



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**

**Petition 21 of 2010**

LAW SOCIETY OF KENYA .....PETITIONER

AND

BETTY SUNGURA NYABUTO ..... 1<sup>ST</sup> RESPONDENT

THE INDUSTRIAL COURT ..... 2<sup>ND</sup> RESPONDENT

THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT

**JUDGMENT**

**Introduction**

1. By a petition dated 13<sup>th</sup> August 2010, the Law Society of Kenya (hereinafter ‘the Society’), a statutory corporation constituted under the *Law Society of Kenya Act (Chapter 18 of the Laws of Kenya)* moved this court to set aside certain proceedings of the Industrial Court.

2. The 1<sup>st</sup> respondent, Betty Sungura Nyabuto, was the Chief Executive of the Society, having been appointed on 1<sup>st</sup> March 2006 until 26<sup>th</sup> May 2009, when the Council of the Society resolved to terminate her services.

**The Facts**

3. The 1<sup>st</sup> respondent filed a suit in the Industrial Court namely; *Industrial Court Cause No. 717(N) of 2009, Betty Sungura Nyabuto v Law Society of Kenya*. In that suit she sought various reliefs including compensation for loss of employment amounting to Kshs.10,260,356.00. This claim was defended by the Society on whose behalf a memorandum of reply dated 1<sup>st</sup> February 2010 was filed.

4. After the close of pleadings, deliberations between advocates for the Society and the claimant took place leading to an offer for settlement of the matter by the Society. This offer was communicated to the claimant’s counsel by counsel for the Society through a letter dated 30<sup>th</sup> March 2010.

5. When the matter came up for hearing on 29<sup>th</sup> June 2010, the parties recorded a consent settling the matter. This consent was captured in a consent letter dated 2<sup>nd</sup> June 2010 executed by the parties’ counsel. The Industrial Court adopted the signed consent and issued an award dated 2<sup>nd</sup> June 2010 in accordance with that consent.

6. When the outcome of proceedings of 2<sup>nd</sup> June 2010 was communicated to the Society by its advocate, the Society instructed its advocate to set aside the consent on the ground that it was entered in excess of instructions given. An application to that effect was prepared. The application dated 5<sup>th</sup> July 2010 seeking to set aside the consent order and award was duly filed.

**The Proceedings**

7. The gravamen of the petitioner's case concerns what transpired in court on 30<sup>th</sup> July 2010 when the application dated 5<sup>th</sup> July 2010 came up for hearing. It is important to set out the verbatim certified proceedings of the court;

**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**CAUSE NO. 717(N) OF 2009**

**BETTY SUNGURA NYABUTO .....CLAIMANT**

**VS**

**LAW SOCIETY OF KENYA .....RESPONDENT**

**CERTIFIED COURT PROCEEDINGS**

30<sup>th</sup> July 2010

**CORAM**

**Judge:** Justice Isaac K. Mukunya

**Members:** Mr. Udoto  
Mr. Alumande  
Mr. Mbuthia

**M/s Nthungu:** Holding brief for Mutua for Applicant

**Mr. Munyi:** Holding brief for the respondent

Re: Application for Review

**Order:** As there is no one to prosecute the application for review in absence of Mr. Mutua who has not given any sufficient reason for his absence, the application for review is hereby dismissed.

Claimant to be at liberty to proceed with the execution of the judgment and award of the court.

**Signed:** Judge.

8. According to the petitioner's counsel, the application for review was adjourned to 30<sup>th</sup> July 2011. On 30<sup>th</sup> July 2011, Ms Judicaster Nthuku on behalf of *E K Mutua & Company Advocates* acting for the Society applied for an adjournment which application was not opposed by the claimant's counsel. As is evidenced from the proceedings, the court rejected the adjournment and gave the claimant liberty to

proceed with execution.

### **The Petitioners Case**

9. The petitioner avers that its rights under **sections 70 and 77 of the Constitution** were breached when the Industrial court made the following orders:

(a) It declined to record the application for adjournment by the petitioner's advocates.

(b) Having declined to grant the adjournment, it declined to allow the petitioner's advocates to prosecute the application.

(c) It proceeded to deny the petitioner a hearing and a fair hearing.

(d) It dismissed the petitioner's application.

10. The petitioner therefore seeks the following reliefs from this court:-

*(a) A declaration that the Petitioner's rights under Sections 70 and 77 of the Constitution were infringed by the Industrial Court in Industrial court Cause Number 717(N) of 2009 by action of the said Court on 30<sup>th</sup> July 2010 in its failure to hear the Petitioner and or to accord the petitioner a fair hearing.*

*(b) A declaration that the entire proceedings and order of 30<sup>th</sup> July 2010 in the Industrial Court in Cause Number 717(N) of 2009 are a nullity.*

*(c) A declaration and order that the Petitioner be granted a hearing by being allowed to prosecute the application dated 5<sup>th</sup> July 2010 before another division of the Industrial Court.*

*(d) An order for stay of proceedings and or execution of the Award/Decree in Industrial Court Cause Number 717(N) of 2009.*

*(e) Any other order(s) this Honourable Court deems just.*

11. Counsel for the petitioner, Mr. Obura, adopted the written submissions filed on 26<sup>th</sup> November 2010. The petitioner invokes **sections 70(a) and 77(g)** of the former Constitution. The Society contends argues that the Industrial Court committed serious breaches of its rights by declining to allow the application for adjournment and also declining to allow the advocate then present, Ms Nthuku, to prosecute the application.

### **The Respondents' Case**

12. The 1<sup>st</sup> respondent opposed this petition by her replying affidavit sworn on 24<sup>th</sup> November 2011. According to her the hearing date was fixed by consent of the parties advocates and that the petitioner's fundamental right to a fair hearing has not been infringed as alleged or at all.

13. The 1<sup>st</sup> respondent's counsel, Hon. Muite S.C., adopted the written submissions filed on 2<sup>nd</sup> March 2011. He urged me to dismiss the petition as **section 27** of the **Labour Institutions Act, 2007** gives the party aggrieved by an order of the court, a right of appeal to the Court of Appeal. The party also has the right to set aside the proceedings before the same court. He urged me to dismiss the petition.

14. Mr. Onyiso, who appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, adopted the grounds of opposition filed on 9<sup>th</sup> May 2011. The respondents argue that the Industrial Court judge has the discretion to disallow the application for adjournment and as such this petition does not raise any constitutional issues. Further it is submitted that the petitioner has not established infringement of the fundamental right to a fair and

impartial hearing. The respondents also oppose the petition on the ground that the petitioner has a right to appeal under **section 27** of the **Labour Institution Act, 2007** which is the alternative remedy.

### **Issues for determination**

15. I have heard the parties, read the pleadings and written submissions and I conclude that there are two broad issues for consideration.

(a) The jurisdiction of this court is contested on several grounds namely;

(i) The petitioner has no capacity to agitate these proceedings.

(ii) The Bill of Rights only recognises vertical application, that is, the bill of rights is only enforceable as against the state or state agents and not as between citizens.

(iii) This court has no jurisdiction to determine the matter in view of the existence of an alternative remedy under **section 27** of the **Labour Institution Act, 2007**.

(b) Whether the petitioner's rights under **sections 70(a)** and **77** of the Constitution were violated.

### **Jurisdiction**

#### ***Capacity***

16. The 1<sup>st</sup> respondent has submitted that the petitioner lacks the capacity to bring this suit to enforce its rights. I disagree. Under **section 123** of the Constitution, a person includes a body of persons corporate or unincorporated unless the context otherwise requires. The Society is a corporate body established under statute and is endowed with capacity to sue and be sued. In the context of **section 77(9)** of the Constitution it is entitled to the protections of the Bill of Rights including due process protections.

### **Horizontal versus Vertical Application**

17. The 1<sup>st</sup> respondent has also argued that the petition for enforcement of fundamental rights cannot be brought against a private person. Reliance has been placed on the case of **Richard Nduati Kariuki v Leonard Nduati Kariuki Nairobi Misc. Civil App. No. 7 of 2006 (Unreported)** where Justice Nyamu (as he then was) relied on the dicta in the Kiribati case of **Teitiwinnang v Ariong & Others [1987] LRC Const 517** where Maxwell CJ held, "*Dealing now with the question can a private individual maintain an action for declaration against another private individual or individuals for breach of the fundamental rights provisions of the Constitution. The rights and duties of individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It follows therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution.*"

18. I am constrained to depart from the reasoning stated above as there is nothing in the Constitution that draws this distinction or limits the application of the Bill of Rights in such a manner. The Bill of Rights applies to all persons and binds everybody. However, the nature and extent of a particular right may be limited in scope to apply to the state and not a private individual.

19. In the present case, the issue is somewhat moot as the petitioner seeks to enforce its rights against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The 1<sup>st</sup> respondent is party to these proceedings as a beneficiary of the order impugned and she has a right to be heard on the matter.

### **Existence of alternative remedy**

20. The respondents argue that in light of **section 27** of the *Labour Institutions Act*, this court has no jurisdiction to determine this case as there is an alternative remedy. It is entitled to lodge an appeal against the order of the Industrial Court.

21. The issue of the existence of an alternative remedy to that provided under **section 84** of the Constitution has now been settled. The right to approach the court under **section 84** of the Constitution is, 'without prejudice to any other action with respect to the same matter which is lawfully available.' I would do no better than quote Justice Waweru in the case of *Church Road Development Company Ltd v. Barclays Bank of Kenya Limited [2007] 1 EA* where he stated, 'It is then immediately clear that the Plaintiff's right to lodge the petition under section 84(1) of the Constitution is without prejudice to any other cause of action available to him. It is therefore not a sufficient answer, as far as this present application is concerned, that the plaintiff ought to have lodged an Appeal against the two orders complained of. It was entitled to bring the petition (and the application within the petition) notwithstanding its right of Appeal.'

22. For the reasons I have stated I find that this Court has jurisdiction to determine whether the petitioner's rights as alleged in the petition were threatened or violated.

### **Whether the Petitioner was afforded a fair hearing**

23. **Section 77(9)** of the Constitution provides as follows;

*A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.*

24. The contents of **section 77(9)** are the constitutional embodiment of the rules of natural justice which our courts have from time to time elucidated at great length. In the case of *Mwongera Nkwaru v M'Linturi M'Libachi Meru HCCA 127 of 1999 (Unreported)*, Justice Emukule stated as follows, 'The principle of natural justice is posited in two propositions, hear the other party (*audi alteram partem*) and no man shall be condemned unheard ..... They connote that the court or adjudicating authority must act fairly in good faith, without bias, and in judicial temper, to give each party the opportunity of adequately stating his case and correcting or contradicting any relevant statement prejudicial to his case, and not to hear one side behind the back of the other. A man must not be a judge in his own case (*memo debet assee judex in propria sua*) so that the presiding officer of judge must declare any interest he has in any subject matter of the dispute before him. A man must have notice of what he is accused. Relevant documents which are looked at by the court or tribunal should be disclosed to the parties interested.'

25. In considering the matter in the case cited, Justice Emukule was satisfied that the party claiming breach of the rules of natural justice attended all the sessions, gave evidence, called witnesses, cross-examined the respondents' witnesses. In other words, he was given all and ample opportunity of adequately presenting his case. The right to a fair hearing is the right to be given an opportunity to be heard.

26. This opportunity must be a fair, reasonable, full and effective opportunity subject to considerations of expeditious disposal of litigation, bringing finality to a dispute and preventing an abuse of the court process. (See *General Plastics Limited v. Industrial Property Tribunal & Another Nairobi Petition No. 348 of 2006 (Unreported)*.)

27. The question for consideration before me is whether on 30<sup>th</sup> July 2010, the Industrial Court denied the petitioner an opportunity to present its case. What is clear from the record of proceedings is that an adjournment was sought and the court found that the reasons were insufficient.

28. The grant or refusal of an adjournment is purely a matter within the court's discretion. (See ***J.S.K (Cargo) Limited v Kenya Airways Limited Nairobi Civil Appeal No. 83 of 2001 (Unreported)***) The mere refusal of the adjournment cannot, of itself, constitute an infringement of the right and opportunity to be heard.

29. The petitioner has also argued that its counsel was denied an opportunity to prosecute its application. The respondent contends otherwise. Fortunately, this matter can only be resolved on the basis of the court record as certified by the court and which proceedings I have set out at paragraph 7 above.

30. It is clear while the court dealt with the application for adjournment substantively, there is nothing on record that shows that the court took arguments on the substantive application, that is the application dated 5<sup>th</sup> July 2010, which was before it or directed its mind to it. It merely dismissed that application when it rejected the application for adjournment.

31. Once the application for adjournment was dismissed, it was incumbent upon the court to give the applicant, through counsel representing it, the opportunity to present the application dated 5<sup>th</sup> July 2010. The court also fell into serious error when it assumed that there was no one representing the Society to prosecute the application when in fact there was an advocate acting on its behalf.

32. The applicant was indeed represented by counsel and that counsel, notwithstanding she was holding brief for purposes of the court record, had ostensible authority to prosecute that application. (See also ***J.S.K (Cargo) Limited v Kenya Airways Limited (Supra)***). The court had to give the counsel present an opportunity to prosecute the application to set aside the consent after the application for adjournment was rejected. There is nothing in the record to show that such a chance was given to her to present the application.

33. This case is not too dissimilar from the case of ***Matiba vs The Attorney General [1995 – 1998] 1 EA 192*** where, in an application for leave to seek an order of certiorari, the court refused to grant the prayer for stay without hearing counsel for the applicant who was present in court. On appeal the Court of Appeal stated as follows, '*On the face of the record, it appeared that the appellants counsel had made no submissions before the learned Judge in the court below, since if they had been made, they would have been reflected in the record. There was thus an order on record in the presence of the appellants' counsel but without affording him an opportunity to address the Judge. This was a fundamental breach of the rule that no man shall be condemned unheard unless he has been given a fair opportunity to be heard, which is a cardinal principal of natural justice. Any order that flowed from such a fundamental breach cannot be sustained.*'

34. The Court of Appeal reiterated this position in the case of ***Kiai Mbaki & Others v Gichuhi Macharia & Another Nairobi Civil Appeal No. 178 of 2002 (Unreported)*** where the judge of the High Court made an order without hearing the parties. The Court stated, '*the right to be heard is a valued right. It offends all notions of justice if the rights of the parties were to be prejudiced or affected without the party being afforded an opportunity to be heard.*'

### **Conclusions**

35. I am satisfied on the record before me that the petitioner was not given the right to prosecute the application dated 5<sup>th</sup> July 2010 in the Industrial Court after the application for adjournment was rejected. I find that the petitioner's rights under **section 77(9)** of the Constitution were breached in so far as it was not given the opportunity to present its application and the application was in fact dismissed without hearing the parties.

36 In the circumstances, I therefore issue the following reliefs under **Article 23** of the Constitution;

(a) I declare that the Petitioner's rights under **section 77(9)** of the Constitution were infringed by the Industrial Court in Industrial Court Cause Number 717(N) of 2009 by action of the said Court on 30<sup>th</sup>

*July 2010 in its failure to hear the Petitioner and or to accord it a fair hearing.*

*(b) I hereby set aside the proceedings and order of the Industrial Court of 30<sup>th</sup> July 2010 in the Industrial Court in Cause Number 717(N) of 2009.*

*(c) For avoidance of doubt, the petitioner's application dated 5<sup>th</sup> July 2010 is reinstated for hearing and the petitioner shall be at liberty to prosecute the application as soon as possible.*

*(d) I award the petitioner costs of this suit as against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.*

**DATED and DELIVERED at NAIROBI** this 20<sup>th</sup> day of January 2012.

**D.S. MAJANJA**

**JUDGE**

Mr Obura instructed by the firm of E K Mutua & Company Advocates for the Petitioner

Hon P Muite, s.c. instructed by the firm of Nyaguthie Njuguna & Company Advocates for the 1<sup>st</sup> Respondent.

Mr Onyiso, State Counsel instructed by the State Law Office for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.