



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 196 OF 2015**

**THE LAW SOCIETY OF KENYA.....APPELLANT**

**VERSUS**

**FAITH WAIGWA.....1<sup>ST</sup> DEFENDANT**

**WAMBUGU GITONGA.....2<sup>ND</sup> DEFENDANT**

**ALEX GATUNDU.....3<sup>RD</sup> DEFENDANT**

**KIMANI WAWERU.....4<sup>TH</sup> DEFENDANT**

**JACQUELINE MANANI.....5<sup>TH</sup> DEFENDANT**

**EDWIN SIFUNA.....6<sup>TH</sup> DEFENDANT**

**ALUSO INGATI.....7<sup>TH</sup> DEFENDANT**

**KINYANJUI THEURI.....8<sup>TH</sup> DEFENDANT**

**CHARLES KANJAMA .....INTERESTED PARTY**

**RULING**

1. Pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Alex Gatundu, the 3<sup>rd</sup> Defendant herein took out the motion dated 22<sup>nd</sup> September 2015 in which he sought the following orders inter alia:

*Pending the hearing and determination of this suit, the Plaintiff's council, its agents, employees and/or members be restrained from discussing, deliberating, conversing, voting, adopting, resolving or in any other way whatsoever howsoever dealing with and/or implementing any resolutions/decisions contrary to the following resolutions passed at the Annual General Meeting of 21<sup>st</sup> March 2015 at the Ordinary General Meeting of 26<sup>th</sup> September 2015 or conducting any business dealing with the aforesaid resolutions.*

- a. *That the IAC project be abandoned.*
- b. *That a forensic audit of the LSK financial accounts for the period between 1.1.2010-31.12.2015 be conducted*
- c. *That the CEO/Secretary of the LSK be sent on compulsory leave pending the outcome of the*

*forensic audit.*

2. The motion sets out the grounds it is based. The Applicant did not deem it fit to file affidavit evidence. When served, the Law Society of Kenya, the Plaintiff herein, filed the replying affidavit of Apollo Mboya, its secretary/C.E.O plus grounds of opposition to resist the motion. Mr. Charles Kanjama, the Interested Party filed grounds of opposition to oppose the motion too.
3. Learned counsels from both sides presented oral submissions and cited authorities to support their positions. I have considered the material placed before me plus the rival submissions.
4. It is the submission of Mr. Mureithi, learned advocate for the 3<sup>rd</sup> Defendant that this court should grant the order sought in the aforesaid motion to avoid this suit being rendered nugatory. It is argued that the Applicant is apprehensive that the Plaintiff will seek to have a discussion or debate touching on the resolutions which it has sought to nullify in an attempt to steal a march on the Defendants and with the sole aim of defeating the purpose of this suit. Mr. Mureithi further argued that any discussion on the resolution will offend the rule on subjudice and hence will prejudice the administration of justice and will erode the integrity of this court. This court was urged to stay or restrain by way of injunction the discussion, deliberation, conversation, voting, adoption or any other form of dealing with the resolutions pending the hearing and determination of this suit. The application was supported by Mr. Masika, learned advocate holding brief for Mr. Okero for the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants. Mr. Masika urged this court to grant the orders prayed in the motion as a way of promoting a fair administration of justice. It is Mr. Masika's argument that the Plaintiff's meeting slated for 26.9.2015 will end up discussing contentious matters which are pending before this court. Mr. Sifuna, the 6<sup>th</sup> Defendant also argued in favour of the motion. He urged this court to set the ground rules so that the Plaintiff's meeting does not descend into the arena of this case thus allowing the Plaintiff to steal a march on the Defendants.
5. Mr. Ongoya, learned advocate for the Plaintiff, appeared together with Mr. Kimuli to oppose the motion. Mr. Ongoya begun by attacking the foundation of the motion. He argued that since the motion is not supported by affidavit evidence as envisaged under Order 51 Rule 4 of the Civil Procedure Rules, then its substratum does not exist like in this case. Mr. Muriithi countered this argument by stating that the Civil Procedure Rules does not make mandatory for such an application to be accompanied by an affidavit. He further argued that under Order 51 rule 10(2) of the Civil Procedure Rules an application should not be defeated on a technicality for want of form.
6. Mr. Ongoya further argued that the Applicant is guilty of laches since notice for the meeting scheduled for 26.9.2015 was given to the Applicants as early as 25.03.2015. Mr. Muriithi did not deny the fact that the Applicant and other members of L.S.K. were notified of the aforesaid AGM in the month of March 2015. Mr. Ongayo urged this court not to entertain the Applicant for being indolent inequity.
7. The Plaintiff's advocate also pointed out that the Applicant wrongly invoked this court's inherent power to entertain an application for injunction yet there are express statutory and procedural provisions covering such applications which have not been cited.
8. Mr. Ongoya further argued that this court has no power to injunct the Plaintiff's A.G.M because the same is guided by a statute which gave power to the L.S.K council to conduct such proceedings. The Plaintiff's advocate also submitted that the 3<sup>rd</sup> Defendant/Applicant has not established a prima facie case to enable this court grant the orders of injunction. He also argued that the 3<sup>rd</sup> Defendant/Applicant misapprehended the doctrine of subjudice in that the doctrine did not bar parties to the dispute from discussing the matter in dispute.
9. Mr. Kanjama, the Interested Party herein also argued against the motion. He pointed out that the application did not meet the conditions set out under section 63(c) of the Civil Procedure Act and under order 40 rule 1 of the Civil Procedure Rules. He pointed out that eh agenda of what is to be

discussed in the L.S.K AGM scheduled for 26.9.2015 were never disclosed or described by the Applicant hence there is no prospect that the court process will be violated. Mr. Muriithi argued that though the 3<sup>rd</sup> Defendant did not file an affidavit, he heavily relied on the material that is in the court records. He also argued that the 3<sup>rd</sup> Defendant merely invoked the court's residual powers.

10. There is no dispute that the Plaintiff has called for its Annual General Meeting to be held on 26.9.2015 at Bomas of Kenya. This court has been beseeched to issue temporary orders of injunction to restrain the Plaintiff council, its agents, employees and or members from interalia discussing or implementing any decisions contrary to the resolutions passed at the AGM held on 21.3..2015 at the Ordinary General Meeting scheduled to be held on 26.9.2015 or conducting business in respect of:

- a. ***That the IAC project be abandoned.***
- b. ***That a forensic audit of the LSK financial accounts for the period between 1.1.2010-31.12.2015 be conducted***
- c. ***That the CEO/Secretary of the LSK be sent on compulsory leave pending the outcome of the forensic audit.***

The Principles to be considered in such application are well settled. First, one must show a prima facie case with a probability of success. Secondly an applicant must show that unless the order is given he would suffer irreparable loss. Thirdly where there is doubt the court will apply the balance of convenience.

11. The 3<sup>rd</sup> Defendant filed an application with ground but without any affidavit evidence to buttress or explain those grounds. This court has been invited to look at the other affidavits which had previously been filed in support of other applications to obtain the evidence required. With respect, I do not think it is the role of this court to go fishing for evidence. That burden is placed on the applicant under order 40 rules 1 of the Civil Procedure Rules.

12. With respect, I agree with the submissions of Mr. Ongeya that the Applicant has failed to discharge that burden. The Plaintiff was prompted to supply vide the replying affidavit the agenda of the meeting. A close scrutiny of the aforesaid agenda will reveal that it may not after all discuss matters in dispute before this court.

13. On this ground alone I find that the applicant has not shown that he has a prima facie case with any chances of success.

14. The other important doctrine which is relevant to this matter is the question of convenience. I will tie this doctrine to the argument that the 3<sup>rd</sup> Defendant is guilty of laches.

15. There is no dispute that the Applicant was notified way back in the month of March 2015, of the holding of the Ordinary General Meeting on 26.9.2015. It is also not in dispute that the Applicant did not deem it fit to raise an objection until 22.9.2015. With respect, I agree with the Plaintiff that the 3<sup>rd</sup> Defendant does not expect equity to come to his aid. The Plaintiff has given in detail the inconvenience that may be caused if the order is granted. One of the arguments put forward is that a colossal amount of money will be lost if the meeting is cancelled. I am convinced that the party which will be more inconvenienced if the order is granted is the Plaintiff as opposed to the Applicant.

16. Before I pen off, let me address my mind on an issue which was ably argued relating to exercise of the inherent power of this court. The court invokes its inherent power when there are no express provisions covering the application. In the motion before this court, the Applicant was basically asking for an order of injunction. With respect, I agree with the submissions of Mr. Kanjama that there was no need to invoke the inherent power of this court when the statute and

the rules provided for such applications. The Applicant therefore improperly invoked the inherent power of this court.

17.The final matter which attracted my attention is the doctrine of subjudice. Mr. Ongoya raised a very interesting argument which I think deserves a little attention.

18.He argued that when the parties involved in the dispute actively discussed same in a form outside the court, they cannot be said to be breaching the subjudice rule. I wish the parties had sufficient time to present arguments over the issue. It is a matter which needs further discussion and arguments. The question which puzzles me is: Are parties who are involved in negotiations with a view of finding an out of court settlement be said to be breaching the subjudice rule?

19.I must commend learned counsels appearing in this matter who within a very short time were able to present serious arguments. Due to time constraints this court may not have captured all the arguments nor utilised the authorities supplied and cited.

20.In the end I find no merit in the motion dated 22.9.2015. The same is dismissed. Since the dispute pits members of the Plaintiff, I direct that each party meets its own costs of the motion.

Dated and delivered in open court this 25<sup>th</sup> day of September, 2015.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant