REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NUMBER 161 OF 2014

HALIMA SHAIYAH.....PLAINTIFF

VERSUS

DAVID KELI KIILU}

BROWN ONDEGO}

ISSAC NJOGU}

NELSON N. OGOMBE}

(SUED AS TRUSTEES OF THE AGRICULTURAL SOCIETY OF KENYA)

THE REGISTRAR OF SOCIETIES.....DEFENDANTS

R U L I N G

Before me for determination is a Notice of Motion dated 3rd June, 2014 brought under the provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 40 Rule 2, Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law. The Applicant Halima Shaiyah seeks from this court orders against the Respondents David Keli Kiilu, Brown Ondego, Isaac Njogu, Nelson N. Ogombe (sued as Trustees of the Agricultural Society of Kenya (ASK)) and the Registrar of Societies that:

1. **……..**

2. **An order of injunction and/or prohibition do issue restraining and/or prohibiting the 5th Defendant from accepting and/or acting upon a return by the ASK based on the ASK letter of 15th May, 2014 suspending and/or removing the Plaintiff from her office of Chairperson of the Nairobi Branch of the ASK until the suit herein is heard and determined.**
3. **A mandatory order of injunction do issue compelling the 1st -4th Defendants, ASK, its official, trustees, agents, employees and any persons whomsoever acting on behalf of the ASK to restore the Plaintiff back to her office of Chairperson of the ASK Nairobi Branch and to gain access of her office at the premises without hindrance until the suit herein is heard and determined.**
4. **Costs of this application be borne by the ASK through the 1st-4th Defendants**.

The said Notice of Motion is further supported by the affidavit of the Applicant sworn on 3rd June, 2014

and her further affidavit sworn on 24th July, 2014 and annextures thereto. The application is opposed by the Defendants/Respondents who swore a replying affidavit through the Chief Executive Officer Mr. Batram Muthoka on 17th July, 2014 and a Supplementary Affidavit sworn on 4th August, 201 and the annextures thereto.

Prayer No. 2 of the Notice of Motion seeking to prohibit the 5th Defendant Registrar of Societies from accepting returns of the ASK based on the letter of 15th May, 2014 suspending or removing the Plaintiff from her office of chairperson of the Nairobi Branch of the ASK until the suit is heard and determined was abandoned in the submissions as not being available to the Plaintiff as the ASK is exempted from registration as a society. What therefore remained in contention and for determination by this court is prayer Numbers 3 and 4 of the Notice of Motion.

Prayer 4 is on costs whereas prayer 3 seeks for a mandatory order of injunction compelling the 1st – 4th defendants, the ASK, its officials, Trustees, agents, employees and any other persons whomsoever acting on behalf of the ASK to resorted the applicant back to Office of Chairperson of the ASK Nairobi Branch and to allow her gain access to her office at the ASK premises without hindrances until the suit is heard and determined.

In brief, the Plaintiff/Applicant is a duly elected chairperson of the ASK Nairobi Branch and that following a publication of the weekly citizen Newspaper of 7th April, 2014 that was highly critical and adverse of the running of the affairs of the ASK by its CEO Mr. Batram Muthoka, a National Staff and Finance Committee was convened and mandated by a Special Executive Committee to inquire into the allegations by the newspaper publishers in order to determine who may have been responsible for the dissemination of the disparaging publication against the ASK. Specifically, the mandate of the committees was to: -

1. Establish the persons behind the adverse publicity against the Society that has appeared in the weekly Citizen Magazine on various dates stated elsewhere in the report.
2. Establish those culpable in respect to the adverse publicity.
3. Take action and make appropriate recommendations which may include disciplinary measures as per the Society Rules be taken against those culpable.
4. Report the findings and recommendations to the Executive Committee.
5. A special Executive Committee meeting be convened to consider recommendations.

According to the Plaintiff/Applicant, on 22nd April, 2014 she was invited to appear before the ASK Staff and Finance Committee on 25th April, 2014 to share knowledge and views over a publication of the "Weekly Citizen" Newspaper of 7th April, 2014 that was adverse and critical of the ASK and she duly obliged. She avers that on 15th May, 2014 the ASK wrote a letter to her purporting to convey the decision taken by the ASK National Executive Committee on behalf of the ASK Council suspending her from office for a period of 5 years pursuant to the meeting of 25th April, 2014.

That she was never informed that the meeting of 25th April, 2014 whose purpose was to share knowledge and views was in fact of disciplinary hearing and hence she contends that the said suspensions is in flagrant breach of all the basic rules of natural justice. That she could only be disciplined by the ASK Council acting in accordance with Articles 37 (e) of the ASK Constitution and that all organs referred to in the suspension letter of 15th May, 2014 have no disciplinary powers and the suspension is thus in breach of the ASK Constitution. That her suspension is utterly unreasonable as the ASK should have pursued the Newspaper for liberal and not to embark on a witch hunt of ASK's elected officials.

In her supporting Affidavit, the application deposes, reiterating her grounds that she was elected as the ASK Nairobi Branch Chair during the ASK Annual General Meeting held in February, 2011 for a 5 year term whose tenure is February, 2016 and that since her election, she has served with singular dedication, diligence and without any incidences. The applicant annexed a copy of the publication which she avers that it was brought to her attention by one of her colleagues, which publication was in the Weekly Citizen

and which was highly critical of the Management of ASK, accusing it of runaway corruption, and whose authors and sources she has no knowledge of.

The applicant states that she later received a letter dated 22nd April, 2014 from the CEO also addressed to several of her colleagues inviting them to attend a meeting of the ASK Staff and Finance Committee that was inquiring into the offensive publication and to share knowledge and views on the said publication which meeting she attended and was later shocked to learn that the ASK and National Executive Committee had purported to take a decision on behalf of the Council suspending her form the ASK for 5 years, following a meeting held on 25th April, 2014 wherein she was accused of commuting ***"actions repugnant to the well- being of the ASK,"*** yet she has never been invited to any disciplinary meeting or process that would determine her guilt to that extend.

The applicant therefore complained that she was condemned unheard, contrary to the Rules of Natural Justice which actions are draconian, disproportionate and unreasonable and a witch hunt. She believes that this court has the jurisdiction to resolve the dispute as ASK has not developed rules under its Articles 53 and 54 of the Constitution on Internal Dispute Resolution Mechanisms.

The application was vehemently opposed with Mr. Muthoka swearing a replying affidavit filed on 17th July, 2014 deposing that the application was brought in bad faith, an abuse of the court process and fundamentally flawed. He also accused the applicant of selectively suing only 4 out of 9 Trustees of the ASK and maintaining that the Applicant was subjected to the disciplinary process of the Society as provided for in its Constitution through an inquiry where the applicant was given an opportunity to be heard before the National Staff and Finance Committee and that the applicant being a member of ASK participated fully in the deliberations that resolved to form an Inquiry Committee to carry out an inquiry to investigate and establish which of the members and persons were involved in the negative publicity of the society and recommend action against those found culpable.

Mr Muthoka further deposed that the applicant, like all other members and 4 of the staff of the Society Nairobi Branch were issued with letters formally inviting them separately to appear at the places, time and purpose of the meetings and the applicant appeared in person at the inquiry on 25th April, 2014 and that she understood the purpose of her appearance and possible effects of the findings of the inquiry and investigations once complete and that from the in-depth inquiry and questioning and her answers thereto, the Committee had no doubt that she was responsible for the Article and Recommended to the National Executive Committee the appropriate action to be taken.

The respondents further contended that the applicant was given a fair hearing and has not complained of any bias and that the inquiry as anchored and envisioned by the ASK's conduct of Members of the Disciplinary and Appeals Process and Rules made pursuant to Article 37 and 53 of the Society's Constitution. That the Applicant deliberately absented herself from the meeting of the National Executive Committee held on 15th May, 2014 which received the report and recommendations from the Inquiry Committee after attending the meeting of 16th April, 2014 as a member of National Executive Committee that directed the inquiry to be conducted.

It is further deposed BY Mr Muthoka that the action taken against the applicant was in accordance with the rule of law, natural justice and adhered to the guidelines set out in the ASK Disciplinary Rules process which the applicant was aware of and fully participated in their formulation hence she could not be heard to be asking for a copy of the disciplinary rules.

Further, it was stated that the Applicant had not exhausted the available remedies by failing to appeal to the Council of the Society within 15 days of the decision made as provided for in the Rules and prematurely rushed to court before exhausting internal dispute resolution mechanisms hence she had come to court with unclean hands and so the remedy being sought was not deserved.

In response to the respondent's Replying Affidavit, the applicant swore a further affidavit filed in court on 24th July, 2014 wherein she maintained that she had a genuine and bona fide claim, reiterating the

contents of her applications grounds and supporting affidavit. In addition, the applicant deposed that there is no legal requirement for all trustees to be cited, denying that there were any disciplinary proceedings conducted against her or at all.

Further, that the minutes of the Special Executive Committee of 16th April, 2014 which were unsigned were inadmissible and reiterated that the invitation letters to the inquiry session were all identical. She denied that any Disciplinary and Appeals Process Rules were promulgated by the 2011 Annual General Meeting and that those exhibited did not bear the Society's logo, date and or on whose authority they were made, promulgated, adopted or approved as they appear anonymous, emphasizing that it is her constitutional right to access the courts in order to be accorded a fair hearing.

The applicant denied ever being served with a notice for the meeting of 15th May, 2014. She contended that her purported expulsion or suspension from the Society for 5 years did not appear in the inquiry Report and that such suspension was based on extraneous matters unrelated to the purpose for the inquiry. Further, that there was no evidence linking her to the offending publication and that the Respondents ought to have pursued the Newspaper for libel and or sought to know the sources of the alleged false information as contained in the purported simple apology from the offending newspaper.

In a rejoinder to the further affidavit, the respondents CEO Mr Muthoka swore a supplementary affidavit filed on 4th August 2014 reiterating the contents of his earlier replying affidavit and deposing further that minutes of previous meetings could only be signed upon confirmation, adoption and ratification in a subsequent meeting, which had been scheduled for 13th August 2014 as exhibited by the notice issued. Mr Muthoka maintained that the applicant had been issued with a specific letter inviting the applicant to the inquiry since she had been mentioned and quoted in the offensive newspaper publication.

Mr Muthoka further maintained that the minutes of members of the Disciplinary and Appeals Process Rules were formally adopted during the 88th AGM of the ASK following an elaborate process and stages as evidenced by the adopted and signed minutes of the said 88th AGM which Rules were formally applied in other disciplinary proceedings by ASK including in the matter of the conduct of the Chairman of Kisumu Branch of the ASK wherein the applicant herein is said to have participated up to the Council level. He therefore contended that it would not be correct for the applicant to state that the Rules do not provide for the procedure for the discipline of its members and that neither was it necessary for the Rules to bear the ASK logo as long as they were promulgated following the laid down procedure as provided for in Articles 37 and 53 of the Society's Constitution.

Mr Muthoka also maintained that exhaustion of available internal mechanisms for dispute resolution was essential before resorting to the court and insisted that the Applicant was duly served with a notice to attend the National Executive Committee Meeting for 15th April, 2014 but that she absconded and that albeit the Inquiry Committee recommended her expulsion, the National Executive Committee resolved to suspend her. In addition, that the apology offered by the newspaper was acceptable to the Society and the Applicant could not suggest to the Respondent what the appropriate remedial measures to adopt were.

Mr Muthoka concluded with an averment that the only lawful process for identifying the persons responsible for the publication of the offensive article in the newspaper was the one conducted by its National Staff and Finance Committee.

On 26th November, 2014 when the application subject of this ruling came before Hon. Justice Mbogholi Msagha the Presiding Judge of the Civil Division of the High Court he directed that this matter be heard by myself. By that time, the parties had already agreed to dispose of the application herein by way of written submissions. The Plaintiff/Applicant filed hers on 26th August, 2014 whereas the Defendant/Respondents did file their written submissions on 1st October, 2014.

In her submissions, the Applicant maintained that she deserved the orders of a mandatory injunction to restore her to her position of Chairman, Nairobi Branch of the ASK for reasons that: -

1. No disciplinary proceedings were conducted leading to the impugned decision as her appearance before the inquiry team on 25th April, 2014 was **to "share knowledge and views over the said publication"** and which she obliged as opposed to facing a disciplinary committee as required under Rules 1 and 2 of the Disciplinary and Appeals Rules purportedly relied on by the Respondents.

   Further, that no accusations or complaints were leveled against or served upon her to enable her respond to them or defend herself hence the letter inviting her to the inquiry could not be construed to mean or trigger disciplinary action against her. The applicant took issue with the respondents' annexture BM IV which was identical to annexture HSIA being letters of invitation to her to attend the inquiry, save that annexture BM IV was longer than annexture HSIA which to her, was suspect and that according to her, annexture BM IV was manufactured once she deposed having misplaced her invitation letter which was identical to all other letters served on other members for the same purpose.

   In her view, the meeting of 25th April, 2014 was a general and preliminary inquiry on the issues of the said publication as confirmed by the minutes of the Special Executive Committee Meeting of 16th April, 2014.

   The applicant's counsel submitted that no minutes of 25th April, 2014 were exhibited to demonstrate that any disciplinary proceedings were in fact conducted against the applicant or anybody else at the meeting. In addition, that in fact, there are no minutes showing the decision of the National Executive Committee suspending her or reversing the recommendation of expulsion for 5 years by the National Staff and Finance Committee.

2. That there was no evidence that the impugned punishment was actually meted out against the Applicant by the authorized organs of the ASK or at all as communicated by the letter dated 15th May, 2014 to her. In other words, that there was no minute, proceedings, deliberations or resolutions of the ASK National Executive Committee or the Council for her purported punishment of suspension for 5 years.

   Further, it was submitted on behalf of the applicant that no minute was exhibited where the National Executive Committee considered and or reviewed the recommendations by the National Staff and Finance Committee to expel the Applicant yet under the **"Disciplinary Mandates/Penalties"** provisions of the Rules, only the Council could impose an expulsion of a member from the ASK and under Rule 3 thereof all disciplinary decisions must be ratified by the Council, as elaborated in the Disciplinary and Appeals Rules **"if at all they existed."**

   It was also submitted that in the absence of any ratification of the recommendations by the National Staff and Finance Committee, the decisions taken were in contravention of Articles 35(b) and 37(e) of the ASK Constitution hence the said decisions were null and void.

   3) On whether the application was properly before the court, the Applicant's Counsels submitted that the insinuations by the Respondents that: -

      (i) the Applicant should have joined all the registered trustees of the ASK ;

      (ii) the Applicant should have first exhausted the available internal mechanisms for dispute resolution before approaching the court;

It was submitted that the above objections by the respondents were misconceived because: there was no legal requirement to sue all trustees of a society as they are sued on behalf of ASK not in their personal capacities.

On the second objection regarding exhaustion of internal remedies before resorting to the court, the

Applicant's Counsel submitted that the ASK and its Rules are subject to the Constitution of Kenya including the Bill of Rights hence, the members have an unimpeded right to access justice and the courts pursuant to the provisions of Article 48 and 50 (1) of the Constitution of Kenya 2010.

In addition, the applicant submitted that the ASK Disciplinary and Appeals Rules do not override the ASK Constitution or oust the jurisdiction of this court to hear and determine this application and the founding suit in accordance with Articles 48 and 50(1) of the Constitution of Kenya.

The applicant maintained that the purported Disciplinary and Appeals Rules were not in existence at the time of the impugned decision since the Applicant had requested for them but received no response from the Respondents. Further doubt was that the Rules did not form part to the Green Book as they were exhibited differently in the two Affidavits sworn by the Chief Executive Officer Mr. Batram Muthoka.

The applicant also maintained that since the impugned decision was a mandate of the Council which had been usurped, the same is null and void. She relied on the case of **Harji Karsan Patel Vs Kunverji Naran Kerai & 2 others, HC Nairobi CC 1025/2004 [2006]** and **Virginia Njoka Vs Joel Nathan Ouma & Another HC NRB ELC No. 285 /2012 [2013] eKLR** that this court has jurisdiction to hear the present application and to grant the interlocutory order of mandatory injunction sought with costs to the Applicant.

In their lengthy 20 page submissions backed by 4 authorities, the Respondents vigorously opposed the Applicant's application and sought for its dismissal with costs.

The respondents' submissions set out the history and background of the whole matter and the process leading to the suspension of the Applicant for 5 years as contained in the affidavits sworn by the CEO of ASK Mr. Batram Muthoka and the annextures thereto, and the responses by the Applicant herein as well as her written submissions which I have reproduced in this ruling.

The Respondents submitted that the Applicant had come to court with unclean hands and that her conduct did not warrant grant of the orders being sought as she disowned documents that she was well aware of including the Disciplinary Appeals Rules of the ASK, letters inviting her to the inquiry, minutes and the disciplinary processes of ASK which she was subject to and which she had been part of in applying to discipline other errand members but which she by her conduct in this case, sought exemption from . the applicant was also accused of challenging the authenticity of minutes of the ASK knowing very well that they were authentic and having participated in the proceedings thereof and knowing that minutes could only be signed in subsequent meetings after their adoption.

Further, the respondents submitted that the 89th Annual General Meeting did approve the 88th Annual General Meeting minutes including the adoption and ratification of the Rules and that the Applicant was part of the team that adopted and ratified the said Rules hence she could not deny their existence as they had even been applied in previous disciplinary processes in ASK wherein she was a party.

On the existence of the punishment, it is submitted that the Inquiry Committee recommended the applicant's expulsion but after the Special Executive Committee sat and considered the report, it reduced it into suspension for 5 years and that the National Executive Council had the mandate to determine the nature of punishment to be meted out on the Applicant.

On the principles governing the grant of injunctions, it was submitted that the Applicant had not established a prima facie case as defined in the **Black's Law Dictionary** 9th Edition PP 1310 at first sight; On first appearance but subject to further evidence or information "or" the establishment of a legally required rebuttable presumption. A party's production of enough evidence to allow the fact – trier to infer the fact at issue and rule in the party's favour. The respondents cited the decision by Makau J in **Kenya Petroleum Oil Workers Union Vs Kenya Petroleum Refineries Ltd & 3 others** Cause No. 16 of 2014 Mombasa citing **Mrao Ltd Vs First American Bank of Kenya Ltd and 2 others (2003) KLR 125** that a prima facie case means:

"one where, based on the material presented, the court would find that there exists a right which has apparently been infringed by the opposite party and which calls for an explanation or rebuttal from the later."

The respondents further employed the definitions of prima facie case from the Indian Jurisdiction in the cases of **SMT Bijuli Chakraborty & 2 Others Vs SMT Bhubaneshwari** Misc. Appeal 14 of 2012. India Supreme Court Civil Judge No. 2, Kamrup, Uwahati) where the Supreme Court of India defined the phrase to mean at first sight or on the first appearance or on the face of it, or so far as it can be judged from the first disclosure. The respondents maintained that the Applicant had not satisfied the test that there should be probability for the Plaintiff to obtain the relief at the conclusion of the trial as was decided in the case of **Gujurat Electricity Board, Gandhinagar Vs Maheshkumar & Co. Ahmedabad, (1995) 5 SCC 545** cited in the **Bijuli** case Page 7 Supra: that a prima facie case is a substantial question raised bona fide which needs investigation and decision on merits. Further, that the court at the initial stage, cannot insist upon a full proof case warranting an eventual decree and if a fair question is raised for determination, it should be taken that the prima facie case is established. In the respondents' view, the Applicant has not demonstrated that any of her rights had been breached as the materials demonstrate a sequence of events procedurally conducted from publication to her suspension.

The respondents submitted that the remedy being sought being an equitable one, failure by the Applicant to disclose that she was part of the team that promulgated the Rules and denial of their existence was a sign of bad faith and unclean hands.

Further, that whereas, she denied knowledge of the rules, she proceeded to analyze them in her written submissions. In addition, that the applicant sat in the Special Committee meeting of ASK on 26th April 2014 and ratified the decision to task the National Staff and Finance Committee to inquire into the adverse publications but that when the committee recommended her expulsion which was reduced to suspension by the National Executive Committee, she sought refuge in the court on the basis that the letters inviting her to the meeting were defective. That such defect if any was not fatal to the decision arrived at by the National Staff and Finance Committee.

On whether the Plaintiff would suffer irreparable injury incapable of remedy by an award of damages, the respondents cited the **Giella Vs Cassman Brown & Co. Ltd [1973] EA 388** case as upheld by the Indian courts in the case of **Charanjit Thukral & another Vs Deepak Thukral & another**, and **Colgate Palmolive (India)Ltd Vs Hindustan Ltd, Air (1990) SC.** That the Applicant had not demonstrated what injury she will suffer if the suspension is not annulled or that an award of damages will be an inadequate remedy for her grievances.

On the balance of convenience, it was submitted on behalf of the respondents that the remedy sought is not available to the Applicant and that it would be so available to her only if the first two principles - prima facie case and irreparable injury had failed to satisfy the court to grant the injunction. It was submitted that the Applicant having failed to satisfy the court on the applicable principles for grant of interlocutory injunction, the application should be dismissed with costs.

Having done enough justice to the pleadings and the rival submissions by both parties to the dispute herein, I now turn to the issues for determination. After considering the application, the objections filed and rival submissions thereto, together with cited authorities, the main issue for my determination at this stage is whether the Applicant has satisfied the court on the principles applicable for grant of interlocutory mandatory injunction compelling the Respondents Trustees of ASK to restore the Applicant back to her office of Chairperson of the ASK Nairobi Branch and to gain access to her office at the ASK premises without any hindrance until the suit herein is heard and determined.

The principles to be considered by this court in determining whether or not to grant the mandatory injunction sought at this stage are as settled in the case of **Shariif Abdi Hassan Vs Nadhif Jama Adar [2006] eKLR** where the Court of Appeal stated thus: -

"The law as regards the principle to be applied when considering the two prayers is

different from the principles set out in Giella's case for the standard of approach when considering whether or not to grant a mandatory injunction is higher than in respect of prohibitory injunction. The case of <u>Locabail International Finance Ltd Vs Agro Export and Another [1986] ALL ER 901</u> sets out the principles applicable in cases of mandatory injunction. It states as follows: -

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

The Court of Appeal in the above Nadhif case went on to emphasize that "these principles have been consistently applied in Kenya. In the case of **<u>Kamau Mucuha Vs the Ripples Ltd</u>** CCA No. NRB 186 of 1992 (UR) Cockar JA stated after referring to the **<u>Locabail Case</u>** as follows: -

"a party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act and, without in any way attempting to pre-decide the intended appeal or to influence a decisions thereto, I am of the view that the order of the learned judge, granting the prohibitory and mandatory injunction ought not to be disturbed at this stage. "The courts have been reluctant to grant mandatory injunctions at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above, that the party against whom the mandatory injunction is sought is on the wrong the courts have taken action to ensure that justice is meted out without the need to await for full hearing of the entire case."

In **<u>Diamond Trust Bank (K) Ltd Vs Jaswinder Singh Enterprises [1999] 2EA 72</u>** at p. 80 Owour JA stated that: -

".. Did the learned judge properly address his mind to the mandatory injunction that he gave? As was stated by Megarry J (as he then was) in the case of Shepherd Homes Ltd Vs S and Ham [1971] Ch 340, that:

"at the end of the action the court will, of course grant such injunction as justice of the case require, but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think <u>the case has to be unusually strong and clear before a mandatory injunction will be granted even if sought to enforce a contracted obligation</u>."

I wholly agree with the above quoted authorities that in cases of mandatory injunction, a higher standard is required by way of establishing certain special circumstances before the same can be granted.

From the evaluation of the facts of this application as evidenced by affidavit evidence filed herein, as well as the pleadings and submissions it is clear that the Plaintiff/Applicant is a duly elected chairperson of the Nairobi Branch of the ASK for a term of 5 years commencing February, 2011 and her term is set to expire in February, 2016, whereas the Defendants are 4 of the 12 Trustees appointed in accordance with Article 19 of the ASK Constitution (2013 Revised), with authority to sue and be sued on behalf of the ASK and are Ipso facto honorary members of the society but not involved in the day today running of the Society affairs.

The Plaintiff/Applicant, pursuant to Article 20 of the ASK Constitution, is an officer of the society duly elected for a five year term. She is also a member of the National Staff and Finance Committee of the Society as well as a member of the National Executive Committee of the Council pursuant to Articles 34

and 35 of the ASK Constitution and a member of the Council pursuant to Article 33(b) of the ASK Constitution.

Under Article 35(b) of the ASK Constitution, the National Executive Committee shall receive and deliberate on proposals and recommendations of the National Staff and Finance Committee of the Council and by resolution make recommendations to the Council.

On the other hand, under Article 37 on the powers and functions of the Council, paragraph (e) thereof provides that the Council shall have power to discipline, suspend, expel or take any action it deems necessary against a Branch, Council member, Committee member, any employee of the Society or any member of the Society who disregards Council directives or whose actions are repugnant to the well being of the Society and especially in matters relating to the duties, powers and functions of the Council.

Under Article 38 of the ASK Constitution on Branches of the ASK, Paragraph (j), thereof provides that there shall be a Branch Chairman who shall be **elected** by the Annual General Meeting of the Branch from amongst members elected to sit in the Council and who will have served in the Committee of the Branch for 5 years. The term of the Branch chairman shall be five years from the date of assumption of office.

The Rules of the Society are made by the Council with approval of the Annual General Meeting. Once developed, the Rules must be circulated to all the Branches and placed in the Rule Book (the Green book) for appreciation by the society members in the branches and upon approval, they shall be published within 30 days.

Under Article 54 of the said ASK Constitution, all disputes between the members and the Society in relation to issues of the Society shall be resolved through an internal dispute resolution mechanism, before referring any mater in relation to the said disputes to **any other body/tribunal**. The Council shall develop Rules that will set up and operationalize the dispute resolution.

On notices, Article 56 of the said Constitution of the ASK provides that the Notices and Communication to member of the Society may be by any of the following forums:

a. Written communication;
b. Electronic mail;
c. Messaging

From the foregoing exposition of the law and precedents as well as the Constitution of the ASK Constitution, Iam inclined to grant the application herein for the following reasons.

a. That the Applicant has established that she had a prima facie case with a high probability of success in that: -

i. It was not established that the Applicant was responsible for the divulging of information and or the publication of the offending article against the ASK.
ii. The record does not disclose any credible or legally acceptable means or forum set up to probe the Applicant's conduct. The Applicant, like other members and employees of ASK were merely called upon to "*provide some information and share her knowledge and views on the matter and respond to any questions that may be posed to her during the inquiry*" On the allegations contained in the newspaper.
iii. There is no evidence of any specific charge being framed and or leveled against the Applicant requiring her to respond. In other words, the Applicant was never accorded a fair trial.
iv. Furthermore, what came out of the inquiry was a report and not a verdict.
v. There is no evidence that the Council acted on the recommendations by the Staff and Finance Committee
vi. There is no evidence that the National Executive Committee, after receiving the deliberations on proposals and or recommendations of the Staff and Finance Committee of the Council, they ever

submitted them to the Council for appropriate disciplinary action to be taken against the Applicant. In other word, there is no verdict of the Council suspending the Applicant from the membership or being an official of the Society.

vii. Under the Society's Constitution as exposed herein, only the Council has the power to discipline, suspend or expel or take any action necessary against a Committee member or Council member of the Society for disregarding Council directives or for acting in a manner that is repugnant to the well-being of the society. There are no minutes exhibited showing such disciplinary action or proceedings commenced and or concluded by the Council against the Applicant.

viii. The apology tendered by the Newspaper that published the offending information concerning the Society did not disclose the person who had supplied them with information that they later learnt to be untrue.

ix. In the absence of any evidence that the Applicant was responsible for the offensive publication, it was even unlawful to subject the Applicant to the inquiry process which in my view was a Kangaroo Court of sorts, purporting to establish her guilt, without according her an opportunity for a fair trial, including an opportunity to be represented by an advocate of her own choice at the said inquiry. Denial of the opportunity to defend oneself is denial of justice and a right to fair trial which cannot be limited by virtue of Article 25 of the Constitution.

x. As the Applicant was elected for a term of 5 years ending in 2016, the purported suspension from being chair, Nairobi Branch for 5 years, to say the least is laughable and superfluous as the purported suspension would go beyond her term as chair.

xi. On whether this court has the necessary jurisdiction to entertain this dispute when the Society's Constitution provides for internal dispute resolution mechanisms, albeit Article 54 of the Society's Constitution provides that all disputes shall be resolved through an internal dispute resolution mechanism before referring any matter in relation to the said dispute **to any other body or tribunal,** a Court of Law, in my view, cannot be described as any other body or tribunal.

xii. In addition, the Rules of the Society which purport to limit filing of suits in court before exhausting Internal Mechanisms are inconsistent with Article 54 of the Society's own Constitution which only **bars any other body or tribunal** and not this court from hearing and determining such disputes.

xiii. Article 159 (1) of the Constitution of Kenya is clear that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established under the Constitution.

xiv. Furthermore, Article 165 of the Constitution establishes the High Court which under Clause (3) has unlimited original jurisdiction in Criminal and Civil matters, and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; jurisdiction to hear an appeal from a decision of a tribunal; interpretation of the Constitution including determination of the question whether any law is inconsistent with or in contravention of the Constitution; and supervisory jurisdiction of subordinate courts and over any person, body or authority exercising a judicial or quasi judicial functions.

xv. Under clause 7 of Article 165 of the Constitution of Kenya 2010, the High Court has jurisdiction to call for the record of any proceedings before any **subordinate court or person, body or authority referred to** in Clause 6 and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

> The jurisdiction of this Court can therefore only be limited by the Constitution which confers jurisdiction on it, or by Statute, and not by some Constitution or Rule of a Society which in this case as I have alluded to above, in any event do not limit the jurisdiction of this Court from hearing and determining disputes between members or officials and the Society.

The Constitution of Kenya expressly ousts the jurisdiction of this court from hearing matters reserved for the exclusive jurisdiction of the Supreme Court under the Constitution and matters falling within the jurisdiction of the Employment and Labour Relations Court and the Environment and Land Court.

In addition, this matter raises justifiable issues which include the rights of the Applicant to be accorded a fair hearing, which right is guaranteed under Article 50 (1) of the Constitution, the right to access justice guaranteed under Article 48 of the Constitution and the right to equal protection and benefit of the law as

guaranteed under Article 27 of the Constitution.

Under Article 50 (1) of the Constitution of Kenya, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body, which right, under Article 25(c) of the Constitution cannot be limited.

I therefore find that there is a real issue affecting the Applicant's rights as guaranteed by the Constitution, that is capable of being adjudicated upon by the court, and especially when it is apparent that the internal mechanisms of the society could not work, necessitating the Applicant to tap on the unlimited jurisdiction of the High Court. I say apparent because the ASK's Constitution and Rules too acknowledge everybody's right to seek redress in the Kenyan Judicial system, which rules of a body, I opine, cannot oust the jurisdiction of the High Court to hear and determine the dispute herein (see my ruling in **Football Kenya Federation Vs Kenya Premier League Limited & 2 Others HCCC 69/2015**) delivered on 16th March, 2015.

Further, it is apparent that it is the same National Staff and Finance Committee members who were also the National Executive Committee members and also members of the Council. The question is, how can one rule out the possibility of bias when it is the same composition that made recommendations for suspension that were to implement the said recommendations? In other words, the body investigating the allegations and recommending action would then turn into the one disciplining and imposing punishment to the convicted offender. (a case of the investigator being the prosecutor and judge!)

As to whether the Applicant's suit cannot succeed for reasons that she selectively sued a few Trustees of the ASK, I find that the argument has no legal basis for reasons that Under Section 2 of the trustees (Perpetual Succession Act) Cap 164 Laws of Kenya, **"Trustees"** includes a sole Trustee . In other words, where there are more than one Trustee, one or more of them may sue or be sued in the name of the Trusteeship as incorporated or as in this case, the ASK having been exempted from registration by the Registrar of Societies as shown by the annexed Certificate of Exemption from registration.

My meticulous examination of the report that recommended expulsion of the Applicant does not even show who was interrogating the **"accused"** person on 15th May, 2014 and or who the members of the Special Executive Committees Meeting held on 16th April, 2014 were.

In my view, the unsigned report of the Special Committee cannot be considered to be minutes capable of being confirmed and or adopted at a subsequent meeting since this was not an ordinary meeting of a committee, as the Special Committee had been tasked with a Specific task of carrying out an inquiry and report to the National Executive Committee. I, therefore, find the purported report not authentic.

The upshot of all the above expositions is that I find the Applicant's case unusually strong and clear, warranting a grant of interim mandatory injunction at this stage.

No doubt, the principles for granting interlocutory mandatory injunction are different from those that apply to interlocutory prohibitory injunctions. The mandatory injunction if granted at this stage, normally operates as if the main suit is determined without the benefit of a full hearing. Nonetheless the parties to this suit and application took their time to file elaborate documentation which has revealed that there was no due process followed in the purported suspension of the Applicant from serving a duly elected chair of Nairobi ASK Branch for 5 years. The Applicant has, in my view, established special circumstances to enable this court grant the mandatory injunction sought.

I adopt the holding in the case of Shariff Abdi Hassan Vs Nadhif Jama Adan [2006] eKLR (supra) and find that indeed the Applicant's case is unusually strong and clear. Consequently, I grant the application dated 3rd June, 2014 and order that:

1. A mandatory injunction do and is hereby issued compelling the 1st-4th Defendants/Respondents,

the Agricultural Society of Kenya, its officials, registered Trustees, agents, employees and any to her person or persons whomsoever acting on behalf of the ASK to restore the Plaintiff/Applicant back to her office of Chair person of the ASK Nairobi Branch and to gain access to her office at the ASK premises without any hindrance or obstruction until this suit is heard and determined.

2. That an order by way of temporary injunction be and is hereby issued prohibiting and or lifting the suspension of the Plaintiff/Applicant from office of Chair Nairobi ASK, Branch until this suit is heard and determined.
3. Costs shall be in the main suit.

Dated, signed and delivered in open court at Nairobi this 23rd day of March, 2015.

R. E. ABURILI

JUDGE

23/3/2015