



Law Society of Kenya, Kericho Chapter & 2 others v Wafula & 8 others (Constitutional Petition 10 of 2024) [2024] KEHC 15391 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15391 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CONSTITUTIONAL PETITION 10 OF 2024**

JK SERGON, J

DECEMBER 5, 2024

**IN THE MATTER OF: ARTICLES 2, 3, 10, 23, 24, 25 (C), 35, 36, 38
(2), 47, 48, 50 (1) AND 73(2) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE LAW SOCIETY OF KENYA ACT, 2014
AND THE KENYA LAW SOCIETY (GENERAL) REGULATIONS, 2020**

AND

**IN THE MATTER OF: SECTION 24(1) AND 41 OF
THE LAW SOCIETY OF KENYA ACT, 2014 AND**

THE KENYA LAW SOCIETY (GENERAL) REGULATIONS, 2020

AND

IN THE MATTER OF: THE RIGHT TO FAIR ADMINISTRATIVE ACTIONS

BETWEEN

LAW SOCIETY OF KENYA, KERICHO CHAPTER 1ST PETITIONER

JOASH KIRUI MITEI 2ND PETITIONER

SIELE KIPRONO 3RD PETITIONER

AND

JACKSON WAFULA 1ST RESPONDENT

THOMAS OKINYI 2ND RESPONDENT

JOYCE MWANIKI 3RD RESPONDENT

FRANKLINE KOKO 4TH RESPONDENT

EDWIN KIPKULEI 5TH RESPONDENT



MUCHELA ASTON ONG'ENG'E	6 TH RESPONDENT
IMBWAGA STEVEN MUKHOGOSI	7 TH RESPONDENT
GRACE NJERI GITHAE	8 TH RESPONDENT
LAW SOCIETY OF KENYA, RIFT VALLEY BRANCH	9 TH RESPONDENT

RULING

1. The applicant filed a notice of motion dated 16th September, 2024 seeking the following prayers;
 - a. Spent
 - b. That this Honourable Court be pleased to exempt the Petitioner from the requirements of regulations 95 and 96 of the Law Society (General) Regulations, 2020 and all other legal provisions requiring him to first exhaust internal dispute resolution mechanisms before filing the instant petition
 - c. Spent
 - d. That pending the hearing and determination of this Petition, this Honourable Court be pleased to issue conservatory orders staying the election results as purportedly held by the Respondents either by themselves, servants, agents or members and from any act of recognizing and/or deliberating on the election results dated 10th September, 2024 or any other day thereafter with a view of implementing the said results.
 - e. That this Honourable Court be pleased to issue any other orders it may deem fit
 - f. That costs of the application be provided for
2. The application is supported by the grounds on the face of it and the supporting affidavit of Joash Kirui Mitei the 2nd Petitioner/Applicant herein, the Chairperson of the Law Society of Kenya, Kericho Chapter (the 1st Petitioner herein). The Applicant avers that he has authority to swear the affidavit on behalf of the 1st Petitioner.
3. He avers that on 13th August, 2024 the 1st Respondent declared vacancies for the Law Society of Kenya Rift Valley Branch's executive and called for interested and qualified persons to submit nomination papers for election for the positions declared vacant.
4. He avers that on the 15th June 2024, the Branch Council informed the branch members that elections of the branch for the position of Chairperson, Vice Chairperson and the Secretary General were scheduled to be held on the 15th August 2024 and the Annual General Meeting set for 15th September 2024. He further avers that the acting Secretary General of the Law Society of Kenya, Rift Valley Branch (the 9th Respondent herein) informed the branch members that a 5-member Committee had been constituted by the Council to oversee the elections.
5. He avers that through a letter dated 25th July 2024, the acting secretary informed all the branch members that the elections of the branch had been postponed to 6th September 2024 and the Annual General Meeting pushed to 7th September 2024. He further avers that on 6th September, 2024 the 1st Respondent sent out a notice informing the LSK Rift Valley Branch members that the elections for the executive members of the branch were to be held on the 10th of September 2024.



6. He avers that on the 9th of September 2024 the LSK KERICHO CHAPTER wrote to the Chairperson and executive LSK Rift Valley Branch expressing their concern over the fact that the scheduled election fell short of the laid down procedure. In the said letter, they expressed their displeasure, they quoted the provisions of Regulation 58 of the Law Society of Kenya (General) Regulations, 2020 and demanded a cancellation of the scheduled elections.
7. He avers that the 6th Respondent was adamant and in a letter responding to Petitioners herein disregarded the concerns raised therein and the procedure laid down in the Regulations citing that the same was not mandatory in nature and the Executive need not abide by it. He further avers that the 6th Respondent in its response claimed that the election committee consisting of the 1st to 5th Respondents was formed with the participation of all the centers a fact that is less than the truth as there was no participation by all centers and chapters.
8. He avers that Regulation 58 of the Law Society of Kenya (General) Regulations, 2020 provides that a branch may adopt a procedure for the election of an executive by a resolution of the members in a general meeting. He avers that the Respondents did not call a General Meeting of the members and there was therefore no resolution to settle on the procedure undertaken by the Respondents and detailed above.
9. He avers that nonetheless, the Respondents proceeded to conduct an election on the 10th of September despite lacking the mandate and legal backing to do the same and that there has been immense pushback from the members who were trying to be custodians of the Branch's sanctity.
10. He avers that from the results and report on the election, it can be gleaned that more than half of the eligible voters did not cast their vote and further the position of the chairperson was declared unopposed, amounting to a self-declaration by the 6th Respondent.
11. He avers that section 17 (3) of the [Law Society of Kenya Act](#) expressly states that the members of the Council shall be elected by all the members of the Society in accordance with the said Act. This applies to Branches. He further avers that it therefore follows that the duly elected Executive as according to the elections held on the 10th of September, 2024 fell short of this requirement of the Act and the only remedy existent for this egregious violation of the statute is a cancellation of the same.
12. He avers that the purported Acting Secretary General has since announced an intended Annual General Meeting scheduled on 18th October, 2024 which is a whimsical shift forming part of the mismanagement of affairs of the 9th Respondent. He further avers that the scheduled AGM dated 18th October, 2024 is a looming perpetuation of an illegality to the extent that the same is intended to sanctify the impugned elections of 10th September, 2024 to the extent that the allegedly elected members will be sworn in.
13. He avers that the alleged elected leaders will benefit from an illegality if this Honorable Court does not intervene to declare that the said election was called upon and conducted by an illegal faction of the Law Society of Kenya, Rift Valley Branch.
14. He avers that the petition raises serious issues that are of a constitutional nature and those contemplated under article 165 (3) of [the Constitution](#) and therefore within the exclusive jurisdiction of the High Court. He avers that in the circumstances, the Petitioner ought to be exempted from the requirement to pursue internal dispute resolution mechanisms.
15. The Respondents raised a Preliminary Objection dated 23rd of October 2024 on the following grounds: (i) that the Petition dated 16th of September is extra-jurisdictional by both pleadings and reliefs sought.



- (ii) that the Petitioners herein lack the requisite locus standi to commence and prosecute this Petition and attendant applications (iii) That the Petition is fatally defective and is for striking out for failing to meet the constitutional threshold test set in *Anarita Karimi Njeru and Mumo Matemu v Trusted Society of Human Rights Alliance*. (iv) That the Petition herein fails the doctrine of exhaustion of forum and forum convenience in utter breach of settled precedents. (v) That the Petition herein is an illegality hence should be struck out with costs.
16. This Court directed the parties to file their written submissions in respect to the preliminary objection.
 17. The Petitioners submitted that Articles 22 and 258 of *the Constitution* of Kenya are the anchor provisions on locus standi, more so article 22(1) which stipulates that “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.” The Petitioners cited the case of *John Mining Temoi & anor v Governor of County of Bungoma & 17 others* [2014] eKLR the court in while construing Articles 22 and 258 stated that “Article 22(1) and (2) of *the Constitution* has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedoms. A literal interpretation of Articles 22 and 258 in my view confers upon any person the right to bring action in more than two instances firstly in the public interest, and secondly, where breach of *the Constitution* is threatened in relation to a right or fundamental freedom. Where one purports to enforce the rights of another, it is in my view that there must be a nexus between the parties.” In the instant Petition, the 1st Petitioner is one of the Chapters of the Rift Valley Branch of the Law Society of Kenya representing Kericho Centre as established by the schedule to the *Law Society of Kenya Act*, 2014. The 2nd Petitioner is the Chairperson of the 1st Petitioner and the 3rd Petitioner is an Advocate of the High Court of Kenya, a member of the 1st Petitioner and an astute defender of the rule of law.
 18. It is the Petitioners’ case that the instant Petition has complied with the set requirements in Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 also known as the “Mutunga Rules” that governs the form that a constitutional petition should take and met the threshold established in the case of *Anarita Karimi Njeru and Mumo Matemu v Trusted Society of Human Rights Alliance*, the Petition contains the specific constitutional provisions that have been infringed/violated and/or threatened by the Respondents and sufficient grounds as to the extent in which they have done so. They cited the case *Patric Baya Martha v Cabinet Secretary Industry and Enterprises Development & 2 Others* [2021] eKLR where the court upheld the position that preliminary objections should not be used as a sword to win a case and deny the Petitioner an opportunity to be heard on merit.
 19. It is the Petitioners case that they were justified in bringing this Petition to safeguard their right to access justice notwithstanding Regulations 95 and 96 of the Law Society (General) Regulations, 2020 and all other regulations requiring the exhaustion of internal dispute resolution mechanisms and cited *Nicholas v Attorney General & 7 others* [2023] eKLR the court stated that “We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief.”
 20. The Petitioners further submitted that they were deserving of conservatory orders and if the conservatory orders are not granted, the Petitioners will suffer irreparable damage that cannot be compensated as the Respondents will continue to occupy office despite the contravention of the Petitioners rights. And that the substratum of the Petition and the Application will be lost. They cited the case of *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and Others* Nairobi



High Court Constitutional Petition No.154 of 2016 (2016) eKLR, where the court summarized three main principles for consideration on whether to grant conservatory orders as follows: “(a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*, (b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and (c) The public interest must be considered before grant of a conservatory order.”

21. The Respondents reiterated that the 1st Petitioner lacked the requisite locus standi, section 3(2) (a) of the Law Society of Kenya clothes the society with the power to sue and be sued, however the and branches and chapters which are subsidiaries of the Law Society of Kenya do not have power to institute suits. The Respondent contended that whereas the 2nd Petitioner was purporting to act on behalf of the 1st Petitioner, he did not produce any authority to act.
22. The Respondents argued that the Petition and Application should summarily fall as the Petitioner had invoked this Court’s authority prematurely. They cited Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR in which the court of appeal observed as follows; “It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.” They relied on the provisions of the Law Society of Kenya (General) Regulations, 2020 which provide a robust dispute resolution mechanism, regulation 96 of the said regulations provides that;

“ Where a dispute arises—

1.
 - (a) relating to the exercise of the mandate or the management of the affairs of the Society, a branch or a chapter; or
 - (b) relating to the rights of a member against any other member or the Council, branch executive or chapter committee, the aggrieved party shall— (i) refer the dispute in writing to the secretary, where the dispute concerns the national office of the Society; or (ii) refer the dispute in writing to the branch secretary of the relevant branch where the dispute involves an issue or a party at the branch level.
- (2) A dispute may exist between or amongst one or more of the parties listed in sub-regulation (1).
- (3) Where a dispute has been lodged with a branch secretary and the dispute cannot be resolved within 30 days, the branch secretary shall, within 7 days, forward the dispute to the secretary and the procedure for hearing and disposal of the dispute provided under this regulation shall thereafter apply.
- (4) The secretary or a branch secretary shall, within 14 days upon receiving notification of a dispute from an aggrieved party, or upon the secretary receiving notification of a dispute from a branch under sub regulation (3), refer the dispute to an arbitrator or arbitrators appointed by the parties to such



dispute for determination. The said regulations also allow for other forms of alternative dispute resolution mechanism to wit negotiation, conciliation and mediation, regulation 95 provides as follows;

- “(1) Parties to a dispute referred to in regulation 96(1) may attempt to reach settlement by— (a) negotiation; (b) conciliation; or (c) mediation.
- (2) The procedure for negotiation, conciliation or mediation shall be simple and the process shall be guided by the international best practices or any law for the time being regulating negotiation, conciliation and mediation.” The Respondents were adamant that the Petitioners had bypassed the provisions of the LSK regulations that provide for alternative dispute resolution mechanisms which are prescribed in article 159 (2) c) of *the Constitution* of Kenya.

23. The Respondents contended that the conservatory orders as sought should not be granted and more so that granting these orders at an interim stage would greatly prejudice the affairs of the LSK.
24. The Respondents contended that the Petition on its merits falls short of the constitutional threshold set in the classic case of Anarita Karimi Njeru v Republic [1979] eKLR as there must be a link between the aggrieved party and the provisions of *the constitution* that have been alleged to be contravened and/or infringed.
25. Having considered the application, preliminary objection filed in response to the application and submissions filed by the parties, this court finds that the sole issue for determination is whether this court ought to exempt the Petitioner from the requirements of regulations 95 and 96 of the Law Society (General) Regulations, 2020 and all other legal provisions requiring him to first exhaust internal dispute resolution mechanisms before filing the instant petition.
26. It is the Petitioners case that the Petition raises serious issues that are of a constitutional nature and those contemplated under article 165 (3) of *the Constitution* and therefore within the exclusive jurisdiction of the High Court and that in the prevailing circumstances, the Petitioner ought to be exempted from the requirement to pursue internal dispute resolution mechanisms.
27. It is the Respondents case that the Petition and Application should summarily fall as the Petitioner had invoked this Court’s authority prematurely. The Respondents were adamant that the the provisions of the Law Society of Kenya (General) Regulations, 2020, specifically regulation 95 and 96 of the said regulations, provide a robust dispute resolution mechanism and further that the said regulations allow for other forms of alternative dispute resolution mechanism to wit arbitration, negotiation, conciliation and mediation which are entrenched in article 159 (2) (c) of *the Constitution* of Kenya.
28. It is the finding of this court that the Law Society of Kenya (General) Regulations, 2020 provide for dispute resolution mechanisms and save for the letter dated 9th September, 2024 written to the Chairperson and Executive LSK Rift Valley Branch expressing concern over the fact that the scheduled election fell short of the laid down procedure, there Petitioners did not demonstrated any other attempts to invoke dispute resolution mechanism prescribed in the regulations.
29. Having considered the facts giving rise to the Petition, it is the finding of this Court that they do not disclose exceptional circumstances, to the doctrine of exhaustion. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition



No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR. The Court stated as follows: “The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*...

The Court also dealt with the exceptions to the doctrine of exhaustion... The first principle is that the High Court may, in exceptional circumstances, consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised...The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively.”

30. In light of the foregoing, it is the finding of this Court that the institution of the instant proceedings before this Court was premature. As such, the Court’s jurisdiction has been improperly invoked.
31. In the end, this Court declines jurisdiction on the basis of the doctrine of exhaustion.
32. The Preliminary Objection dated 23rd October, 2024 is hereby upheld. Therefore, the Petition and the motion dated 16/9/2024 are hereby ordered struck out.
33. Each party to meet their own costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 5TH DAY OF DECEMBER, 2024.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Langat

Kiletyen for the Petitioner

No Appearance for the Respondent

