Court**, which

— (a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution; Const2010 Constitution of Kenya,

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191; and (e) any other jurisdiction, original or appellate, conferred on it by legislation.”

73. The High Court has an administrative system that has resulted its locus in almost all the Counties in Kenya. There is no provision for a classes of courts within the High Court. *Hio sijaiona kwa Katiba yetu*. In any event there are legal provisions on the transfer of cases, because there are times when that becomes necessary. There is no room for this court to consider it an insult when party asks for the transfer of a case. The duty of the court would be to hear the party and determine whether that case fits into the requirements for that transfer in other words whether the application is merited

74. In this case it is clear to my mind that no prejudice will be occasioned to the Petitioners herein if this matter is transferred to Nairobi to be heard together with **E260 of 2021**. It will save the court from further abuse of the process of court, and judicial time. We shall avoid possible embarrassing conflicting decisions.

75. In the upshot I find therefore that the application dated 18th July 2021 is partially merited; that the Petition herein is *sub judice* **Nairobi High Court Petition No.E260 of 2021**: the Petition herein is not *Res Judicata* **HCJR E1146 of 2021**.

76. In view of my findings I allow the applicants’ prayer to have the Petition transferred to Nairobi to be heard together with **E260 of 2021**.

77. Each party to bear its own costs.

78. Orders Accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF SEPTEMBER, 2021

MUMBUA T MATHEKA

JUDGE

In the presence of:-

Court Assitant Edna

Mr. Havi for the Applicants/all Respondents except 3rd Respondent

Mr. Koigi and Mr. Odundo for the Petitioners/Respondents

Mr. Mwalimu for the 9th to 16th Interested Parties

Mr. Ondieki for 19th Interested Party

N/A for the 1st to 8th, 17th, 18th, 20th and 21st Interested Parties