



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

**AT MOMBASA**

**PETITION NO. 64 OF 2014**

IN THE MATTER OF: ARTICLES 2, 10, 19, 20, 21, 22, 23 AND 165 OF THE CONSTITUTION

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS SECURED AND GUARANTEED UNDER ARTICLES 27, 28, 32, 33,

34, 35, 36, 40, 44, 46, 47 AND 49 OF THE CONSTITUTION

AND

IN THE MATTER OF: THE LAW SOCIETY OF KENYA ACT CHAPTER 18, LAWS

OF KENYA AND THE ADVOCATES ACT, CHAPTER 16, LAWS OF KENYA AND THE

LAW SOCIETY OF KENYA GENERAL REGULATIONS

AND

IN THE MATTER OF: THE SPECIAL GENERAL MEETING HELD ON 27<sup>TH</sup> SEPTEMBER 2014

**BETWEEN**

**KIMANI WAWERU & 28 OTHERS ..... PETITIONERS**

(Suing on their own behalf and on behalf of the 1018 other Petitioners)

AND

**LAW SOCIETY OF KENYA & 12 OTHERS ..... RESPONDENTS**

**RULING**

1. This is a ruling on an application dated the 5<sup>th</sup> November 2014 filed by the counsel for the Respondents seeking the transfer of the Petition to the High Court at Nairobi and for consolidation with Nairobi

Petition No. 507 of 2014 in specific terms as follows:

**“ORDERS**

- a). *That this application be certified as urged and service be dispensed with at first instance.*
- b). *That this Petition be transferred to the High Court at Nairobi and consolidated with High Court Petition No. 507 of 2014, Deynes Muriithi & others -vs- Law Society of Kenya & Another.*
- c). *That the Court do issue any other directions as may deem fit and just in the circumstances and interest of justice in this matter.*
- d). *That the Petitioners do pay the costs of this application.”*

The application was expressed to be brought pursuant to the provisions of sections 1A, 1B, 3A, 6 and 17 of the Civil Procedure Act. The application was opposed. Counsel for the parties – Mr. Mutubia for the Respondents/applicants and Mr. Jengo for petitioners made oral submissions thereon on 10<sup>th</sup> November 2014 and ruling reserved for the 17<sup>th</sup> November 2014.

2. Section 6 of the Civil Procedure Act on *sub judice* rule does not apply to the application before the court because the present proceedings were filed first in time on the 15<sup>th</sup> October 2014 before the proceedings in the High Court at Nairobi which were filed on the 16<sup>th</sup> October 2014. Moreover, no order of stay which is the subject of section 6 of the Act has been sought in the application; it sought rather an order for the transfer of the petition to Nairobi for consolidation and trial with Petition No. of 2014.

3. Section 17 of the Civil Procedure Act has similarly no application as the provision deals with the transfer of cases pending hearing before the subordinate courts. There is only one High Court of Kenya which sits at different court stations as appointed by the Hon. The Chief Justice by notice in the Kenya Gazette from time to time, and the court sitting at one such station has no power to **transfer** a case pending before it or before another court sitting at a different station.

4. To be sure, however, with regard to constitutional petitions such the one before the court, **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice And Procedure Rules, 2013 [Mutunga Rules]** has provision for transfer of petitions in the following terms:

**8. (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.**

**(2) Despite sub rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party.**

5. However, even in regular civil litigation the court may in accordance with the rules of the court **direct that the hearing of any proceedings be had at one or the other court station** where the High Court is gazetted to sit. This is the effect of Order 47 rule 6 of the Civil Procedure Rules 2010, which is in the following terms:

**6. (1) Every suit whether instituted in the Central Office or in a District Registry of the High Court shall be tried in such place as the court may direct; and in the absence of any such direction a suit instituted in the Central Office shall be tried by the High Court sitting in the area of such Central Office and a suit instituted in a District Registry shall be tried by the High Court sitting in the area of such District Registry.**

**(2) The court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court:**

***Provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place, and all the other circumstances of the case.***

6. In determining the place for trial with respect to the present proceedings where there is an application for transfer, the court must therefore take the convenience of the parties and their witnesses as a primary consideration. Indeed, one of the principles for the determination of the place of suing in an application for the transfer of cases pending before the subordinate courts is the place where the defendant resides or carries on business. Section 15 of the Civil Procedure Act, provides as follows:

***15. Other suits to be instituted where defendant resides or cause of action***

***arises***

*Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—*

*(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, **actually and voluntarily resides or carries on business, or personally works for gain;** or*

*(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, **actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution;** or*

*(c) the cause of action, wholly or in part, arises.*

7. ***Mulla on the Code of Civil Procedure*** (2012) 18<sup>th</sup> ed. at p.391 explains the rationale on the defendant's actual and voluntary residence and place of work when considering section 20 (a) and 20 (b) of the Indian Code of Civil Procedure which is in ***pari materia*** with section 15 of the Civil Procedure Act of Kenya set out above, as follows:

e. ***Scope and principle of the Section.*** - *Clauses (a), (b) and (c) of s 20 are independent of each other.*

*This is a general section embracing all personal actions. At common law, actions are either personal or real. Personal actions are also called transitory because they may occur anywhere, such as actions for tort to persons or to movable property or suits on contracts. Real actions are actions against the res or property and are called local because they must be brought in the forum where the immovable property is situated. An action may also be a mixed action being partly real and partly personal. Torts to immovable property such as trespass and nuisance are mixed actions and are referred to in s 16(e). Otherwise, s 16 deals with real and local actions, while ss 19 and 20 deal with personal or transitory actions.... **The principle underlying s 20(a) and s 20(b) is that the suit is to be instituted at the place where the defendant can defend the suit without undue trouble.***

8. So while the convenience of the parties and their witnesses is to be considered in accordance with Order 47 rule 6 of the Civil Procedure Rules first principles indicate that it is the convenience of the defendant that should be given paramount consideration to avoid undue hardship on his part in defending the suit.

9. Further consideration must be had of the undesirability of multiple suits over the same subject matter being considered by different courts of concurrent jurisdiction with the possibility of conflicting decisions over the same subject matter. No authority is necessary for this obvious consideration of judicial policy which goes to promoting public confidence in the judicial system. Moreover, Article 159 of the

Constitution and section 1A of the Civil Procedure Act require of the courts that the dispute resolution process be fair, expeditious and cost effective with proportionate use of judicial resources. Engaging two courts of concurrent jurisdiction to deliberate on the same or similar issues is not proportionate utilization of judicial resources but rather wasteful duplication which is bound to create uncertainty as to the binding effect of either court's decision in the event of conflict.

10. In arriving at a decision in this matter, I have considered the followings matters as determinant:

a. Although the basis of the claim before the court in this Petition No. 64 of 2014 is that the convention, method of voting and therefore resolution of the 1<sup>st</sup> respondent's meeting of the 27<sup>th</sup> September 2014 were unconstitutional and unlawful, the true objection is against the resolutions of the meeting which is the same subject of the Petition No. 507 of 2014 pending hearing in Nairobi. Indeed, the two petitions significantly have similar prayers as follows:

Prayer 31(e) of Petition NO. 64 of 2014

***“An order of Certiorari be and is hereby issued to quash any and all resolutions of the Special General Meeting of 27<sup>th</sup> September 2014 of the Law Society of Kenya. ”***

Prayer 17(c) of Petition NO. 507 of 2014

***“An order of Certiorari to bring before this court and quash the decision made by the 1<sup>st</sup> respondent making it a condition precedent for the petitioner and any advocate to pay Ksh.39000.00 or any other monies not contemplated under the Advocates Act cap. 16 Laws of Kenya, The Kenya Law Society act, cap 26 and Rules there-under prior to issuance of a Practising Certificate.”***

b. It was asserted by the respondents without contradiction by the petitioners that the principal defendant, the 1<sup>st</sup> respondent Society has its seat at Nairobi where its head office and its secretariat is situate and that all the respondent members of the Council of the Society and most of the petitioners are based in Nairobi, even though the respondent has a branch office at Mombasa. The convenience of the parties dictates that the matter be heard at Nairobi.

c. The petitioners are advocates who according to the pleadings are advocates of the High Court of Kenya and members of the Law Society of Kenya and therefore entitled to carry on business at Nairobi and other parts of the country, and there is no evidence of inconvenience in having the suit proceed to hearing at Nairobi.

d. The consideration of efficient use of judicial resources dictate that the two petitions on the same or similar dispute be heard by one rather than two courts.

e. The consideration of judicial policy against conflicting decisions of courts of concurrent jurisdiction call for hearing of the two petitions by the same court.

f. Consolidation of suits does not, unlike the principles of *sub judice* and *res judicata*, depend on the parties in the different suits being the same or litigating in the same capacity. Consolidation only requires that the same or similar questions of law and fact be present in two or more suits to be consolidated. See *Stumberg and Anor. v. Potgieter* [1970] E.A. 323, where the traditional considerations in consolidation of suits were given as follows:

***“Consolidation of suits under Order 11 of the Civil Procedure (Revised) Rules 1948 should be ordered where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time.”***

g. No prejudice has been shown to result from the hearing of the petition in No. 64 of 2014 at Nairobi either separately or in consolidation with Petition No. 507 of 2014 as the petitioners as advocates of the High Court of Kenya are entitled to and do also carry out business at Nairobi, and both courts are able, and indeed enjoined by Article 159 of the constitution and section 1A of the Civil Procedure Act, to expedite the hearing of any application including that for conservatory orders pending in this matter, on the basis of any urgency shown.

h. The determination of the application for consolidation can only be made by the court before which the hearing of both petitions is pending. As the petitions are before different courts now, the application for consolidation is premature and should be urged before the High Court at Nairobi once the file on petition No. 64 of 2014 herein is sent to Nairobi for hearing and disposal.

11. Pursuant to Rule 8 of the ***Mutunga Rules*** and having regard to the subject matter of the two petitions under reference in this application, the undesirability of separate concurrent court hearings for same or similar disputes and the convenience of the parties in terms of Order 47 rule 6 of the Civil Procedure Rules 2010, the Petition No. 64 of 2014 must be transferred to Nairobi for hearing and disposal, either separately or in consolidation with Petition No. 507 of 2014, as that Court may determine.

12. Accordingly, I make the following orders on the Notice of Motion dated the 5<sup>th</sup> November 2014:

1. The **Mombasa Petition No. 64 of 2014** herein is transferred to the High Court sitting at Nairobi for hearing and determination.
2. The High Court sitting at Nairobi may consider the application for consolidation of the **Mombasa Petition No. 64 of 2014** with **Nairobi Petition No. 507 of 2014**.
3. Costs in the cause.

13. The Court file on this matter will be placed before the Head of the Constitutional Division of the High Court at Nairobi for directions as to the hearing of the Petition and any application/objection made there-under.

**Dated, signed and delivered on the 17<sup>th</sup> November 2014.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Mutiso for Mr. Jengo for the Petitioners

No appearance for the Respondents

Mr. Murimi Court Assistant