REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL SUIT NO. 542 OF 1996

KIPLAGAT.....APPLICANT

VERSUS

LAW SOCIETY OF KENYA.....RESPONDENT

RULING

By an Originating Notice of Motion dated 5th June, 1996, the applicant sought various reliefs as appears in the application.

Firstly, it sought a declaration that section 4 of the Law Society Act of Kenya (the Act) is inconsistent with sections 70(b), 78(1) and 80(1) of the Kenyan Constitution. This section falls in chapter 5 of the Constitution and provides for the protection of fundamental rights and freedom of the individual. Section 70(b) entitles every person in Kenya to the freedom of conscience, of expression and of assembly and association: Section 78(1) states that

“except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience”,

and section 80 is in the following terms:

1. Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.

2. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:-

a. that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

b. that is reasonably required for the purpose of protecting the rights or freedoms of other persons;

c. that imposes restrictions upon public officers, members of a disciplined force, or persons in the service of a local government authority; or

d. for the registration of trade unions and associations or trade unions in a register

> established by or under any law, and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or of members necessary to constitute an association of trade unions qualified for registration, and conditions whereby registration may be refused on the grounds that another trade union already registered or association of trade unions already registered, as the case may be, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

It will be seen that the freedom of assembly and association is subject to the exceptions set out in sub-section 2. It will also be seen that none of those exceptions are relevant in the present case. We also take the word "and except that" at the end of sub-section (2) to be conjunctive and therefore qualifies those matters, which are set out in (a) - (d) of subsection (2). So that if any of those things are shown not to be justifiable in a democratic society, then they would not apply as exceptions. The question arises as to whether the right of freedom of assembly enables a person to refuse to be a member of an organisation which the law imposes on him, a duty to be member of. The applicant relied upon the case of *Keller vs State Bar of California* 496 US 1. This is a case which was decided in the Supreme Court of the United States. Mr G B Kariuki for the Law Society submitted that this was a decision of a foreign jurisdiction and that in any event the Constitution of the United States of America was absolute unlike in Kenya where it is qualified and that therefore this Court should not take notice of that decision. We have considered the reasons for the decision and in our view if the facts are sufficiently analogous and if the provisions of the law are similar, then this Court would be entitled to adopt some or part of the reasoning which is relevant to the situation in Kenya. Not unlike the position in Kenya the State Bar of California required members to pay dues as a condition of practicing law. The object of that Bar was "to promote the improvement of the administration of justice" and the membership dues were for self regulatory functions, such as formulating rules of professional conduct and disciplining members for misconduct. The Bar also used to lobby the Legislature, to hold annual delegate's conferences for the debate of current issues and the approval of resolutions and engage in educational programmes. The petitioners brought in the State Court a suit claiming that through the latter activities the Bar expends mandatory dues. Payments to advance political and ideological causes to which they did not subscribe, in violation of their rights under the 1st and 4th amendments, rights to freedom of speech and association and as a result they sought an injunction restraining the State Bar from those activities.

The first holding which is at page 2 of the record of the proceedings, states:

"The State Bar use of petitioner's compulsory dues to finance political and ideological activities with which petitioners disagree violates their first amendment right of free speech when such expenditures are not necessary or reasonably incurred for the purposes of regulating the legal profession or improving the quality of legal services".

Applying this reasoning to the situation in Kenya, we are of the view that if the compulsory fees paid by a member of the Law Society are not used for purposes which fall within the objects set out in the Act then it is possible that the same can constitute an infringement of a member's rights under the Constitution to freedom of assembly and association."

The power to declare void any provision of any law is given to the Court by sec 3 of the Constitution which states as follows:

"This Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void".

What the applicant seeks to do in this case is to have the objects clause in the Act namely section 4 struck out. The interpretation of the section was dealt with by the Court of Appeal (in) Criminal Application No

NAI 6 of 1994 between the *Republic and George Benedict Maina Kariuki*, in which the learned judges at page 3 stated

"The Society is primarily meant to regulate the affairs and conduct of its members in their practice and provision of law".

In that case the learned Justices of Appeal held that the Society had no power under its object clause to intervene in any proceeding before any Court whether or not the parties to those proceedings agree to its intervention.

The Law Society must therefore act totally within the bounds of its objects but we shall deal with that matter later in this ruling. It is necessary for the Court therefore to decide whether or not by virtue of section 4 of the Act the applicant's constitutional rights are being infringed by being forced to become a member of the Law Society.

The compulsion to be a member of the Law Society is to be found in sections 21 (1)(b) and section 23 (1) of the Advocates Act which are in the following terms:

21(b) "The Registrar shall issue in accordance with, but subject to, this part and any rules made under this Act certificates and annual licences authorizing the advocates named therein to practice as advocates." And 23(1) "Every advocate to whom a practising certificate is issued under this part thereupon and without payment of any further fee, subscription, election, admission or appointment, and notwithstanding anything contained in the Law Society of Kenya Act or in any regulations made thereunder, become a member of the Society and the Advocates Benevolent Association and the subject to any provision of law or rule of the Society and the Advocates Benevolent Association for the time being affecting the members thereof."

The applicant has however not applied to strike out these sections in his application. Had he done so the Court would have had to consider whether these are reasonable and if so whether they should be struck out or not.

Section 4 which is the object's section of the Law Society Act in our view does not in any way make it compulsory for the applicant or any other advocate to become a member of the Law Society and we can see no reason why this should be struck out. In fact to do so would give the Law Society unlimited powers as it would have no objects within which to work. The other section of the Act which might have applied is section 8 of the Law Society of Kenya Act which is in the following terms:

"Subject to the provisions of sections 27 and 28 of the Advocates Act, every member of the Society shall pay the Society such annual subscription as may be prescribed from time to time: Provided that no honorary member shall be liable to pay any such subscription."

In the circumstances we are not able to grant the declaration sought for in prayer 3 of the application.

We now turn to the declaration sought in prayer 4 of the Notice of Motion, which is in the following terms: Declaration that the only constitutionally justifiable activities that the Law Society of Kenya Act can sanction are activities which are germane to the practice of law to wit:- (a) collection of dues (b) discipline of members (c) regulation of profession. We have already cited the decision of the Court of Appeal earlier in this ruling and we would reiterate that the Law Society is bound to stay within the objects which are set out in the Act in section 4 as to go outside these objects would be *ultra vires* its powers.

The next declaration sought for by the applicant is that the said constitutional standard precludes the Law Society of Kenya Act from conferring powers that will result in the propagation of any communication to any person or persons not a member or members of the Law Society of Kenya. We find it difficult to make such a declaration as this would be much too wide. It may in the course of its business be necessary for the Law Society to communicate with persons who are not members of the Law Society and indeed it

could be proper to do so as for example section 4(e) of the Law Society Act is in the following terms:

"To protect and assist the public of Kenya in all matters touching ancillary or incidental to the law."

This of necessity would involve speaking to or writing to members of the public in respect of matters which are of interest to both.

In his application, the applicant exhibited a number of documents which broadly fall into three categories. In the first category are documents which are either extracts from Law Society minutes or deliberations or otherwise press releases and in one case a letter of complaint to the Commissioner of Police dated 25th July, 1994. So far as the press releases are concerned we are of the view that these are *ultra vires* the powers of the Law Society as it has no right to make press releases. And in fact the contents of these releases are to a large extent scandalous and are not matters which should have been dealt with in this way if at all. In one of the council meetings the council referred to its role in the democratisation process. Again with respect we do not think that this falls within the constitution of the Law Society to indulge in matters of this kind which are of a political nature. It is true that under section 4(c) which is in the following terms:

"To assist the Government and the Courts in all matters affecting legislation in the administration and practice of law in Kenya the Society does have a role in assisting Government and the Courts."

However in our view this relates to existing legislation and matters affecting it and the purpose of this object is for the better implementation of justice in the Court through more efficient and better procedures.

With regard to the complaint to the Commissioner of Police, this we think would again go outside the Law Society's mandate as it is not relating to a complaint or assistance of a member but relates to a complaint in respect of a women's seminar which though involving some advocates, was not a matter which the Law Society should have become seized of. However the matters complained of in this group are now of an academic nature as they took place some four or so years ago and we can see no remedy that would assist in respect of those complaints at this time.

The second group of complaints relates to exhibits 9 - 14 inclusive and arise largely out of an investigation for a final report prepared by Koimburi Tucker & Company which is exhibit KK12. It is our considered view that these matters are of an internal nature and that the proper method for dealing with them is at the meetings of the Law Society whether at the ordinary general meeting or at a special general meeting called by any of the members to raise the matters pertained therein. As such we do not think that the Courts have jurisdiction to interfere with these matters as they are provided for within the Act itself.

The third group of complaints relates to press cuttings which are contained in exhibits 15, 16 and 17. In our view these constitute hearsay and as such this Court cannot grant relief in respect of them as they are generally accounts of matters related to them by third parties.

The applicant lastly seeks a permanent injunction barring the Law Society of Kenya from engaging in activities not germane to the practice of law and to be discussed or expending any monies to fund any activities not direct germane to the practice of law, that is to say, activities which are of (a) a political nature, (b) an ideological nature and (c) philosophical nature. In our view it would be too broad a remedy to grant. We have already set out in this ruling our views as to what is and what is not within the constitution of the Society. If any particular matter arises which goes outside and to *ultra vires* the powers of the Law Society then at that time any aggrieved member would be entitled to apply to the Court for an injunction restraining the activity complained of, in which event it would be dealt with on its merits at that particular time. As a result we do not think we are able to issue a blanket injunction of this kind but we have already made our observations on the interpretation of section 4. Application is therefore dismissed with costs.

We think the most appropriate order for costs is that each party should pay their own costs.

Dated and Delivered at Nairobi this 1st day of August 2000.

J.A.ALUOCH **P.J.RANSLEY**

JUDGE **JUDGE**