



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 55 OF 2015

IN THE MATTER OF: ARTICLES 2, 10, 19, 20, 21, 22, 23 AND 165 OF THE CONSTITUTION OF KENYA, RULES 4, 10 AND 23 OF THE CONSTITUTION OF KENYA (PROTECTION OF THE RIGHTS AND FUNDAMENTAL FREEDOM PRACTICE AND PROCEDURE RULES, 2013)

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 35, 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE LAW SOCIETY OF KENYA ACT, 2014, THE ADVOCATES ACT, CHAPTER 16, LAWS OF KENYA, THE FAIR ADMINISTRATIVE ACTION ACT 2015 AND THE LAW SOCIETY OF KENYA GENERAL REGULATIONS

AND

IN THE MATTER OF: NOTICE ALLEGEDLY ISSUED UNDER SECTION 13 OF THE LAW SOCIETY OF KENYA AT 2014 AGAINST MCMILLAN EDWIN JENGO, JACQUELINE OKEYO (MANANI) AND ALE GATUNDU

BETWEEN

MCMILLAN EDWIN JENGO..... PETITIONER

VERSUS

LAW SOCIETY OF KENYA.....RESPONDENT

AND

WANGALWA PATRICK OUNDO.....INTERESTED PARTY

RULING

1. In his Notice of Motion dated and filed on 18th September, 2015 the Petitioner, an Advocate of the High Court of Kenya, sought *inter alia* temporary or conservatory orders to restrain the Respondent

whether by itself or its agents or servants from discussing a notice of motion seeking to expel the Petitioner from the membership of the Law Society of Kenya during the forthcoming meeting of members scheduled for 26th September, 2015, pending the hearing and determination of the application and the petition herein.

2. The Application is premised upon the grounds on the face thereof and the Applicant's Supporting Affidavit sworn on 18th September, 2015. The Applicant's main bone of contention in support of the Application is that he is unaware of the grounds for purporting to expel him along with two other counsel, Jacqueline Okeyo (Mombasa) and one Alex Gatundu.

3. The Applicant depones in paragraphs 11 and 12 of the Application that the Interested Party whom he met at Mombasa Law Courts in the company of another Advocate Mathew Nyamu together with other unnamed Advocates, when presumably confronted by the Applicant, denied knowing the Applicant personally and of ever issuing to the Respondent any complaint against the Applicant. The Applicant therefore concluded in paragraph 12 of his Supporting Affidavit that the grounds upon which the motion to expel the Applicant from membership of the Respondent was fictitious, malicious and issued in bad faith with the sole intention of intimidating the Applicant and other Advocates who like the Applicant, have been vocal in demanding accountability and transparency in the implementation of a project known as or christened, the **International Arbitration Centre** initiated by the Respondent.

4. The Applicant cited section 13(2) of the Law Society of Kenya Act (Cap 18, Laws of Kenya, as re-enacted by the Law Society of Kenya Act, 2014) that a member of the Respondent shall neither be suspended nor expelled unless first given an opportunity to answer all allegations against him.

5. The Applicant further cited section 4(3) of the Fair Administrative Action Act 2014, which reiterates and expands the rights to notice before an adverse decision may be taken against a person who may be affected by such action. The Applicant also referred to the provisions of the Law Society of Kenya (General) Regulations 1962, and Regulations 33(1) thereof (on the prerequisites for convening a valid ordinary general meeting of the Respondent, Regulation 35(1) (2) (on 21 notice days) to discuss any resolution at the Respondent's such meetings.

6. Finally, the Respondent cited Article 35(1) of the Constitution (on the right to information), Article 50 (on the right to fair trial), Article 47 (on the right to fair administrative action) and Article 43 (on the right to human dignity and the right to earn a livelihood).

7. For all those reasons, the Applicant urged the court to find that he had made a prima facie case with a probability of success and that a conservatory order should be granted to forestall the Respondent from including in the agenda, any item to discuss the suspension or expulsion of the Applicant from the Respondent's membership.

DETERMINATION

8. I have reviewed carefully the Applicant's counsel's submissions, the grounds of the Application and the Applicant's Supporting Affidavit and come to the firm conclusion and determination that the Applicant has not made a prima facie case for the grant of a conservatory order. These are the reasons.

9. **First**, there is absolutely no evidence that the Applicant will be discussed at the Law Society of Kenya meeting on 26th September, 2015. The agenda attached to the Applicant's Supporting Affidavit does not include the Applicant as subject of discussion at the meeting.

10. **Second**, even taking the Affidavit of one Emilio Mugo Caesar as true, both the Respondent and the Interested Party had less than three days to file and serve their papers. They were served at 12.30 p.m. and 2.00 p.m. respectively. The Interested Party received the application under protest because the notice was too short. The Interested Party noted that it was already committed to another matter on 24th September, 2015, and that the only available day was 2nd October, 2015. Service upon the Respondent was effected

upon **“one of the legal staffs who after going through the documents accepted service by stamping and signing in front of my copy”**. One of the legal staffs is not disclosed. More importantly the Respondent’s stamp which is alleged to have been signed by **“one of the legal staffs”** is not in fact signed.

10. **Third**, even if there was proper service upon the Respondent and the Interested Party, a conservatory order is intended to maintain the **status quo**, as between the Applicant and the Respondent, in particular. The Respondent is a professional body with highly competent officials, and if they were to move a motion as against the Applicant, it is not likely that they would do so, without cognisance of the provisions of section 13 of the Law Society Act, section 4(3) of the Fair Administrative Action Act, 2015, and under the Law Society of Kenya (General) Regulation 1962, or indeed the applicable provisions of the Constitution as to rules of natural justice, fair trial and fair administrative action.

11. **Fourth**, the Respondent is mandated under its establishing statutes to maintain discipline and standards among its members. Even assuming for argument’s sake that it has breached all norms of the rules of natural justice, as enshrined in the Constitution of Kenya 2010, the Law Society of Kenya Act, and the Law Society of Kenya (General Regulations 1962), that would clearly mean that the Respondent has acted upon fictitious grounds and therefore maliciously by including an item in its agenda of its meeting to discuss disciplinary matters against the Applicant. That would be unimpeachable ground for action in damages against the Respondent. The Respondent is not known to be an impecunious body. It would be both unwise and injudicious to stop it albeit temporarily, from carrying its statutory mandate to discipline any errant member, including the Applicant.

12. For those reasons, I decline as already stated, any conservatory orders against the Respondent.

Dated, Signed and Delivered in Mombasa this 25th day of September, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Simiyu holding brief Jumbale for Applicant

Mr. Kaunda Court Assistant