



**Maina v Lumumba & 6 others; The East African (Interested Party)
(Constitutional Petition 409 of 2016) [2023] KEHC 1912 (KLR)
(Constitutional and Human Rights) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1912 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 409 OF 2016
AC MRIMA, J
MARCH 10, 2023**

BETWEEN

WACHIRA MAINA PETITIONER

AND

PLO LUMUMBA 1ST RESPONDENT

LAW SOCIETY OF KENYA JOURNAL 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

KENYA SCHOOL OF LAW 4TH RESPONDENT

LAW SOCIETY OF KENYA 5TH RESPONDENT

LAWAFRICA PUBLISHING (K) LTD 6TH RESPONDENT

GODFREY KITIWA 7TH RESPONDENT

AND

THE EAST AFRICAN INTERESTED PARTY

RULING

Introduction:

1. The dispute, subject of this ruling, stems from the consent filed in court on February 14, 2017. According to Wachira Maina, the petitioner herein, the consent absolved only the 1st respondent, PLO Lumumba, from the claim as set out in the petition.



2. The rest of the respondents (2nd, 4th, 5th, 6th and 7th respondents; the 3rd respondent having been expunged from the proceedings) hold the view that, going by the contents of the consent, the whole petition was withdrawn and as such there is nothing left for determination.
3. This ruling, therefore, seeks to interrogate the contents of the consent, its import and settle the parties' divergent interpretation thereof.

Background:

4. A snapshot of the entire dispute will suffice. The Law Society of Kenya Journal, the 2nd respondent herein, published the article titled '*From Jurisprudence to Poliprudence: The Kenyan Presidential Election Petition 2013*' (hereinafter referred to as 'the publication' or 'the article') as purportedly authored by the 1st respondent.
5. The publication aggrieved the petitioner on the basis that the said article was derived from his original work and that the 1st respondent was, therefore, passing it as his own in violation of his right to intellectual property guaranteed by the *Constitution* in article 40.
6. It was the petitioner's case that the 1st respondent, who was then the Director of the Kenya School of Law, 4th Respondent herein, plagiarized the work he had published in the East African Newspaper, the interested party herein, and was being erroneously distributed to the general public and the Kenya School of Law students as his authentic exclusive work.
7. The petitioner sought the following reliefs in the petition;
 - A. A declaration that the article published by the first respondent PLO Lumumba in the Law Society of Kenya Journal Volume II 2015 No I is substantially similar to version of the petitioner's article published in East African newspaper of April 20, 2013 and amounts to blatant plagiarism and theft of the petitioner's fundamental right to intellectual property as defined in article 260 and protected and guaranteed under article 40(1) of the *Constitution*.
 - B. A declaration the petitioner is entitled to damages for the plagiarism and theft of his intellectual property.
 - C. A declaration that the petitioner is entitled to correction and deletion of the untrue and misleading content in the article that is the work of the petitioner in terms of article 35(2) of the *Constitution*.
 - D. A declaration that the first respondent PLO Lumumba's conduct in publishing the said article breaches and undermines the values and principles of public service as set out in article 232(1) of the *Constitution* and he is consequently unfit to continue holding the public office of the Director of the Kenya School of Law.
 - E. An order consequential to the above declarations directing the respondents 1,2,3, and 7 to recall and delete from the Law Society of Kenya Journal Volume II 2015 No I the article titled 'From Jurisprudence to Poliprudence: The Kenyan Presidential Election Petition 2013' within such periods as the honourable court shall determine.



- F. An order consequential to the above declarations quantifying damages awardable to the Petitioner.
- G. Costs of this Petition and Interest.
- H. Any further or alternative relief.

The Consent:

- 8. The Petitioner and the 1st respondent negotiated and managed to arrive at an agreement. Thereafter, the consent was filed in court on February 14, 2017.
- 9. The centrality of the consent behoves this court to reproduce it. It was couched in the following terms: -

“Consent to Settle the Petition Out of Court

In consideration for the petitioner, Wachira Maina, agreeing to withdraw the above petition herein, the first respondent, Prof PLO Lumumba, agrees to the following terms;

- 1. That the 1st respondent will within 14 days after the filing of this consent order, by himself to through counsel, write a suitable apology to the petitioner in terms agreeable to the petitioner, for publishing the article From Jurisprudence to Poliprudence: The Kenyan Presidential Election Petition 2013’ in Law Society of Kenya Journal Volume II 2015 No I which was substantially similar to the article by the Petitioner. Titled Verdict on Kenya’s Presidential Election Petition: Five reasons the Judgment Fails the Legal Test; published in East African newspaper of April 20th 2013.
- 2. That in addition and within fourteen days consequential to the recording of this consent, the 1st Respondent will write, by himself or through counsel, a suitable letter of correction, in terms agreeable to the Petitioner, directed to the 2nd, 5th,6th, and 7th Respondents to immediately recall and delete from the Law Society of Kenya Journal Volume II 2015 No the article titled From Jurisprudence to Poliprudence: The Kenyan Presidential Election Petition 2013’
- 3. That in further consideration of the Petitioner foregoing further claims on this matter the parties have agreed to an amicable settlement.
- 4. That each party be at liberty to apply.”
- 10. Long after the consent was filed and adopted as an order of the court, the petitioner fixed the petition for hearing. On the date for hearing, the 1st respondent’s Counsel, Mr Okwech Achando alongside the other respondents’ respective Counsel, Mr Agwava and Miss Oloo Counsel for the 5th and 7th respondents and 6th respondent respectively, contended that the consent’s effect withdrew the entire petition.
- 11. The said respondents’ Counsel fronted the position that there was nothing left for this court to determine. To that end, they made reference to paragraph 3 of the consent to reiterate that the petition was wholly withdrawn and as such the dispute must come to an end.
- 12. Counsel for the petitioner, Miss. Nkonge took the contrary position. It was her case that the consent was in respect of the 1st Respondent only.



13. According to her, the dispute remained intact as against the 2nd, 4th, 5th, 6th and 7th Respondents.
14. This ruling, therefore, interprets the import of the Consent and gives the way forward.

Analysis:

15. This court has juxtaposed the consent against the Petition. It is apparent that the claim was principally against the 1st Respondent.
16. From the wording of the consent, the 1st respondent was to undertake two main things. One, he was to write a suitable apology to the Petitioner in terms agreeable to the Petitioner, and, two, he was to also write, by himself or through Counsel, a suitable letter of correction, in terms agreeable to the Petitioner, directed to the 2nd, 5th, 6th and 7th Respondents to immediately recall and delete the impugned article from the Law Society of Kenya Journal.
17. As a result of the agreement between the Petitioner and the 1st Respondent, the Petition was, pursuant to item number 3 of the consent, deemed as settled.
18. It is the case that if the 1st Respondent lived to the terms of items 1 and 2 of the consent, then there would be nothing left to be determined between the Petitioner and the rest of the Respondents. I say so because if the 1st Respondent owned up to the Petitioner's claim and even offered to make amends through the consent, and going by the way the Petition was drafted and the reliefs sought, then I do not see how the Petition would reasonably stand against rest of the Respondents after the adoption of the consent as an order of this Court.
19. The effect of the consent, therefore, rendered the entire Petitioner's claim settled. That was as much captured in item number 3 of the consent. In the event the terms of the consent were not honoured, then the Petitioner would undertake appropriate enforcement proceedings.
20. There is a further reason why the consent settled the entire claim. It was headed as such: "Consent to settle the petition out of court". The consent was drafted by Counsel and it did not indicate that it was in partial settlement of the Petitioner's claim.
21. Another reason still comes to the fore. In fact, the Petitioner undertook to forego any further claims in the matter and that was captured in item number 3 of the consent as follows: -
 3. That in further consideration of the Petitioner foregoing further claims on this matter the parties have agreed to an amicable settlement.
22. The consent was recorded and adopted as an order of the Court. In the event the Petitioner now wishes to retract the consent, then he may have to consider formally moving the Court, otherwise the subsistence of the consent renders the Petition settled.
23. On the basis of the foregoing, the following final orders do hereby issue: -
 - a. This Petition is hereby marked as settled in terms of the consent filed in Court on February 14, 2017.
 - b. This file is marked as closes.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 10th DAY OF MARCH, 2023.

A. C. MRIMA



JUDGE

Ruling No. 1 virtually delivered in the presence of:

Miss. Nkonge, Counsel for the Petitioner.

Mr. Okwech Achando, Counsel for the 1st Respondent.

Mr. Agwava, Counsel for the 5th and 7th Respondents.

Miss. Oloo, Counsel for the 6th Respondent.

Regina/Chemutai – Court Assistants.

