REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. E018 OF 2021

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAW SOCIETY OF KENYA ACT NO. 21 OF 2014

AND

IN THE MATTER OF THE LAW SOCIETY OF KENYA GENERAL REGULATIONS, L.N 32/2020

BETWEEN

JAMLIC MURIITHI……..……..…PETITIONER/APPLICANT

VERSUS

THE LAW SOCIETY OF KENYA……...…….…….....1ST RESPONDENT

THE LAW SOCIETY OF KENYA

BRANCH CHAIRS CAUCUS……..2ND RESPONDENT

AND

MATHEW NYABENA……..…1ST INTERESTED PARTY

ERIC THEURI……..2ND INTERESTED PARTY

LINDA KIOME……...……3RD INTERESTED PARTY

JUSTUS MUTIA……..……..4TH INTERESTED PARTY

JOSHUA MARITIM……5TH INTERESTED PARTY

SUSSY RAUTTO……..6TH INTERESTED PARTY

WILKINS OCHOKI……7TH INTERESTED PARTY

OCHANG AJIGO……8TH INTERESTED PARTY

RULING

1. This is a Ruling on two applications by Petitioner, one dated 25th August 2021, seeking interim conservatory orders and the other dated 31st August 2021 which is a contempt of Court application seeking to cite the 2nd Respondent and the Interested Parties for contempt of Court and a preliminary objection dated 6th September 2021 to the said applications and the Petition by the Interested Parties.

2. This matter primarily concerns the Petitioner's challenge to the Law Society of Kenya's Special General Meeting which was scheduled for 27th August 2021 for reasons of non-compliance with both procedural and substantive matters. The main statute alleged to have been violated for the procedural aspects are the Law Society of Kenya Act and the Law Society of Kenya Regulations with respect to the calling of, the convening of and the presiding over the meeting. The substantive issues relate to the agendas proposed for the Special General Meeting which are objected to as being *sub judice* and not proper items for deliberation in the Special General Meeting.

The Petitioner's Applications

Application dated 25th August 2021

3. In his application dated 25th August 2021, the Petitioner seeks the following orders: -

> ***i. Spent***
>
> ***ii. Spent***
>
> ***iii. That pending the hearing and determination of this Application inter partes, a conservatory order be and is hereby issued suspending/staying Agenda number 2 and 3 to be discussed at the Special General Meeting scheduled for the 27th day of August, 2021 to the effect that motion for the appointment of a chairperson to conduct the affairs of the proposed Special General Meeting is hereby suspended from the list of the Agenda items to be discussed on the 27th August, 2021.***
>
> ***iv. That pending the hearing and determination of this Application inter partes, a conservatory order be and is hereby issued staying the Law Society of Kenya Special General Meeting scheduled for the 27th day of August, 2021.***
>
> ***v. That pending the hearing, determination and final disposal of this Petition, an order be and is hereby issued that the President of the Law Society of Kenya is the Chair mandated to preside over all the meetings of the 1st Respondent and in his absence, the Vice President to be considered pursuant to Section 78 of the Law Society of Kenya Act, No. 21 of 2014.***
>
> ***vi. That the costs of this application be borne by the Respondent.***

4. The application was supported by the grounds on the face of it and by the Petitioner's supporting affidavit sworn on 25th August 2021. He urges that on 29th June 2021, the Law Society of Kenya Branch Chairs Caucus submitted the Special General Meeting requisition notice to the LSK and that a letter dated 16th August 2021, they notified the LSK that the Special General Meeting had been scheduled for 27th August 2021. He urges that the CEO of the 1st Respondent, who is on compulsory leave circulated notice to the 1st Respondent's members by email on 20th August 2021 purporting to schedule the Special General Meeting on 27th August 2021. He urges that this email notification sent by the CEO was done in utter disregard of the laws affecting the operations of the LSK secretariat. He urges that the President of the LSK on 23rd August 2021 wrote to members raising the substantive and procedural issues that had been flouted by the branch chairs and the CEO.

5. He urges that Section 31 (1) of the Law Society of Kenya Act permits requisition of an SGM by members of the LSK and there is no provision for branch chairs to requisition for an SGM. He urges that Agenda No. 2 of the meeting which proposes to have the presiding chair to be appointed outside the Council members is contrary to Section 16 (6) and (7) of the Act. He urges that the only persons permitted to preside over LSK's meetings are the President, and in his absence the Vice President, and in her absence a Council member nominated by the Council. He urges that both the President and the Vice President have not been removed from office and that an ad hoc Council was legally appointed at the SGM held on 26th June 2021 thus the Council is fully constituted.

6. He further urges that most of the Agenda for the meeting are *sub judice* and cannot be discussed including the following: -

> *i. The agenda that a signatory to the society's accounts be appointed from one of the Council members or any other person which issue is pending in Court in Nakuru Petition No. E017 of 221 Collins Odhiambo Odundo & Another vs Nelson Havi & Others following the appointment of Dr. Maxwel Miyawa and Clarise Mmbone as signatories in the SGM held on 26th June 2021.*
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> *ii. The agenda that a date be fixed for election of LSK Female Representative to the JSC, Election of members of the LSK Advocates Disciplinary Committee and Election of Council member representing advocates of over 25 years the resolutions of which were made in the SGM of 18th January 2021 and was challenged in Nairobi Petition No. E025 of 2021 Adrian Kamotho vs LSK & Others.*
>
> *iii. The issue on payment of Branch Devolution Funds which is also pending before the Court and is awaiting determination in Nairobi C & A CC No. E0662 of 2021.*

7. He urges that unless the impugned SGM is stayed, then there is risk of several parties proceeding to Court to challenge any resolutions that will emanate from the meeting and this will make the 1st Respondent incur heavy financial costs in defending the claims. He urges that it is in the interests of the Rule of Law that the 1st Respondent's council, being legally constituted, be allowed to conduct and preside over the SGM.

The Application dated 31st August 2021

8. In his Application dated 31st August 2021, the Petitioner seeks the following orders: -

> ***i. Spent***
>
> ***ii. That an order be and is hereby issued by this Honourable Court against the 2nd Respondent and the 1st to 8th Interested Parties to show cause why they should not be held in contempt of Court orders for disobedience of the orders issued by this Honourable Court on the 26th day of August, 2021 by Hon. Justice Jesse Njagi in this matter and particularly Order Number 3 therein.***
>
> ***iii. That an order be and is hereby issued citing the 2nd Respondent and the 1st to 8th Interested Parties for being in contempt of Court orders issued by this Honourable Court on the 26th day of August 2021 by Hon. Justice Jesse Njagi in this matter.***
>
> ***iv. That an order be and is hereby issued by this Honourable Court against the 2nd Respondent and the 1st to 8th Interested Parties committing them to civil jail for contempt for the disobedience of the court orders issued by this Honourable Court on the 26th day of August 2021 by Hon. Justice Jesse Njagi in this matter.***
>
> ***v. Any other orders that the court deems to be appropriate.***
>
> ***vi. That costs of this application be provided for.***

9. His application is supported by the grounds set out in the notice of motion and on his supporting affidavit sworn on even date. He highlights the *ex parte* orders that the Court issued on 26th August 2021 as follows: -

> ***a) Pending the hearing and determination of this application, inter partes, a conservatory order be and is hereby issued suspending/staying Agenda Number 2 and 3 to be discussed at the Special General Meeting scheduled for the 27th August 2021 to the effect that the motion for the appointment of a chairperson to conduct the affairs of the proposed Special General Meeting is hereby suspended from the list of the Agenda items to be discussed on 27th August 2021; and***
>
> ***b) Pending the hearing and determination of this application inter partes, a conservatory order be and is hereby issued staying the Law Society of Kenya Special General Meeting scheduled for the 27th day of August 2021.***

10. He urges that the 2nd Respondent and the 1st to 8th Interested Parties were duly served with the said orders and the Petition together with the instant application. That on 27th August 2021, the 2nd Respondent and the 1st to 8th Interested Parties proceeded to hold the meeting chaired by the 2nd Interested Party, in violation of the court orders, particularly Order Number 3. He urges that during the said LSK SGM, the order dated 26th August 2021 was displayed and read to the attendees but the conveners, being the 2nd Respondent and the 1st to 8th Interested Parties decided to proceed with the same despite knowledge of the order.

11. He urges that the Court should grant the orders sought as failure to do so will place the Court into great disrepute in the eyes of the general public and will lead to a breach of the Rule of Law as court orders must be obeyed.

1st Respondent's Replying Affidavit

12. The 1st Respondent filed an affidavit in support of the Petitioner's applications which was sworn on 3rd September 2021 by Carolyne Kamende Daudi, the 1st Respondent's Vice President. She urges that the 2nd Respondent and the Interested Parties, being organs of the 1st Respondent under Section 15 of the Law Society of Kenya Act cannot requisition for a Special General Meeting of the 1st Respondent; that the 2nd Respondent and the Interested Parties have no power to pass the motions in the agenda contained in the notice informing the SGM on behalf of the 1st Respondent; that the agendas contained in the Notice for the SGM scheduled for 27th August 2021 is an abuse of the process on account of *sub judice.*

13. She urges that the members of the 1st Respondent in their Special General Meeting of 26th June 2021 passed resolutions and resolution 12 thereof appointed Dr. Maxwel Miyawa and Clarise Mmbone as signatories to the accounts of the Society in addition to herself. She urges *that Petition No. E017 of 2021 Collins Odhiambo Odundo & Another vs Nelson Havi & Others* which challenges the resolutions passed on 26th June 2021 is pending in Court and that the 8 branch chairs are parties to and they support the said Petition, which awaits Ruling on 27th September 2021.

14. She further urges that whereas the Special General Meeting of 26th June 2021 passed a resolution to send the Chief Executive Officer and Secretary of the Council on leave with pay, and another resolution that no communication on behalf of the 1st Respondent should be effected by the CEO/Secretary without the President's express authority, and that the President and Council of the 1st Respondent did not receive the letter dated 19th August 2021 and it did not authorize the circulation of the notification of the purported SGM in the notice sent by the CEO/Secretary by way of email to members.

15. She urges that the resolutions of members passed in the SGM held on 18th January 2021 have been challenged *through Nairobi Petition*

No. E025 of 2021 and *Nairobi JR No. E005 of 2021* and that the 8 branch chairs are parties to and support the Petition and JR Application. She urges that the issue of election of the Society's representative to the Judicial Service Commission, members of the Advocate's Disciplinary Committee, Council Members of at least 25 years standing, constitution of the Elections Board and appointment of a forensic and annual auditors are *sub judice* and that in any event, the issues can only be revisited after nine months as per Section 36 of the LSK Act.

16. She further urges that in the SGM of 26th June 2021, members resolved that an auditor be appointed by the Institute of Certified Public Accountants of Kenya (ICPAK) and that this resolution is challenged in *Nakuru Petition No. E017 of 2021* and the issue is thus *sub judice* and cannot form the agenda of an SGM.

17. She further urges that the 8 branch chairs filed *Nairobi C & A CC No. E0662 of 2021 (OS), ABA & Others v LSK & Others* seeking Ksh 38,479,900/= and Ksh 32,430,150/= respectively from the Society and the Judgement of the claim will be delivered on 16th September 2021 and the issue cannot therefore form the agenda of the SGM.

18. She urges that the Agenda for opening of accounts for devolution funds and ABA contributions; that monies held by the Society in that regard be transferred to the said accounts and further, that the accounts be operated by the representatives of the branches and the ABA is not up for deliberation because the opening and operation of accounts is an exclusive function of the Council of the 1st Respondent under Regulation 48 (1).

19. That the intended resolution for the creation of an ad hoc audit committee is not proper because Regulation 52 empowers the Council to recommend an auditor for approval by the General Meeting and that there is a challenge on the resolution passed at the AGM on 23rd July 2021 to appoint an auditor to conduct forensic audit in *Nairobi Petition No. E025 of 2021* now set for hearing on 6th October 2021.

20. She urges that the functions of the 2nd Respondent and the Interested Parties are statutory as set out under Section 24 (2) of the LSK Act and that the said section limits the powers of branch chairs to three functions first being practice within their centres, secondly is the welfare of members practicing in their centres and thirdly is informing the Council of matters affecting members within branches which require the Council's intervention. That the 2nd Respondent and the Interested Parties have no powers to call for an SGM and more so to seek to usurp the functions of the Council. That it is only the President, in his absence the Vice President and in her absence a Council Member nominated by the Council who are authorized to preside over a General Meeting and thus, the agenda proposing to elect a chairperson from outside the Council is not proper. She urges that the President and the Vice President had not been removed from office as contemplated by Section 22 of the Act and that the scheme to oust the President and Vice President through the meeting is a manifestation of the illegal premise upon which the meeting is sought to be held. She urges that the 2nd Respondent and the Interested Parties are all parties to the suits filed for or against the Society and no resolution of members is required to withdraw or compromise them as proposed by Agenda 13 of the impugned SGM.

21. She further urges that despite service of the Court order issued by this Honourable Court on 26th August 2021, the 2nd Respondent and the Interested Parties proceeded with the meeting on 27th August 2021 where the 2nd and 1st Interested Parties co-chaired the meeting.

2nd Respondent's Replying Affidavit

22. The 2nd Respondent opposed the Applicant's application for conservatory orders by the replying affidavit sworn by Mathew Nyabena, the Chairman of the Law Society of Kenya, Coast Branch and the Chairman of the 2nd Respondent, sworn on 6th September 2021. He urges cites Section 15 and Section 24 of the Law Society of Kenya and Regulation 63 (2) of the Law Society of Kenya Regulations which establishes the organs of the Society, the eight (8) branches of the Society and the caucus branch chairpersons respectively. He urges that the branches of the Law Society of Kenya are autonomous bodies from the Council of the Law Society with a distinctive mandate.

23. He urges that the Petitioner lacks locus to institute the present Petition because he does not hold a practicing certificate as required under Section 23 (2) of the Advocates Act and Section 8 of the Law Society of Kenya Act and that he is not a member of the 1st or 2nd Respondent and would not be eligible to vote at the Special General Meeting.

24. He urges further that the Petitioner has failed to lay any basis for a Constitutional Petition as he has failed to particularize precisely any right and/or freedom violated or threatened to be violated by the 2nd Respondent. He further urges that the meeting scheduled for 27th August 2021 was convened in strict adherence to the law and that Section 31 (1) of the LSK Act permits the requisitioning of an SGM by members and that this was the basis for the 2nd Respondent to embark on collection of signatures through the branches. That this exercise was commenced by a statement issued on 8th June 2021 to members of the LSK. That the members of the various branches signed the requisition for the SGM and the signatures were presented to the Secretary of the LSK on 28th June 2021. He urges that according to the Act, the Council had 14 days otherwise the requisitioners would convene the SGM.

25. He urges that the LSK's CEO had initially indicated that the SGM would be held on 30th July 2021 but later, on 26th July 2021, she communicated that although the requisitioners had met the threshold, the financial difficulties posed by failure to sign cheques by the LSK's Vice President, the Council was not in a position to host the SGM. He urges that the contention that the branch caucus cannot make a requisition is misleading and is a misinterpretation of the law because it is 883 members who made the requisition of the meeting; the law requires that at least 5% of the members of each branch must sign the requisition for the SGM; that in any event, the branch caucus chairs are members of the LSK and as such, can make a requisition of the meeting.

26. He further urges that the convening of the meeting is intended to allow members to speak on critical issues affecting their practice and welfare and that the 1st Respondent has the first right to convene the meeting but could not due to the leadership wrangles. He urges that the architecture of the Law Society Act maintains the supremacy of the members by making an express proviso that where the Council fails to call for a Special General Meeting, then the members who requisitioned can do so.

27. He urges that the LSK Act allows a Special General Meeting to be requisitioned by either the Council or the members so long as they get 5% of the members of each Branch to sign the requisition. With respect to who is to preside over the meeting, he urges that notwithstanding Section 16 of the LSK Act, the General Meeting is the Supreme organ of the Society and all leaders including the President and chairs of branches are subordinate to the General Meeting. That the members present at the SGM have the residual right to decide on who presides over the meeting. That the proposal to have a member outside Council was informed by the present wrangles and leadership contests. He urges that the members of the society find themselves in peculiar and exceptional circumstances where the Council is split and the Secretariat is compromised hence it is reasonable to anticipate that holding a successful meeting in such a hostile environment is highly unlikely unless presided over by a neutral person. That the issue of who attends and who presides can only be known once the meeting is convened.

28. He further urges that the rationale for setting an agenda is to give notice of the items to be discussed in a meeting and those agenda items are not binding until when voted upon and for this reason the proposal to have someone else elected is just a proposal and cannot be the basis to stop a meeting as it does not amount to removal of a President, Vice President of the Council Members.

29. He further urges that on 26th June 2021, the LSK President presided over a Special General Meeting wherein the Petition alongside some other Advocates were appointed as 'Caretaker Council Members' which creation is not sanctioned by the LSK Act and the LSK Regulations and that this happened despite court orders issued in ***Nairobi Petition No. E025 of 2021 Adrian Kamotho vs LSK & Others*** barring the removal of council members. That the uncertainty on who are the council members and the instant Petition is a demonstration of the leadership wrangles faced in the LSK. He urges that it is impossible to separate the Petitioner from the 1st Respondent and this demonstrates the mischief and abuse of Court process. He urges that the main complaint in the Petition is 'the imaginary removal' of the President and Vice President on the basis of a proposal in the agenda that they should not chair the meeting and that this is not a matter that the Court can decide on but is for the members to decide. He urges that the Petitioner had misled the Court by suggesting that the Agenda of the meeting is *sub judice* without providing any evidence of the same. He urges that the Special General Meeting is a form of Alternative Dispute Resolution allowing members to for a position on strategy to be adopted in pending litigation including a resolution to compromise, withdraw or undertake alternative dispute resolution. He urges that the agenda to be discussed in the SGM are on issues that directly affect the members and that it would be a great injustice to have members of the 2nd Respondent be prevented from proceeding with a meeting properly convened which seeks to resolve an impasse that is affecting the practice and ability of Advocates to earn a living.

1st to 8th Interested Parties' Case

30. The 1st to 8th Interested Parties opposed the applications by way of a Notice of Preliminary Objection dated 6th September 2021 and the Grounds of Opposition of event date. They urge that the filing of the matter at Meru High Court was an abuse of court process and was a case of forum shopping because Meru is far from Eldoret where the Petitioner works and resides and that Meru is far from Nairobi where both Respondents host their secretariats where the cause of action arose and where the meeting was to be held.

31. Citing the case of ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others (2014) e,KLR,*** they further urge that the application has not met the threshold for grant of conservatory orders requiring that the Petitioner shows that his Petition is arguable; that it would be rendered nugatory in the absence of conservatory orders; and that the public interest demands the orders.

32. They urge that the Petition and application are defective and that the Court is divested of jurisdiction under the doctrine of exhaustion of alternative remedies because Section 9 of the Fair Administrative Action Act which is a normative derivative of Article 47 of the Constitution demands that the Court rejects a case where a party has not exhausted an internal remedy unless the party, citing exceptional circumstances applies and is exempted under the Act. They cite the case of ***Republic vs J P Maiywo & 2 Others ex parte Humphrey Nguma Macharia & Another (2019) eKLR***. They urge that Regulation 95 and 96 of the Law Society of Kenya (General) Regulations 2020 require mandatory arbitration of Society disputes. They cite several other cases where the Court dismissed Petitions involving the Law Society of Kenya as a party for failure to exhaust internal remedies. These include ***Nelson Andayi Havi v Law Society of Kenya & 3 Others (2018) eKLR, Majimbo Georgiadis v Law Society of Kenya, Nairobi Branch & 11 Others (2018) eKLR, Mark Ndumia vs Law Society of Kenya & 20 Others, Petition No. 94 of 2019 consolidated with Kimani Waweru & Another v Law Society of Kenya & 7 Others, Jennifer Shamalla v Law Society of Kenya & 15 Others.***

33. They urge that the Petition fails the test of precision per the Anarita case and does not raise a single arguable constitutional issue. They urge that the Petitioner has withheld all particulars of constitutional violation, mentioning constitution only once in its headings. They urge that the Respondents and branch chairs do not know what constitutional ills they are required to respond to in this opaque, vague and imprecise petition.

34. The finally urge that the contempt of Court application was filed in jest. They urge that the application rests solely on screenshots which have been carefully edited to conceal the participation of the Petitioner who spoke severally at the meeting and that no certificate of authenticity accompanies the screenshot, contrary to the Evidence Act. They cite the case of ***Jack & Jill Supermarket Limited v Viktar Maina Ngunjiri (2016) eKLR*** for the holding that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of Section 106 B (4). They further urge that while contempt is quasi criminal and the threshold for proof of contempt is quite high, the Petitioner does not demonstrate what order was disobeyed and how. They urge that though the Petitioner spoke extensively at the meeting, he conceals this fact and does not disclose, if any, what agenda was read, motion moved or resolution passed in violation of the court order. That the Petitioner has not supplied any audio, video or text transcript of the meeting and he does not explain his failure to do so. They urge that by concealing the fact of his extensive participation at the meeting from Court, the Petitioner is trying to use the contempt application for personal vindictive ends as opposed to preserving the dignity of the Court.

35. In their Grounds of Opposition, they urge that the application is fatally incompetent and incurably defective; that the applications are pre-mature, misconceived, bad in law and abuse of court process; that the application lacks merit; that the Special General Meeting never took off thus all the interested parties fully complied with the orders of this Court and that the Members were duly informed that a court order had been issued by the Court and therefore the SGM could not proceed; that the cited contempt does not meet the test for when disobedience of a civil order constitutes contempt since none of the interested parties called to order any of the agenda of the Special General Meeting; that the Court does not have territorial jurisdiction to hear and determine the applications.

Issues for Determination

36. The applications before the Court bring out three main issues for determination: -

> ***i. Whether the Court has jurisdiction to entertain the Petition.***
>
> ***ii. Whether the Petition meets the threshold required in bringing constitutional petitions.***
>
> ***iii. Where the 2nd Respondent and the Interested Parties are in contempt of Court orders.***
>
> ***iv. Whether the Court should issue the conservatory orders sought.***

Whether the Court has jurisdiction to entertain the Petition

37. The 2nd Respondent and the Interested Parties have raised a challenge on the jurisdiction of this Court to entertain the Petition. The contestations on the Court's jurisdiction are hinged on 4 main assertions. Firstly, that the Petitioner lacks locus, that he is guilty of forum shopping; secondly, that the Petition offends the principle of exhaustion of remedies; and thirdly, that the Petition has not met the threshold for constitutional claims as per the Anarita case.

Locus of the Petitioner to bring the Petition

38. The 2nd Respondent and the Interested Parties assert that the Petitioner lacks locus standi to bring the Petition because he has not taken out a current practicing certificate. This Court finds that the expanded rules on locus standi under Article 22 (2) (c) for a person acting in the public interest would cover his Petition if it be a constitutional petition under Article 22 and 258 (2) (c)of the Constitution.

Forum Shopping

39. The 2nd Respondent and the Petitioner urge that the Petitioner is guilty of forum shopping for having filed his Petition in Meru whilst he himself works and resides in Eldoret, whilst the Respondents' Secretariats are both hosted in Nairobi and whilst the cause of action arose in Nairobi, where the intended meeting was to be hosted.

40. This Court has considered this issue and observes that the Constitutional Petition involves parties who are based all over the country including the Mt. Kenya region where the Meru High Court is based. This Court is of the view, that the matter, filed as a constitutional petition can indeed be heard by any High Court in the country. This Court considers that the nature of claims urged in constitutional issues which touch on the inherent rights under the Bill of Rights, the same are not strictly bound by the civil procedure rules that apply with respect to place of filing suits. The Court also considers the generality of Article 165 (3) (b) of the Constitution which gives the High Court jurisdiction to determine matters where violation of rights in the Bill of Rights has been claimed.

Exhaustion of Alternative Remedies

41. The 2nd Respondent and the Interested Parties urge that the Petition offends the doctrine of exhaustion of remedies pursuant to the provisions of Regulation 95 and 96 of the LSK Regulations. The principle of exhaustion of remedies was discussed in the Court of Appeal case of ***Speaker of National Assembly vs Njenga Karume, Civil Application No. NAI 92 of 1992 eKLR*** where Kwach, Cockar & Muli JJA held as follows: -

> ***"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."***

42. The 2nd Respondent and Interested Parties urge that the matter ought to have been lodged for arbitration. Regulation 95 and 96 of the LSK Regulations provide as follows: -

95. Negotiation, conciliation & mediation

> ***1) Parties to a dispute referred to in regulation 96 (1) may attempt to reach settlement by-***
>
> ***a) Negotiation;***
>
> ***b) Conciliation; or***
>
> ***c) Mediation.***
>
> ***2) The procedure for negotiation, conciliation or mediation shall be simple and the process shall be guided by the international best practices or any law for the time being regulating negotiation, conciliation and mediation.***
>
> ***3) A decision or settlement by the use of any of the methods under paragraphs (a), (b) or (c) of sub-regulation (1) shall be***

concluded within 28 days from the date of lodging the dispute.

4) A decision or settlement by the use of any of the methods under paragraphs (a), (b) or (c) of sub-regulation (1) shall immediately be filed with the secretary and shall, subject to the Act and these Regulations, be binding on the parties to the dispute.

96. Arbitration

1) Where a dispute arises-

a) Relating to the exercise of the mandate or the management of the affairs of the Society, a branch or a chapter; or

b) Relating to the rights of a member against any other members or the Council, branch executive or chapter committee, the aggrieved party shall-

i) refer the dispute in writing to the secretary, where the dispute concerns the national office of the Society.

ii) refer the dispute in writing to the branch secretary of the relevant branch where the dispute involves an issue or a party at the branch level.

2) A dispute may exist between or amongst one or more of the parties listed in sub-regulation (1).

3) Where a dispute has been lodged with a branch secretary and the dispute cannot be resolved within 30 days, the branch secretary shall, within 7 days, forward the dispute to the secretary and the procedure for hearing and disposal of the dispute provided under this regulation shall thereafter apply.

4) The secretary or a branch secretary shall, within 14 days upon receiving notification of a dispute from an aggrieved party, or upon the secretary receiving notification of a dispute from a branch under sub regulation (3), refer the dispute to an arbitrator or arbitrators appointed by the parties to such dispute for determination.

5) The number of arbitrators so appointed shall not, in relation to any one dispute, exceed three persons.

6) Where a dispute is between-

a) a member and another member; or

b) a member and a branch executive or chapter committee, and the parties to the dispute cannot agree on an arbitrator within 14 days, the president shall appoint an arbitrator to hear and determine the dispute

7) Where a dispute involves-

a) the Council; or

b) a member of the Council, and any other party, and the parties cannot agree on an arbitrator within 14 days of lodging of the dispute, the arbitrator shall be appointed by the Chairperson of the Chartered Institute of Arbitrators, Kenya Chapter.

8) The arbitrator or arbitrators shall hear and determine a dispute in accordance with the law for the time being regulating arbitration, and the decision shall be final and binding on all parties to such dispute.

9) The time provided under this regulation for lodging or taking other step in dispute resolution process is subject to regulation 45 where the dispute concerns elections.

43. The matter herein involves a dispute between a member of the LSK, the LSK itself, the LSK Branch Chairs caucus and the Chairs of the various branches. All these persons are directly affiliated to the LSK by virtue of their membership and institutional roles played under the LSK Act. They all fall under the category of persons contemplated under Regulation 95 and 96. The matter is also a dispute involving the exercise of the mandate of the affairs of the Society which is the dispute contemplated by Regulation 96 (1). The specific affairs in question have both procedural and substantive elements. The procedural affairs involve the requisition for a meeting, the convening of a meeting and the presiding over of a meeting. The substantive issues involve the question of what agendas may be up for deliberation and what is not up for deliberation in the said meetings by virtue of them being *sub judice*.

44. The provisions of Regulation 95 providing for mediation, negotiation and conciliation are couched in suggestive terms by use of the term 'may.' The provisions of Regulation 96 are however couched in mandatory terms, employing the use of the word 'shall.' It is therefore clear that the Petitioner should have utilized the avenue of arbitration through the Secretary of the LSK as provided for under the Regulation 96.

45. The question to ask however is whether compliance with this requirement was feasible in the circumstances of the case. As correctly pointed out by the 2nd Respondent and Interested Parties, it is permissible for an applicant to apply to be exempted from pursuing the primary statutory avenue for redress. The instances when a party may be permitted to explore other secondary avenues were outlined in the case of

Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others, Judicila Review No. 378 of 2017 [2017] eKLR where J. Ngugi, G. V. Odunga & J. M. Mativo JJ held as follows: -

> ***"46. What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it."***

46. In the case of ***Adrian Kamotho Njenga vs Law Society of Kenya & 14 Others, Nairobi Petition No. E025 of 2021,*** W. Korir J, in considering the impracticability of requiring a party to pursue arbitration in strict compliance of Regulation 96 of the Law Society of Kenya Regulations held as follows: -

> ***"I am therefore in agreement with the Petitioner that the alternative dispute resolution mechanism provided by Regulation 96 is, in the circumstances of this case, impracticable and unattainable. The provisions of Article 159 (2) (c) of the Constitution, including Article 48 which protects the right to justice. If the consequence of asking a party to follow the statutory dispute resolution mechanism will result in the party not being heard, then the party should be allowed to pursue the case in court so that the right to access justice is not curtailed."***

47. In the present case, the Court has considered that the impugned SGM meeting was scheduled for 27th August 2021, only two days succeeding the filing of the instant Petition. The email sent out by the CEO notifying members of the meeting was done on 20th August 2021 just but seven days to the meeting. This Court also considers that as per Regulation 96, upon notification to the secretary of the existence of the dispute, attempts to solve the dispute are expected to be done and even after this, the Secretary has fourteen days to forward the dispute to an arbitrator. Taking into account the time constraints that would result by reason of following the strict procedure under Regulation 96, and the fact that the referral of the dispute ought to have been done through the secretary (said to be on compulsory leave), this Court finds that the alternative dispute resolution mechanism provided for under Regulation 96 would be difficult to achieve and in any event, not serve the purpose of challenging the holding of the SGM which action was time bound. This Court is alive to the fact that in judicial as well as quasi-judicial actions time is of the essence and this is the rationale behind the maxim that justice delayed is justice denied. It is therefore not outrageous that the Petitioner opted to come to Court instead of invoking the procedure as per Regulation 95. This Court is however aware of the rules on arbitration permitting an applicant to file an application seeking interim measure of protection before or during arbitration as per Section 7 of the Arbitration Act, and this would have been the best course for the Petitioner if arbitration was the proper forum. The matter is however already in Court as a Petition and further, this Court observes that the Petition seeks judicial review orders which can only be given by the High Court. In addition, going by the supervisory function of the High Court pursuant to the provisions of Article 165 (6) and (7) of the Constitution, this Court finds that the Petitioner has a right to approach the Court for judicial review orders.

48. Finally, this Court finds that one of the factors to be considered in analyzing whether an exception to the general rule lies is in looking at the consequences of requiring a party to strictly follow the statutory procedures. In this Court's view, in order to balance the objectives of the principle with the constitutional rights of parties to access justice, this Court is inclined to find that the circumstances of the case require an exception to the rule requiring exhaustion of alternative dispute resolution. The Court has also considered the leadership wrangles that are currently ongoing in the 1st Respondent, thus making it difficult to arrive at consensus on crucial administrative matters. This Court thus finds that despite him not having formally applied for exemption as required under Section 9 (4) of the Fair Administrative Actions Act, and all other factors constant, the Petitioner has met the threshold for exemption from the need to comply with the requirement under the doctrine of exhaustion.

Whether the Petition meets the threshold required in bringing constitutional petitions.

49. The 2nd Respondent and the Interested Parties urge that the Petition does not meet the threshold required in constitutional claims. It was argued by the Petitioner and the 1st Respondent that a determination on whether the test has been met can only be made at the close of the matter after hearing the Petition. This Court does not agree with these submissions because waiting to determine whether the test has been met at the conclusion of the matter would defeat the essence of the rule as the Court will have already gone into the merits of the case despite whereas the rule is intended to bar a determination of the case on merits if the test has not been met. This Court does not also agree with the submissions by the 1st Respondent that the import of the decision in the case of ***Leisure Lodges Ltd vs Commissioner of Lands and 767 Others (2016) eKLR*** was to the effect that a determination on whether a Petition had met the threshold could only be made after the hearing.

50. This Court finds that a determination on this issue requires a plain reading of the pleadings which have already on record and it is therefore possible to discern whether the test has been met at this early stage. This is in tandem with the principles underlying preliminary objections as per the *locus classicus* case of ***Mukisa Biscuit Company v Westend Distributor Limited (1969) EA 696*** as follows: -

> ***"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

51. A contestation on the manner of pleadings within the context of the Anarita test is therefore, by all means, a preliminary objection which is to be determined at the earliest stage possible. In the case of ***Anarita Karimi Njeru v The Republic (No.1) (1979) eKLR***, Trevelyan & Hancoxx JJ held as follows: -

> ***"If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he***

complaints, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

52. This Court has set out its appreciation of the principle in Anarita case in the case of ***Bryson Mangla v. Attorney General & Others, Nairobi HC Petition No. 284 of 2016,*** as follows: -

"***Particularity of pleading constitutional cases***

The requirement of setting out with specificity the particulars of the petitioner's complaint under the Bill of Rights and other constitutional litigation (and indeed any pleading before the court) is a requirement of common sense that a claimant's case should be clear and elaborate to enable the respondent know the case it has to meet and the court the question it will be asked to determine. Pleadings should not leave the Court guessing the case before it, as the court in Anerita Karimi Njeru, supra, did or the respondent the case he has to answer.

The context of the oft-cited holding of the High Court (Travelyan J. and Hancox, JJ.) in Anerita Karimi Njeru v. Republic (No. 1) (1979) KLR 154, 156 gives the background and motivation of the directions for precision in pleading constitutional infringement cases, which is applicable to all litigation:

> ***"On the morning of the commencement of the hearing before this Court Mr Muttu representing the Republic raised a preliminary objection. After hearing it, we then invited Mr Mwirichia to give us further and better particulars of precisely that which he is alleging under the second head of his complaint, that is to say that the applicant was not given facilities to procure the attendance of witnesses other than Mr Mase. In the event he did not do so; and in our opinion he could not validly do so, for he is on record as having said to the magistrate, after he had returned to conduct the applicant's defence, that the only evidence the defence wished to call was that of Mr Mase. Accordingly, in our view, the only complaint that can lie of an alleged refusal to afford the defence such facilities (and we accept that this means "reasonable facilities" under section 77(2) (e) of the Constitution) is as respects Mr Mase. We mention that we also sought to be enlightened as to which of the paragraphs of section 77 of the Constitution were thereby alleged to have been infringed, and Mr Mwirichia referred to his list of authorities (filed on to the day preceding the hearing) which mentioned both paragraphs (c) and (e) of subsection (2) of that section. This was a rather curious manner of bringing a statutory provision to the notice of a court of law, but, at all events, we were prepared to permit Mr Mwirichia to develop his arguments under both paragraphs. In the event, on the second day of the hearing before us, Mr Mwirichia abandoned the position he had previously taken up under paragraph (c). We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."***

53. In the Court of Appeal case of ***Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2021 [2013] eKLR,*** Kihara Kariuki, PCA, Ouko *(as he then was),* Kiage, Gatembu Kairu & Murgor JJA held as follows: -

> ***"(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.***
>
> ***(42) However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:***
>
> ***"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."***
>
> ***(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.***
>
> ***(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the***

petition before the High Court did not meet the threshold established in that case.

54. Going by the above, it is this Court's view that the test for determining whether a Petition meets the constitutional threshold lies in the question whether the Respondents have been put on proper notice as to the constitutional claims brought against them and whether the Court can identify the constitutional violations raised in the matter. In his Petition, the Petitioner has not cited any constitutional provision which he claims to have been infringed upon. In his entire Petition, he has failed to spell out the Articles in the Constitution that he is expressing to have been violated. Although he has elaborately outlined the facts in support of his Petition, he has not shown the nexus between the facts and the constitutional rights infringed, if any. The only provisions of law cited in support of the Petition are the Law Society of Kenya Act and the Law Society of Kenya Regulations. This was a serious omission and strictly speaking, it does not make much of a difference that the Petitioner intended to cite the articles in his submissions. As this Court has previously held, submissions are not a substitute for pleadings. This Court is therefore not able to fashion an appropriate remedy.

55. As a final attempt to salvage his case, this Court has had a look at the nature of prayers he is seeking from the Court and observes that none of them seeks any declaration of violation of constitutional rights. The prayers sought in his Petition are as follows: -

i. An order that the impugned SGM scheduled for the 27th day of August 2021 is illegal for not complying with the provisions of the Law Society of Kenya Act No. 21 of 2014 and in particular Sections 16 (6), (7), 31, 22 and 78 and any resolution thereof is invalid, null and void.

ii. Judicial Review by way of an order of certiorari, to remove into the Court for purposes of quashing the entire notice informing the SGM and the Agenda in the form of motions to be discussed during the SGM scheduled on the 27th day of August 2021 for being sub judice and procedurally illegal.

iii. Costs of the Petition to be borne by the Respondent.

iv. Such other orders this Honourable Court shall deem it fit.

56. Clearly, the Petition does not seek any declaration of violation of any of his constitutional rights. In fact, it is clear that he is seeking judicial review orders. This Court is alive to the fact that Article 23 (3) (f) of the Constitution permits the High Court, constituted as a constitutional court to grant judicial review orders, among other remedies. This is however not an excuse to file a constitutional petition seeking judicial review orders in any other ordinary matter. The invocation of this Court's jurisdiction is dependent on the existence of constitutional claims which must be clearly demonstrated on the body of the Petition. Otherwise, the Petitioner herein ought to have raised his claim as an ordinary judicial review matter in the judicial review court.

57. This Court agrees with the 2nd Respondent and the Interested Parties that the Petition has failed to meet the threshold required of bringing Constitutional Petitions. For this reason, this Court finds that it has no jurisdiction to entertain the Petition.

Whether the 2nd Respondent and the Interested Parties were in contempt of court orders.

58. The other issue raised is whether the 2nd Respondent and the Interested Parties are in contempt of court orders. It may be a point of concern whether this Court has any business interrogating the matters of contempt of Court in view of the fact that the Court will not determine the merits of the Petition to its logical conclusion base on the finding of issue 2 above. However, owing to the importance of upholding the authority of the Court, this Court will go ahead and determine this issue.

59. The High Court in the case of ***Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR*** discussed in depth the applicable law on contempt of court as follows: -

"It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) The terms of the order, (ii) Knowledge of these terms by the Respondent, (iii) Failure by the Respondent to comply with the terms of the order"

60. The court in the aforementioned case proceeded to quote with approval the learned authors of the book; ***Contempt in Modern New Zealand*** thus;

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

b) The defendant had knowledge of or proper notice of the terms of the order;

c) The defendant has acted in breach of the terms of the order; and

d) The defendant's conduct was deliberate."

61. On 26th August 2021, the Court issued the following orders: -

a) Pending the hearing and determination of this application, inter partes, a conservatory order be and is hereby issued suspending/staying Agenda Number 2 and 3 to be discussed at the Special General Meeting scheduled for the 27th August 2021 to the effect that the motion for the appointment of a chairperson to conduct the affairs of the proposed Special General Meeting is hereby suspended from the list of the Agenda items to be discussed on 27th August 2021; and

b) Pending the hearing and determination of this application inter partes, a conservatory order be and is hereby issued staying the Law Society of Kenya Special General Meeting scheduled for the 27th day of August 2021.

62. This Court has observed the evidence adduced and notes that indeed, a meeting was held. There is no dispute on service of the order. There is also no dispute on that the terms of the order were unambiguous. The question thus lies on the remaining two limbs of contempt matters i.e whether there was disobedience of the Court orders and whether the conduct was deliberate.

63. The Petitioner and the 1st Respondent contend that the 2nd Respondent and the Interested Parties went ahead to hold the meeting despite service of the Court orders. On their part, the 2nd Respondent and the Interested Parties do not deny that a meeting took place on 27th August 2021. They however urge that the electronic evidence produced by the Petitioner to prove that the meeting took place was not accompanied by a certificate of authenticity. While it true that proof of electronic evidence requires a certificate under Section 106 B4 of the Evidence Act, this Court finds that the default is not material because in this matter, the meeting went on and the contention is in the nature of the meeting, which they asserted was an informal *kamukunji* to inform the members of the development in the matter. In fact, the Interested Parties go ahead to argue that the Petitioner himself attended the meeting and participated and that the Petitioner has concealed this fact from Court which is a fact to be used against him.

64. In the instant case, although it is true that a meeting was indeed held, it is questionable as to whether the meeting held and what transpired during the meeting amounted to an SGM within the meaning of an SGM as contemplated by the Act. As pointed out by Counsel for the Interested Parties in her oral submissions, the Applicant does not claim that any of the Agendas were discussed and that resolutions were passed in the meeting. In fact, it was urged that during the meeting, the members were notified and shown the court orders which are the subject of the contempt application. This Court also observes that the orders which form the basis of the contempt orders were issued on 26th August 2021, a few hours before the intended meeting. Any notification to members of the 1st Respondent of this postponement would have to be done formally, probably in the same way the notification of the meeting was done, which was by email. This would require communication to the Secretary requesting her to attend to the same by notifying the members of the cancellation and/or postponement. This may explain why the notification of the orders to the members was done during the session that was held informing them that the meeting could not proceed.

65. The standard of proof in contempt of Court applications is higher than that of balance of probabilities but lower than that of beyond reasonable doubt. This was discussed in the *locus classicus* of ***Mutitika vs Baharini Farm, Civil Application No. NAI 24 of 1985 (1985) eKLR*** where Hancox, Nyarangi JJA & Gachuhi Ag JA held as follows: -

"In England matters relating to contempt are now governed by the Contempt of Court Act, 1981. The courts, nevertheless take the view that where the liberty of the subject is, or might be, involved, the breach for which the alleged contemnor is cited must be precisely defined – see for instance Chiltern Districts Council v Keane, [1985] Law Society's Gazette, 29th May page 1567.

In, Re Breamblevale Ltd [1969] 3 All ER 1062, Lord Denning MR. (as he then was), at page 1063, had this to say,

"A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time– honoured phrase, it must be proved beyond reasonable doubt".

With the greatest possible respect to that eminent English judge, that proof is much too high for an offence "of a criminal character" and, ipso facto, not a criminal offence properly so defined.

We agree with Mr. Khaminwa's submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved "with such strictness of proof ... as is consistent with the gravity of the charge ..."

66. The threshold and limits for determining breach of court orders was also discussed at length in ***Borrie & Lowe The Law of Contempt Third Edition by Nigel Lowe and Brenda Sufrin*** at page 568, the following is established:

'Despite the foregoing statements, it is equally established that casual or accidental and unintentional acts of disobedience will not be met by the full rigours of the law. In Fairclough & Sons v Manchester Ship Canal Co (No 2) for example, Lord Russell CJ said:

'We desire to make it clear that in such cases no casual or accidental and unintentional disobedience of an order would justify either committal or sequestration. Where the Court is satisfied that the conduct was not intentional or reckless, but merely casual and accidental and committed under circumstances which negative any suggestion of contumacy, while it might visit the offending party with costs and might order an inquiry as to damages, it would not take the extreme course of ordering either of commitment or of sequestration.'

67. In view of the fact that in the meeting, no agenda was deliberated and no resolutions were passed, and further that in the meeting, the members were notified of the orders which had been made the previous day which form the subject of the application for contempt of Court, this Court is not convinced that the 2nd Respondent and the Interested Parties were in breach of the court orders in issue or that any breach of the same was deliberate and intended to mock the authority of the Court. In the absence of any evidence to the contrary, this Court does not find that the 2nd Respondent and the Interested Parties were in contempt of Court in the circumstances of the case.

Whether the Court should issue the conservatory orders sought.

68. In view of the successful challenge to the jurisdiction of this Court, it may not be necessary to delve into the merits of the case to avoid embarrassing any other Court or body which will ultimately determine the issue. However in view of the importance of the matter and the public interest that it attracts, this Court is inclined to point out, by way of opinion, what the law requires with respect to the procedural and substantive issues raised by the parties.

69. The first point of call is Section 16 of the Law Society of Kenya Act which provides as follows: -

16. The General Meeting

> ***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.***

70. A reading of Section 16 (6) and (7) reveals that the President of the Council is the person mandated to preside over the meeting and in his absence, the Vice-President and in his absence, a Council member nominated by the Council. The Section does not contemplate any other scenario or any other person presiding over the meeting except these three. It would thus not be proper to have any other member outside the Council to preside over the meeting, more so when the President, Vice President and Council are validly and legally still in office.

71. In this Court's view, it is not an excuse that the leadership wrangles do not allow for compliance with the law and if at all this was the case, the conveners of the meeting ought to have approached the Court to seek for indulgence and sanction of their actions, otherwise not recognized in law. It is also this Court's view that the argument that the General Meeting is the Supreme Organ of the Society and thus members can decide on who will preside over the meeting at the very meeting does not hold water because the requirements under Section 16 (6) and (7) were enacted for a reason which to this Court's mind was to ensure certainty, orderliness and a standard way of conducting meetings of the Society.

72. The other important provision is Section 31 of the Law Society of Kenya Act which provides as follows: -

31. Requisitioning a special general meeting.

> ***1) A special general meeting shall be convened at any time-***
>
> ***a) If requisitioned by at least five percent of the members from each branch; or***
>
> ***b) By the Council on its own motion after a thirty days notice.***
>
> ***2) The notice requisitioning a special general meeting under subsection (l)(a) shall-***
>
> ***a) Be in writing;***
>
> ***b) Be signed by the members from all the branches as specified in subsection (1);***
>
> ***c) specify the object of the proposed meeting;***
>
> ***d) be submitted to the secretary to the Society***
>
> ***3) Council shall, within fourteen days of receiving a requisition submitted under subsection (2), convene a special general***

meeting of the Society.

4) The Council fails, within fourteen days after the requisition, to convene a general meeting in accordance with the requisition, and specifying that it shall be held within thirty days, the members may themselves convene that general meeting to be held at any time within two months after such requisition.

73. The above provisions reveal that the only persons who can legally requisition for a special general meeting are the Council and/or at least 5% of members from each branch. There is no other scenario contemplated by the Act as to who can requisition for a special general meeting. The argument urged by the Petitioner is that the branch chairs are not allowed to requisition. This Court however considers that the branch chairs are members of the Society in their own rights as they would not be branch chairs unless they were first members. Furthermore, the 5% of members' from the branches threshold required, was urged to have been met. It is urged by the 2nd Respondent and Interested Parties that they got 883 members to support the requisition and that the Secretary confirmed that the threshold had been met. This Court is of the view that there is nothing amiss in the branch chairs being the one who communicated to the Secretary the requisition, if they were doing it on behalf of the members. Unless it can be shown that they were doing it in their own capacities and that the signatures of the 883 members who supported the requisition were obtained fraudulently, this Court does not see any breach of the provisions of Section 31 of the Act.

74. With respect to the substantive issues on the legality of the agendas proposed for the meeting, this Court observes that some of the items proposed for the agendas touch on matters currently pending before various Courts, with some awaiting hearing and some awaiting rulings and judgments. In this Court's view, there is some sense in the arguments propelled by the 2nd Respondent and Interested Parties that a general discussion on the strategy of the matters would not amount to interference with the matter. However, since the deliberations are yet to be had, the Court may not be in a position to opine whether the scope of the deliberations offends the rules of *sub judice*. This Court is also minded that during the meeting, representations including those challenging the trajectory of any deliberations should be welcomed. This Court is of the view that the matters in the agenda may or may not be *sub judice* depending on the scope and extent of the deliberations.

Conclusion

75. The Petition before the Court sought to challenge the Law Society of Kenya's Special General Meeting which was scheduled for 27th August 2021. The 2nd Respondent and the Interested Parties raised contestations on the jurisdiction of the Court on four grounds. On whether the Petitioner has locus to bring the Petition, this Court found that he would have locus as per Article 22 (2) (c) and 258 (2) (c) of the Constitution if his Petition raised constitutional issues. On whether the Petitioner is guilty of forum shopping, this Court finds in the negative because the nature of constitutional petitions permits for them to be filed in any High Court station in the country in accordance with jurisdiction under Article 165 (3) (b) of the Constitution of Kenya. On the issue of exhaustion of remedies, this Court finds that although Regulation 96 of the Law Society of Kenya Regulations requires mandatory arbitration for disputes concerning the affairs of the Society, the exceptional circumstances of this case, being the need to achieve expeditious access to justice and the time constraints involved in following the strict statutory procedure call for the exemption of the Petitioner from having to exhaust the alternative remedy. Further, the right to approach the Court for a determination of questions of violation of constitutional provisions is of course unlimited and an applicant need only bring himself within the purview of principles applicable to constitutional litigation. This Court also finds that despite omission to make an application for exemption as contemplated under Section 9 (4) of the Fair Administrative Action Act, the Court has inherent power to exempt in a proper case. The Court further observes that the Petition in this case seeks to challenge the legality of the actions of the 2nd Respondent and Interested Parties on a claim that they acted contrary to the provisions of the Act. This is a claim based on *ultra vires*, a judicial review issue, for which the High Court has jurisdiction pursuant to the provisions of Article 165 (6) and (7) of the Constitution. The matter would thus be best handled by the High Court and not an arbitrator. Indeed, the Petitioner has in his Petition sought the order of judicial review of certiorari.

76. However, on the threshold for filing of constitutional petitions, under which the judicial review order is sought, this Court observes that the Petition does not cite any single article of the Constitution alleged to have been violated either in the main body or in the prayers section. The Petitioner's pleadings offend the laid down principles under the ***Anarita Karimi*** case requiring precision and particularization of constitutional violations. This Court finds that it is not possible for the Court to understand the alleged constitutional violations. The 2nd Respondent and Interested Parties have also not been given notice of what constitutional issues they are expected to respond to.

77. Finally, this Court does not find that the alleged contempt of its orders has been proven to the required standard, which is higher than that of a balance of probabilities. The Court has not made any substantive findings on the question of whether the Petitioners would have been entitled to conservatory orders because of its finding of lack of jurisdiction.

ORDERS

78. Accordingly, for the reasons set out above, this Court makes the following orders: -

i. The 2nd Respondent's and Interested Parties' Preliminary Objection dated 6th September 2021 is allowed to the extent that the Petitioner's Petition has failed to meet the required threshold for constitutional petitions as regards the particularization of constitutional violations.

ii. The Petitioner's Petition dated 25th August 2021 is hereby struck out.

iii. The Petitioner's Application dated 25th August 2021 seeking conservatory orders is hereby declined.

iv. The Petitioner's application dated 31st August 2021 seeking the committal of the 2nd Respondent and the Interested Parties for contempt of Court is hereby dismissed.

v. For avoidance of doubt, the Respondents are at liberty to call for a Special General Meeting with strict compliance with Section 16 and 31 of the Law Society of Kenya Act, and the Petitioner is at liberty to commence court process for Judicial Review to challenge the legality of any such convened meeting, without having to seek arbitration, in cases of demonstrable exceptional circumstances.

vi. In view of the public interest element in the Petition there shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED ON THIS 23RD DAY OF SEPTEMBER, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Manwa & Mr. Otieno for the Petitioner/Applicant

Ms. Kamende, Ms. Odiya, Ms. Kabita & Mr. Havi for the 1st Respondent

Mr. Theuri & Mr. Nyabena for the 2nd Respondent

Mr. Ochiel for the 1st-3rd Interested Parties

Ms Kiome for the 4th -8th Interested Parties