



**Muigai & another v Law Society of Kenya & another (Petition 286 of 2014)
[2015] KEHC 6973 (KLR) (Constitutional and Human Rights) (13 March 2015) (Judgment)**

Githu Muigai & another v Law Society of Kenya & another [2015] eKLR

Neutral citation: [2015] KEHC 6973 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 286 OF 2014**

WK KORIR, M NGUGI, GV ODUNGA & GV ODUNGA, JJ

MARCH 13, 2015

BETWEEN

GITHU MUIGAI 1ST PETITIONER

THE HONOURABLE ATTORNEY GENERAL 2ND PETITIONER

AND

LAW SOCIETY OF KENYA 1ST RESPONDENT

COUNCIL OF THE LAW SOCIETY OF KENYA 2ND RESPONDENT

The Law Society of Kenya has no mandate to award certificates of dishonour.

Reported by Beryl A Ikamari

***Jurisdiction**-jurisdiction of the High Court-interpretation of constitutional provisions-office of the Attorney General-whether the Law Society of Kenya had the mandate to award the Attorney General a certificate of dishonour, expressing dissatisfaction over the performance of official functions-Constitution of Kenya 2010, article 165.*

***Constitutional Law**-Office of the Attorney General-whether the Law Society of Kenya could summon and question the Attorney General with respect to the performance of official duties-Constitution of Kenya 2010, article 156; Office of the Attorney General Act, sections 8 & 6.*

***Statutes**-statutory interpretation-conferment of honours by the Law Society of Kenya-whether the mandate to honour included the mandate to dishonour-whether the Law Society of Kenya could award the Attorney General a certificate of dishonour-Law Society of Kenya Act (Cap 18) (Repealed), section 7; Office of the Attorney General Act, No 49 of 2012, section 8.*



Brief facts

The Law Society of Kenya (LSK) was dissatisfied with the manner in which the Attorney General handled a suit in the United Kingdom, High Court of Justice Queen's Bench Division Claim No 2006 Folio 881, on behalf of the Republic of Kenya. The suit arose from Anglo Leasing contracts entered into by the Kenyan government. There were allegations that the contracts had been tainted by corruption and cost taxpayers billions of shillings. With respect to the handling of that suit, the LSK summoned the Attorney General and required him to show cause why a certificate of dishonour should not be issued against him. As a result, the Attorney General was awarded a certificate of dishonour.

In response, the Attorney General filed a Petition claiming that there had been a violation of his fundamental rights and freedoms as recognized in the Bill of Rights. The grounds raised in the Petition included the contention that the LSK had acted in excess of its mandate and jurisdiction and that the proceedings leading to the award of the certificate breached the rules of natural justice and were conducted by persons who had an apparent bias.

Issues

- i. Whether the High Court had jurisdiction to entertain the Petition.
- ii. Whether the Law Society of Kenya had jurisdiction to summon the Attorney General and question the conduct of affairs by the office of the Attorney General.
- iii. Whether the Law Society of Kenya had the mandate to award certificates of dishonour to members of the Law Society of Kenya.
- iv. Whether the Attorney General could be awarded a certificate of dishonour by the Law Society of Kenya.

Held

1. The High Court could only entertain a suit if it had jurisdiction to do so. The jurisdiction conferred upon the High Court in article 165 of the Constitution of Kenya 2010 included jurisdiction to interpret the Constitution and to determine whether anything purportedly done under the authority of the Constitution or any written law was consistent with the Constitution.
2. Article 165(6) of the Constitution of Kenya 2010 provided for the High Court's supervisory jurisdiction over subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function. That supervisory jurisdiction extended to the proceedings of the LSK concerning certain issues.
3. The Respondents contended that the award of the certificate of dishonour was an exercise of the statutory powers of the Law Society of Kenya (LSK) and the Attorney General was a member of the LSK. Constitutional issues had been raised concerning the mandate of the LSK and the independence of the Office of the Attorney General and also as to the fairness of the process leading to the award of the certificate.
4. The Petitioner was summoned by the Law Society of Kenya with respect to the performance of his duties as the holder of the office of the Attorney General and not with respect to his conduct as an advocate.
5. The Office of the Attorney General was established in article 156 of the Constitution of Kenya 2010. The Office of the Attorney General Act, No 49 of 2012 was established pursuant to the provisions of article 156(4)(c) of the Constitution. Under section 8 of the Office of the Attorney General Act, No 49 of 2012 the Attorney General was protected from personal liability for acts done in good faith in furtherance of his official duties. Section 6(5) of the Office of the Attorney General Act, No 49 of 2012 laid emphasis on the independence of the office, in effect, in the performance of his duties the Attorney General was not subject to the direction or control of any person or authority.



6. The Law Society of Kenya was mandated to exercise powers which were reasonably connected to its objects. There were no statutory or common law powers which entitled the LSK to exercise the kind of powers they sought to exercise over the Attorney General.
7. If the Attorney General had exercised his functions dishonourably, there were various avenues through which the LSK could have sought redress. First, they could have made a Petition to Parliament and filed a Petition in Court as they had already done. Secondly, they could have pursued the alleged misconduct via the constitutional provisions on leadership and integrity and the Leadership and Integrity Act (Cap 182.) Thirdly, they could have filed a Petition for the enforcement of the Constitution as per article 258 of the Constitution of Kenya 2010.
8. Purporting to haul the Attorney General before the Council of the Law Society of Kenya and to censure him was an arrogation of power and an abuse of power.
9. The mandate of the Law Society of Kenya to confer honours was provided for in section 7 of the Law Society of Kenya Act (Cap 18) (Repealed). Generally the mandate to honour included a mandate to withdraw an honour but it would not include the mandate to dishonour.
10. Placing a label or mark of shame on members of the LSK was not within the mandate of the LSK as provided for in section 7 of the Law Society of Kenya Act (Cap 18) (Repealed).
11. Section 8 of the Office of the Attorney General Act, No 49 of 2012 protected the Attorney General from personal liability where he acted in good faith in the performance of his duties. The certificate of dishonour was a form of personal liability which was not lawful unless it was shown that the Attorney General had not acted in good faith.

Petition allowed.

Citations

Cases

1. Cheruiyot, Andrew Kibet & another v Medical Practitioners and Dentists Board & 2 others (Petition 260 of 2013; [2014] KEHC 5307 (KLR)) — Explained
2. In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011; [2011] KESC 1 (KLR)) — Mentioned
3. Law society of Kenya v Centre for Human Rights and Democracy & 13 others (Civil Appeal 308 of 2005; [2013] KECA 172 (KLR)) — Explained
4. Macharia v KCB and 2 others (Application 2 of 2011; [2012] eKLR; [2012] 3 KLR 199) — Explained
5. Muiruri v Credit Bank Ltd & another (Children Miscellaneous Application 1382 of 2003; [2007] KEHC 1587 (KLR); [2006] 1 KLR 385) — Explained
6. Mwau, John Harun v Peter Gastrow & 3 others (Petition No 233 'A' of 2011; [2014] eKLR) — Explained
7. Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1979] KLR 1272)
8. Owners of the Motor Vessel "Lillian "S" v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989; [1989] eKLR; [1989] KLR 1) — Mentioned
9. Re Hardial Singh and others ([1979] KLR 18; [1976-80] 1 KLR 1090) — Followed
10. Republic v Kenya Revenue Authority Ex-Parte Aberdare Freight Services Ltd & 2 others (Miscellaneous Civil Application 946 of 2004; [2004] KEHC 1238 (KLR); [2004] 2 KLR 530) — Explained
11. Du Plessis and others v De Klerk and another ((CCT8/95) [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658) — Explained
12. NK v Minister of Safety and Security ((CCT52/04) [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC); [2005] 8 BLLR 749 (CC); (2005) 26 ILJ 1205) — Mentioned
13. S v Mhlungu ((CCT25/94) [1995] ZACC 4; 1995 (3) SA 867 ; 1995 (7) BCLR 793) — Mentioned
14. RWDSU v Dolphin Delivery Ltd. ([1986] 2 SCR 573) — Mentioned



15. East African Railways Corp. v Anthony Sefu Dar-es-Salaam (HCCA No 19 of 1971; [1973] EA 327) — Explained

Statutes

1. Advocates Act (cap 16) — section 23 — Cited
2. Constitution of Kenya — article 2, 3, 19, 20, 22, 23, 25, 28, 47, 50 (1), 156, 165, 258, 256; Chapter 6 — Cited
3. Law Society of Kenya Act (cap 18) — section 4, 5, 7, 13, 14 — Cited
4. Law Society of Kenya Ordinance repealed (cap 18) — section 3 — Cited
5. Leadership And Integrity Act (cap 185C) — In general — Cited
6. Office of The Attorney-General Act (cap 265E) — section 6 (1), (5); 8 — Cited

Texts

1. Garner, BA., (Ed) (2009), Black's Law Dictionary (St Paul Minnesota: West Group 9th Edn)

Advocates

Mr Waweru Gatonye, Senior Counsel & Mr Nyakundi

The Case

1. *Mr Waweru Gatonye and Mr Nyakundi*

Mr Ahmednasir Abdullahi, Senior Counsel

2. *Mr Ahmednasir Abdullahi*

JUDGMENT

Introduction

1. This petition concerns a decision by the Council of the Law Society of Kenya to censure and confer on the 1st petitioner what it refers to as a “certificate of dishonour” for conduct the respondents consider dishonourable in the discharge of his duties as Attorney General. The 1st petitioner, Professor Githu Muigai, is an Advocate of the High Court of Kenya who currently holds the office of the Attorney General of the Republic of Kenya, a constitutional office established under Article 156 of the *Constitution*. The Attorney General is named in this petition as the 2nd petitioner.
2. The 1st and 2nd respondents are the Law Society of Kenya (LSK) and its Council. The LSK is a body corporate established under the *Law Society of Kenya Act*, Chapter 18 of the Laws of Kenya. Its objects as outlined in section 4 of the Act include to protect and assist the public in Kenya in all matters touching on, ancillary or incidental to the law. All Advocates practising in Kenya are members of the LSK pursuant to the provisions of Section 5 of the *LSK Act* and Section 23 of the *Advocates Act*, Chapter 16 of the Laws of Kenya.

Background

3. The facts giving rise to the petition have their background in the infamous Anglo Leasing contracts entered into by Kenya government agencies which were alleged to have been tainted by massive corruption and led to the country losing billions in taxpayers' money. It appears that sometime back, prior to the tenure of the current Attorney General, the office of the Attorney General of Kenya, while acting in an official capacity, handled on behalf of the Republic a suit filed in the United Kingdom, namely, High Court of Justice Queen's Bench Division Claim No 2006 Folio 881 in which Kenya was a party. The upshot of the litigation was that the Republic of Kenya lost the suit, and orders were made for the payment of various monies to the successful claimant. The Office of the Attorney General under



the 1st petitioner advised the government to pay the decretal amount, which was done in or around May/June 2014.

4. Dissatisfied with the manner in which the Office of the Attorney General had handled the litigation, the respondents took a series of steps against the office and its current holder, the 1st petitioner. They instituted proceedings against, among others, the Attorney General and the National Treasury being High Court Petition No 213 of 2014 which is pending hearing and determination. The LSK Council also commenced proceedings in Parliament by lodging a petition seeking the removal of the Attorney General from office, and also lodged its concerns with the Ethics and Anti-Corruption Commission, while the Chairman of the Kenya Law Society issued various public statements condemning the Attorney General and his officers.
5. On 19th May 2014, the respondents wrote a letter to the Attorney General challenging the manner in which he handled the said Queen’s Bench Claim No 2006 in the United Kingdom and further required him to show cause why a “certificate of dishonour” should not be issued against him.
6. Subsequently, by a letter dated 16th June 2014, the respondents summoned the Attorney General for a meeting. The letter indicated that the purpose of the meeting was to give the Attorney General an opportunity to address the issues touching on the said Claim No 2006 folio 881 and to also enable him share relevant information and documents to enable the Council make a determination on their next course of action. The meeting with the respondents was scheduled for 18th June 2014. On that day, the 1st petitioner sent his Counsel to the meeting.
7. The 1st petitioner felt aggrieved by the acts of the respondents and therefore filed the present petition challenging the acts of the respondents in summoning him and purporting to award him a “certificate of dishonour”. The 1st petitioner also alleges violation of various constitutional provisions as well as his constitutional rights.
8. As is apparent from the pleadings, in effect, though the title to the petition has two petitioners, the petition is brought by one person, Professor Githu Muigai. Due to what appears to be a conflation of his personal and official role, actions have been sought to be taken against him in his capacity as an advocate and a member of the LSK for conduct in the discharge of his official duties. For the purposes of this judgment, we shall consider that there is only one petitioner before us, Professor Githu Muigai.

The Petitioner’s Case

9. The petitioner’s case is contained in the Amended Petition dated 24th September 2014 and the affidavit in support sworn by Professor Githu Muigai. The petitioner also filed submissions dated 8th October 2014, which were highlighted before us by his Learned Counsel, Mr Waweru Gatonye, Senior Counsel, and Mr. Nyakundi.
10. The petitioner’s case is that the office of the Attorney General is established under Article 156 of the Constitution as the principal legal adviser to the Government. The Attorney General is empowered by the Constitution to appear as a friend of the court with leave in any civil proceedings to which the Government is a party as he is enjoined to promote, protect and uphold the rule of law and to defend the public interest. It is also his submission that he is the titular head of the Bar, and that by virtue of section 8 of the Office of the Attorney General Act No 49 of 2012, no criminal or civil proceedings may ensue against the Attorney General, the Solicitor General or a subordinate officer in respect of any proceedings in a court of law and discharge of the functions of the Attorney General under the Constitution and the Act. It is also his case that no matter or thing done by the Attorney General, the Solicitor General or other subordinate officer shall, if the matter or thing is done in good faith for



executing the functions, powers or duties of the Office, render the Attorney General, Solicitor General or other subordinate officer personally liable to any action, claim or demand whatsoever.

11. The petitioner argues that the Attorney General is independent, corporate and immunized from any liability arising from the performance of the functions of his office; that in acting for the Government, he would naturally enjoy the relationship of confidentiality between advocate and client; and that in accordance with Section 6 (5) of the *Office of the Attorney General Act* which ordains that in exercise of the powers and performance of the functions of his office, the Attorney General shall not be under the direction and control of any person or authority and further that Section 8 (2) forbids any censure of the Attorney General in carrying out his mandate.
12. It is his submission therefore that the above provisions of law are so clear as to make any attempt at harassing the Attorney General, as the respondents propose to do, plainly unlawful.
13. The petitioner submits further that the Attorney General enjoys professional latitude and cannot act under the control and supervision of any person or authority. It is his submission therefore that the respondents have violated the petitioner's rights in his office under the *Constitution*, but also his personal rights risk being violated.
14. The petitioner relies on Article 19 of the *Constitution* and submits that the Bill of Rights is binding on all persons and all State organs, and he calls upon this Court to develop the law to the extent that it gives effect to a right or fundamental freedom. He also relies on Article 22 which gives every person a right to institute court proceedings and provides that in applying the law, the court is not to be shackled with procedural technicalities.
15. The petitioner argues that the Council of the Law Society of Kenya does not have any jurisdiction to supervise the Attorney General or officers serving under him in any matter that pertains to the functions and performance of his office. He submits that this is because the respondents are creatures of statutes and can only exercise such authority as expressly conferred upon them by statute.
16. The petitioner argues further that the acts that the respondents complain of were performed while the Attorney General was acting in the course of his mandate, which is protected from undue censure. It was his submission further that neither the respondents nor any other person has been accorded any supervisory role, however expressed, over the Attorney General. In that regard, he relies on the decision in *S.K Macharia v KCB and 2 others*, Supreme Court Civil Appeal (Application) No 2 of 2011 in support of the argument that jurisdiction has to be conferred expressly and no amount of legal craft can create jurisdiction where there is none.
17. The petitioner further argues that if the respondents have taken umbrage with his conduct as an advocate and were taking disciplinary action against him as an advocate, disciplinary action against an errant advocate is clearly provided for under the *Advocates Act*. He submitted further that he is a Senior Counsel, a position for which there exists an elaborate disciplinary process should such proceedings be necessary, and that there is therefore nothing in either disciplinary process that recognizes the process the respondents has adopted against the Attorney General.
18. The petitioner submits further that no known member of the Bar has been issued with a "certificate of dishonour", which he submitted was a device unknown in custom, law and practice and has been arbitrarily conjured up in prosecution of a mischievous agenda in a manner that is plainly discriminatory. He argued that the said "certificate of dishonor" is not known in law and was just a creature of convenience that had been conjured up. It was also his case that it was an illegal instrument creating an unknown offence and unknown consequences, which was manifestly illegal, oppressive, without precedent and was being pursued in furtherance of an agenda inimical to fair administration



- of justice. It was also his contention that it was an inroad into the functions of the office of the Attorney General in the context in which it was created.
19. The petitioner further argues that the respondents' acts constitute a clear misunderstanding and violation of the Constitution, an abuse of the rights of the individual, an invasion into the functions of an office that is protected by law and a precedent to administrative chaos and confusion.
 20. The petitioner further submits that the acts of the respondents are an affront to well-known tenets of natural justice as the process they undertook was fraught with malice and bad faith. He contends that the Secretary of the LSK, Mr. Apollo Mboya, had been a ranking officer with the Office of the Attorney General and received and acted on information in circumstances demanding confidentiality and it would be against the law and public policy for such information to be let loose.
 21. The petitioner submits that Mr. Mboya not only swore an affidavit in support of Petition No 213 of 2014 filed against the Attorney General and the National Treasury but also sat in judgment in the proceedings in which it was sought to issue the "certificate of dishonour" to the Attorney General, a fact which, in the petitioner's view, demonstrates the conflict of interest in the matter. It was also his case that Mr. Mboya had been pressing for payment of legal fees alleged to be owed to a lawyer who is said to have acted for the Government of Kenya in the matters under contention.
 22. The petitioner therefore argues that the presence of Mr. Mboya in the proceedings of 18th June 2014 constituted a substantial violation of the law of natural justice; as did the presence of one James Mwamu, a member of the Council of the Law Society of Kenya who was the lawyer retained to act for the LSK in the petition against the Attorney General.
 23. The petitioner is also aggrieved by the conduct of the Chairman of the LSK. He argues that the Chairman, having publicly taken a position against the Attorney General, could not then, in the circumstances, be expected to exercise any objectivity over the same subject matter.
 24. It was his case that the Office of the Attorney General as a constitutional office which submits to accountability and oversight created over it by the Constitution is immunized from interlopers and it would be an act of violence to logic to expect it to be at the mercy of loose oversight by the LSK when the Attorney General is not engaged in private practice. In his view, the absurdity of holding otherwise would mean that the Speaker of the National Assembly, Judges, the Director of Public Prosecutions, the Auditor General, the Director of Budget, the Chairman of the Independent Electoral and Boundaries Commission and the Chief Justice would also be subject to the oversight of the LSK should they incur its ire.
 25. The petitioner contends that the LSK does not enjoy jurisdiction to discipline the Attorney General either under the Constitution or any statute and the "certificate of dishonour" is an instrument without any legal basis for it is a device designed at the spur of the moment with utterly no legal standing. He relied on the decisions in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1 and, In the Matter of the Interim Independent Electoral Commission, Constitutional Application No 2 of 2011 in support of his argument in that regard. It was also his submission, in reliance on the decision in Civil Appeal No 308 of 2012 Law Society of Kenya v The Centre For Human Rights And Democracy & 13 others, that an inferior tribunal, person or authority charged with the responsibility of making a decision in a judicial or quasi-judicial function has the parameters and limits of its jurisdiction set out by its enabling statute.
 26. In the petitioner's view, the respondents' summoning him as the Attorney General amounted to the Attorney General being called upon to personally answer for acts allegedly done by his predecessors and



other persons, which would be a violation of the Attorney General's rights. The petitioner therefore seeks the following orders: -

- a. A Declaration that the acts of the respondent are unlawful and unconstitutional.
- b. An Order to bring into the court and quash the proceedings initiated by the respondents for the penance of the alleged certificate of dishonor.
- c. An Order that the proceedings at the Council of the Law Society of Kenya concerning the 1st petitioner shall cease forthwith and an order to permanently restrain them from any further proceedings.
- d. An Order directed at the respondent, restraining them by themselves, their servants and/or agents from summoning the petitioners singularly and severally for purposes of conducting any proceedings whatsoever and howsoever pertaining to High Court of Justice Queen's Bench Division Claim No 2006 Folio 881 or any matters connected thereto specifically and generally on any matters pertaining to the functions of the office of the Attorney General.

The Case for the Respondents

27. The respondents did not file any affidavit in reply to the petition. Their case is contained in their Grounds of Opposition dated 21st July 2014 and submissions dated 28th July 2014. It was presented by their Learned Counsel, Mr Ahmednasir Abdullahi, Senior Counsel.
28. The respondents submit that the present claim is premised as a claim by the office of the Attorney General as created under Article 156 of the *Constitution*, and is not a petition by an individual whose rights are threatened with violation. It is their contention therefore that this Court lacks the jurisdiction to entertain the claim as framed.
29. The respondents term the petition as an abuse of the court process, as one that is difficult to understand and even more difficult to conceptualize. It is also their contention that the petition is devoid of a single constitutional law controversy for the Court to interrogate and determine; that even the true character of the applicant before the court is unclear; and neither is it clear who the aggrieved person is and what his grievances against the respondents are.
30. The respondents ask the Court to make a finding that it cannot determine, define and delimit the list of honour and dishonour the 1st respondent can award to its members or the general public.
31. The respondents argue further that from the pleadings, the petition has been brought by an organ of State, the office of the Attorney General created under Article 156 of the *Constitution*. It is not by an aggrieved individual, Prof. Githu Muigai, and nothing in the petition indicates that any of his rights as an individual have been violated. It is their contention therefore that the petition seeks to validate and protect the rights of the Office.
32. The respondents argue that an organ of State has no rights under the Bill of Rights capable of violation, and that it cannot claim that private citizens such as the respondents have violated its constitutional rights. It is their submission that in any event, constitutional rights cannot be enforced horizontally, only vertically against the State, placing reliance in this regard on the provisions of Articles 19 to 24 of the *Constitution*. They rely on the decisions in *S v Mblungu* ZACC (1995), *SDGMR v Dolphin Delivery LTD* (1986) 2RCS. *NK v Minister of Safety and Security* ZACC (2005) and *Du Plessis and others v De Klerk and another* ZACC (1996 for the proposition that the Bill of Rights cannot be applied horizontally.



33. The respondents submit that the petitioners have not pleaded with any degree of specificity and particularity how their constitutional rights have been violated. It is their contention that of the 14 Articles cited by the petitioners, namely Articles 2, 3, 19, 20, 22, 23, 25, 28, 47, 50 (1), 156, 165, 258 and 256, only three, 28, 47, and 50 (1) relate to the Bill of Rights, and the petitioners have not demonstrated how these provisions have been violated. The respondents rely on the decisions in *Hon John Harun Mwau v Peter Gastrow* (2011) eKLR and *Anarita Karimi Njeru v Republic* (1976-80) KLR to submit that the petitioners have not met the requirements from a party alleging violation of constitutional rights. It is their submission that the Court should not allow trivial litigation of rights under the *Constitution* and should only entertain deserving cases.
34. The respondents contend that their right to summon the 1st petitioner cannot be questioned in this Court as the petitioner is an advocate of the High Court and the respondents have both wide ranging statutory and common law powers over members of the legal profession. It is their submission that the Court has absolutely no supervisory power over the respondents. It is also their contention that the Court has no power to make the determination and declarations sought by the petitioners as the powers of the respondents with respect to the subject matter are absolute and infinite. They submit that the court should therefore not gag or shackle the respondents whose rights with regard to its members must be respected. It is their position that they have wide discretion to honour and dishonour their members according to the service or disservice they give to their clients and the public in general.
35. The respondents contend further that for the petitioners to contend that the certificate of dishonour does not exist in law is to assume the powers of the respondents; that the creation of awards by the respondents is an evolving process and they can create awards as demanded by the time and needs of its members and the Kenyan society. They contend that they regulate the affairs of their members, have powers, duties and responsibilities and are regulated by statutes, customs, traditions and practice, and award many certificates of different types to their members, which certificates include a certificate of dishonour.
36. They assert, in the words of their Learned Counsel, that their powers with regard to the issuance of certificates of all kinds are “infinite in nature and no power on earth, including this Honourable Court has the power to define, delimit, force, compel, stop, injunct or interfere” with the right of the respondents to reward or issue any certificate of any nature as determined by the respondents.
37. The respondents submit further that this Court has no jurisdiction to delimit or define or interfere with the internal workings and mechanism of the respondents, nor does it have power to determine for the respondents the certificates, honours and dishonours it can award to its members.
38. It is the respondents’ contention that by summoning the 1st petitioner, they have not violated any of the rights of the office of the Honourable Attorney General of Kenya; and that in summoning one Professor Githu Muigai SC who is a member of the 1st respondent, the respondents have complied with the law as they have accorded him all the honour and respect a member of the 1st respondent is entitled to.
39. They ask the Court to dismiss the petition and to grant them the costs thereof as the petition is a frivolous and vexatious suit filed to ensure that the respondents do not interrogate the petitioners.

Determination

40. The parties have addressed themselves to various issues in their pleadings and submissions, among them the question of the identity of the proper petitioner before the Court, the jurisdiction of the Court



to entertain the matters raised in the petition, and the powers of the respondents vis a vis the office of the Attorney General.

41. Upon considering the pleadings and submissions of the parties, we take the view that the petition raises three main issues:
 - i. Whether this Court has jurisdiction to hear and determine this matter;
 - ii. Whether the respondents have jurisdiction to summon the petitioner or question the conduct of affairs by the Office of the Attorney General;
 - iii. What remedies (if any) are available to the petitioner.

Jurisdiction

42. The respondents have challenged the jurisdiction of the Court and argued that it cannot supervise the 1st respondent or question its right to summon the petitioner as the petitioner is an advocate of the High Court, and they have wide ranging statutory and common law powers over members of the legal profession.
43. We agree with the respondents that a Court can only engage with a matter if it has jurisdiction to do so. As the Court of Appeal stated in the case of *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1, jurisdiction is everything, and if a court finds that it has no jurisdiction, it should not take any further step in the matter before it. Further, in the case of *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others*, Civil Appl. No 2 of 2011, the Supreme Court of Kenya observed with regard to jurisdiction that:

“A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”
44. So what is the jurisdiction conferred on the High Court by the *Constitution*? Article 165 (3) states, *inter-alia*:
 3. Subject to clause (5), the High Court shall have –
 - a. Unlimited original jurisdiction in criminal and civil matters.
 - b. Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened;
 - c. Jurisdiction to hear an appeal from a decision of a tribunal appointed under this *Constitution* to consider the removal of a person from office, other than a tribunal appointed under Article 44;



- d. Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of this Constitution including the determination of –
 - i. The question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii.
 - iv.
 - e. Any other jurisdiction, original or appellate, conferred on it by legislation.
- 4.
 - 5.
 - 6. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - 7. For the purposes of clause (6) the High Court may 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.

45. The Constitution thus gives the High Court wide jurisdiction to, among other things, interpret the Constitution and determine the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. It also has jurisdiction, under Article 165(6), to supervise subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function.

46. In this case, it was contended that the issues raised by the petitioner do not raise any constitutional issues. That contention leads us to an examination of what amounts to a “constitutional issue”. In Peter Nganga Muiruri v Credit Bank Ltd & another Nairobi HCMCS No 1382 of 2003 [2006] 1 KLR 385, Nyamu, J (as he then was) was of the view that:

“A constitutional issue in my view is that which directly arises from court’s interpretation of the Constitution. For example – what is a fair trial is a constitutional issue and the courts have interpreted what is the meaning of a fair trial.”

47. In the instant petition, one of the issues raised by the petitioner is the fairness of the process commenced by the respondents with a view to “conferring” on him a certificate of dishonour. Such an issue, going by the holding in the Muiruri case above in our view, constitutes a constitutional issue.

48. In addition, while the respondents have challenged the jurisdiction of the Court, they submit that they have exercised what they refer to as their wide ranging statutory and common law powers over members of the legal profession. The petitioner has challenged the constitutionality of the acts of the



1st respondent, which were conducted in its capacity as a statutory body. That being the case, the 1st respondent and its Council have acted on the basis of statute, a law. Such action, in our view, is subject to the Constitution, and to the jurisdiction of the High Court to determine whether “...anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.”

49. Unless it is the 1st respondent’s’ submission, which we believe it is not, that it is above the law, then a party aggrieved by its actions is entitled to approach the Court, and the Court is entitled to subject such action to the light of the Constitution. Further, the High Court is entitled to supervise the actions of the 1st respondent as a body established by statute, and exercising powers donated by statute.

50. We believe that the supervisory jurisdiction of the High Court over bodies or persons exercising judicial or quasi-judicial functions is not in dispute. The Constitution has expressly vested such powers in the High Court by dint of Article 165(6) and (7) which provides as follows:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may 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.

51. In the case of Andrew Kibet Cheruiyot & another v Medical Practitioners and Dentists Board & 2 others, Petition No 260 of 2013, the Court observed as follows:

“

“(61) Article 165(6) gives the High Court jurisdiction over bodies such as the 1st respondent by providing that the High Court shall have supervisory jurisdiction over “subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function”.

....

(64) The petitioners allege violation of their constitutional rights and invoke the jurisdiction of the Court set out above. It cannot, in my view, in the face of the above provisions, be in dispute that the Court has jurisdiction to entertain the present petition. Whether in the exercise of its jurisdiction to enforce and protect fundamental rights or to supervise the functioning of inferior tribunal such as the 1st respondent, the jurisdiction of the Court cannot be validly disputed.”

52. It is our view, therefore, that the submissions by the respondents with regard to the jurisdiction of the Court and its assertion that the Court cannot question or supervise its decision to summon the petitioner is not tenable.

Whether the Respondents have Jurisdiction to Summon the Petitioner or Question the Conduct of Affairs by the Office of the Attorney General



53. In dealing with this issue, we must acknowledge some difficulty, which we alluded to earlier in this judgment, with the conflation by the parties of the person of Prof. Githu Muigai and the office of the Attorney General of the Republic of Kenya, which Prof. Muigai currently holds.
54. In summoning Prof. Githu Muigai to answer to them over the conduct of the affairs of the Office of the Attorney General, the respondents were, as we understand it, summoning Prof. Githu Muigai, not as an advocate who is a member of LSK and with respect to his conduct as an advocate, but in his capacity as the Attorney General and in respect of his actions as Attorney General.
55. In turn, in filing the Amended Petition first in his personal capacity as the 1st petitioner and in his official capacity as the 2nd petitioner, Prof. Githu Muigai was responding to the summons in respect of the office of the Attorney General. That being the case, we must address ourselves to the question whether the respondents can properly summon the Attorney General of the Republic of Kenya on account of actions taken in his official capacity on the basis that he is also an advocate by profession and a member of the Law Society.
56. It must be acknowledged, first, that the office of the Attorney General is a State office under the Constitution. Article 156 of the Constitution, under which the office is established, provides as follows:
1. There is established the office of Attorney General.
 2. The Attorney General shall be nominated by the President and, with the approval of the National Assembly, appointed by the President.
 3. The qualifications for appointment as Attorney General are the same as for appointment to the office of Chief Justice.
 4. The Attorney General –
 - a. Is the principal legal adviser to the Government;
 - b. Shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
 - c. Shall perform any other functions conferred on the office by an Act of Parliament or by the president.
 5. The Attorney General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.
 6. The Attorney General shall promote, protect and uphold the rule of law and defend the public interest.
 7. The powers of the Attorney General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
57. Pursuant to the provisions of Article 156 (4) (c) of the Constitution, Parliament enacted the Office of the Attorney General Act, No 49 of 2012, to make further provisions with regard to the office of the



Attorney General. Its holder is statutorily protected from personal liability for acts done in good faith in the course of his duties while in office. Section 8 of the Act provides as follows:

- (1) No criminal proceeding or civil suit shall be brought against the Attorney-General, the Solicitor-General or a subordinate officer in respect of any proceeding in a court of law or in the course of discharging of the functions of the Attorney-General under the Constitution and this Act.
- (2) No matter or thing done by the Attorney-General, the Solicitor-General or a subordinate office shall, if the matter or thing is done in good faith for executing the functions, powers or duties of the Commission (sic), render the Attorney-General, Solicitor-General or other subordinate officer personally liable to any action, claim or demand whatsoever.

58. This provision manifests the Legislature’s intention to protect and safeguard the office of the Attorney General and enable the holder to perform the functions of the office without fear of being held personally culpable, if acting in good faith, while discharging the functions of the office under the Constitution or the Act. At section 6(5), the Act further emphasizes the intention to vest independence in the office by providing that:

- (5) In the exercise of the powers and performance of functions of the Office, the Attorney- General shall not be under the direction or control of any person or authority.

59. That, then, is the status of the office of the Attorney General. It is the principal legal advisor of the national government, and has the constitutional duty to “promote, protect and uphold the rule of law and defend the public interest.” The question is what happens when the Attorney General fails, or is perceived from any quarter, as having failed to discharge his constitutional mandate?

60. In the case before us, the petitioner alleges that the respondents took the view that he had not acted in accordance with his mandate in respect of the Anglo Leasing contracts. The respondent then made press statements with regard to the perceived failure of the petitioner. They wrote to him on 19th May 2014 questioning his conduct in the matter. They filed a lawsuit against the Attorney General and the Cabinet Secretary, Treasury, being Petition No 213 of 2014 Law Society of Kenya v The Cabinet Secretary, National Treasury and the Attorney General.

61. The respondents also lodged a petition with the National Assembly seeking the removal of the petitioner from office as Attorney General. Finally, they wrote the letter dated 19th May 2014 in which they required the appearance of Prof. Githu Muigai before them to show cause why a certificate of dishonour should not be issued to him for his conduct in the Anglo Leasing matter.

62. The question is which, among these acts of the respondents, the law permits them to do? The respondents have argued that they have ‘statutory and common law powers’ over advocates. It is therefore worthwhile to inquire into what these powers are, and their reach vis a vis a member of the Law Society who also happens to hold a public office such as is the case with the petitioner.

63. The respondents were acting under the provisions of the Law Society of Kenya Act Cap 18 Laws of Kenya. This Act has been replaced with the Law Society of Kenya Act, 2014. However, at the time of the events forming the basis of this petition, section 3 of the LSK Act provided as follows:

“The body corporate established by section 3 of the Law Society of Kenya Ordinance, 1949 (No 10 of 1949) (now repealed), shall continue in existence by virtue of this Act as a body



corporate by the name of the Law Society of Kenya with perpetual succession and a common seal and with power to sue and be sued in its corporate name.”

64. At Section 4, the Act set out the objectives of the LSK in the following terms:

The objects for which the Society is established are—

- (a) to maintain and improve the standards of conduct and learning of the legal profession in Kenya;
- (b) to facilitate the acquisition of legal knowledge by members of the legal profession and others;
- (c) to assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya;
- (d) to represent, protect and assist members of the legal profession in Kenya in respect of conditions of practice and otherwise;
- (e) to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law;

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....

- (i) to do all such other things as are incidental or conducive to the attainment of all or any of the foregoing objects.

65. With respect to the governance of the LSK, Section 13 established the Council of the Law Society of Kenya, which was to comprise a Chairman and ten other members elected by members of LSK. Section 14 empowered the Council to exercise all the powers of the LSK.

66. If one were to extrapolate from the powers of LSK and its Council, which are not expressly stated in the Act, from its objects under Section 4, one would reach the conclusion that such powers pertain only to the powers reasonably connected with the objects of LSK. The question is whether such powers as the LSK exercises arising from its objects include the power to summon the Attorney General, who is also, under Section 6(1) of the *Office of the Attorney General Act*, the titular head of the Bar, to answer to the Council, or even the LSK membership in a General Meeting, with respect to acts or omissions that the Attorney General has undertaken in his official capacity.

67. A further question is whether the Council can purport to find that the Attorney General qua Attorney General has engaged in conduct that is dishonourable in the performance of his official duties, and then purport to censure him by the issue of a “certificate of dishonour”. We take the view that both questions must be answered in the negative.

68. The respondents have argued that the suit is frivolous as it seeks to “ensure that the respondents do not interrogate the applicant” and that it is “designed to shield the petitioner from the political and legal consequences of his omission and incompetence in office.” We have considered the statutory objects of the respondents. We have not been able to find, nor were we directed to any “statutory or common law powers”, that would entitle the respondents to exercise the sort of powers that they seek to exercise over the office of the Attorney General. If indeed the Attorney General did act incompetently or dishonourably in the exercise of the functions of his office, it is not the statutory duty of the respondents to censure him.



69. As a State Officer appointed, in accordance with the Constitution, by the President with the approval of the National Assembly, the route that the respondents had initially taken—lodging a petition in Parliament and filing a petition before the Court with regard to the alleged mishandling of the case in the Queen’s Bench Division in the United Kingdom, was the proper way for the respondents to exercise their statutory power. Were they also of the view that the petitioner had violated the Constitution through acts of omission or commission, they also had the option to also institute legal proceedings pursuant to the provisions of Article 258 (1). Further, in accordance with the provisions of Chapter 6 of the Constitution on Leadership and Integrity, they had the further option of pursuing the alleged misconduct of the petitioner through the provisions of the Leadership and Integrity Act. These are all lawful processes, provided in law and underpinned by the Constitution, open to the respondents.
70. To do otherwise, to purport to haul the Attorney General before the Council and censure him, on the basis that he happens to be a member of the LSK is, in our view, in itself an arrogation of power, and abuse of those powers, by the respondents. Nothing in the provisions of the LSK Act, whether expressly or by necessary implication, vests on the respondents the kind of powers that they allege to have.
71. As submitted by the petitioner, to allow the respondents to proceed with its course is to open the way for it to determine when a holder of a public office who happens to be an Advocate has transgressed, summon such officers before its Council, and adjudge him or her guilty of dishonourable conduct and deserving of condemnation through a “certificate of dishonour” of the kind the respondents seek to bestow on the Attorney General.
72. We must however point out that the respondents are not precluded from instituting disciplinary proceedings against the holder of the office of the Attorney General where the complaint does not relate to his status as the Attorney General but relates to his conduct as an advocate of the High Court of Kenya. Even then, disciplinary proceedings against an Advocate must be undertaken in accordance with the law. In this case however, it is clear to us that the complaint against the petitioner is directed to his performance as the Attorney General rather than as an advocate of the High Court of Kenya.

Whether the Respondents Are Justified in awarding a Certificate of Dishonour to the Petitioner

73. Which leads us to a consideration of the issuance of a “certificate of dishonour” that the respondents wish to bestow on the petitioner, Prof. Githu Muigai. The respondents cite section 7 of the LSK Act as entitling them to issue the said certificate. Section 7 of the Law Society Act grants the Council the discretion to elect any person as an honorary member of the Society. It states as follows:

“The Council may elect as an honorary member of the Society any person whom it may think fit so to honour, either for life or for such period as the Council may in any case deem appropriate.”

74. In our view, the conferment of honorary membership to the Law Society ranks alongside honorary degrees as marks of respect for distinguished service or conduct in a field or to society. It is a positive commendation that enhances one’s place in society. That provision in our view does not confer on the respondent the powers to “award” negative distinctions. The word “honour” is defined by Black’s Law Dictionary 9th Edn. at page 805 as inter alia “those dignities or privileges, degrees of nobility, knighthood, and other titles that flow from the Crown”. In our view, to stretch the meaning of the word to include “dishonour” is to stretch its meaning too far. “Honour” in our view can only be defined in terms of positive attributes. “Dishonour” on the other hand is defined in the same edition of Black’s Law Dictionary at page 536 as inter alia to “deface or defile”. Clearly, therefore, “dishonour” is the antithesis of “honour”. Whereas it may well be that the respondents may perfectly withdraw honours



- conferred by them under the aforesaid section of the LSK Act, to interpret that section to mean that the respondents are empowered to withdraw “honours” which they have not conferred in the first place by issuing a “certificate of dishonour” would be to give them powers which the statute does not expressly confer upon them.
75. While the respondents do not have the statutory power to issue such a certificate of dishonour, the fact that they endeavor to do so and set the process in motion displays an intent, even if nothing else is achieved, to embarrass the petitioner in his office.
76. To imply into the provisions of section 7 of the LSK Act a power to award a “certificate of dishonour” would, in our view, amount to introducing and legitimizing, in the legal field in Kenya, a power in the 1st respondent and its Council to place a label, a mark of shame, on members of the Law Society holding public office for alleged misconduct that has been conceived of, adjudged dishonourable, and determined as deserving of punishment and public shame by the respondents. Our understanding of the extent to which the respondents can go in reliance on section 7 of the LSK Act, with respect to a person they wish to censure, would be to withdraw an honorary membership. We cannot find anything in the powers vested in the respondents to “award” the kind of certificate they contemplate.
77. We observe also that the acts which the respondents seek to censure through the “certificate of dishonour” resulted from acts performed by the petitioner in his capacity as the Attorney General of Kenya. The respondents are therefore seeking to hold the petitioner personally liable for acts performed in his official capacity as the Attorney General. In our view, even had such an attempt been made by a party with the statutory mandate to call the Attorney General to account, they would have been unsustainable unless it had been shown that the acts were not done in good faith. This is because the provisions of section 8 set out elsewhere in this judgment insulate the Attorney General and other officers from personal liability when acting in good faith in the discharge of their official functions.
78. The 1st respondent and its Council are established by statute and are subject to the Constitution and the law. They are subject to the supervision of the High Court. Should they arrogate to themselves powers that they do not have, the Court is under an obligation to stop them.
79. In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In Republic v Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 others [2004] 2 KLR 530, it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others, and based on East African Railways Corp. v Anthony Sefu Dar-es-Salaam HCCA No 19 of 1971 [1973] EA 327, Courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it.
80. Consequently, where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. Further, Courts will not be rubber stamps of the decisions of administrative bodies. However, if Parliament gives great powers to statutory bodies, the Courts must allow them to exercise it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the Court on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law. See Re Hardial Singh and others [1979] KLR 18; [1976-80] 1 KLR 1090.



81. It is our view in this case that the 1st respondent and its Council have sought to arrogate to themselves powers that they have not been vested with by the establishing statute, and it is the responsibility of this Court to stop them.

Disposition and Remedies

82. The petitioner has sought various orders and declarations from the Court with regard to the acts of the respondents. Many of the reliefs sought were premised on the alleged violation of the petitioner's rights, which have not, however, been demonstrated. In the circumstances, and bearing in mind the provisions of the Constitution at Article 23 which give the Court jurisdiction to grant appropriate relief, including a declaration of rights, an injunction, and an order of judicial review, the orders we deem appropriate in the circumstances of this case are as follows:

- i. We declare that the acts of the respondents of summoning the petitioner to question his conduct in the performance of his duties as Attorney General of the Republic of Kenya is *ultra vires* their powers under the Law Society Act and therefore unlawful and unconstitutional.
- ii. We hereby quash the proceedings initiated by the respondents for the purpose of issuing the petitioner with a "certificate of dishonour".
- iii. We hereby issue orders restraining the respondents by themselves, their servants and/or agents from summoning the petitioner for purposes of conducting any proceedings whatsoever and howsoever pertaining to High Court of Justice Queen's Bench Division Claim No 2006 Folio 881 or any matters connected thereto specifically and generally on any matters pertaining to the functions of the office of the Attorney General.

83. With regard to costs, which are within the discretion of the Court, we direct each party to bear its own costs.

DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF MARCH 2015

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W. KORIR

JUDGE

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MUMBI NGUGI

JUDGE

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G. V. ODUNGA

JUDGE

