



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.57 OF 2021(OS)

IN THE MATTER OF ACCOUNT NUMBERS 0102095866700, 0102095866701, 0102095866702, 0102095866703, 0102095866705 AND 0102095866706 OPERATED BY THE LAW SOCIETY OF KENYA WITH STANDARD CHARTERED BANK KENYA LIMITED AND IN THE MATTER OF ORDER 37, RULE 1 OF THE CIVIL PROCEDURE RULES, 2010

LAW SOCIETY OF KENYA PLAINTIFF

-VERSUS-

STANDARD CHARTERED BANK KENYA LIMITED..... DEFENDANT

RULING

1. The plaintiff (“the Society”) is Kenya’s premier Bar Association established under the Law Society of Kenya Act, Cap 18 of the Laws of Kenya (“the Act”). Its objects are set out in **section 4 of the Act**. These include but not limited to; maintaining and improving the standards of conduct and learning of the legal profession in Kenya, to represent, protect and assist members of the legal profession in Kenya in respect of conditions of practice and otherwise and to protect and assist the Kenyan public in all matters touching, ancillary or incidental to the law.

2. On 29/1/2021, the Society took out an Originating Summons seeking 3 declarations. Those declarations sought that **Carolyn Kamende Daudi** and **Mercy Kalondu Wambua** be mandated to operate a total of 6 bank accounts, *to wit*, Account Numbers **0102095866700, 0102095866701, 0102096866702, 0102096866703, 0102096866705** and **0102096866706** (“the said accounts”) held by the Society with the Standard Chartered Bank Limited (“the defendant”).

3. Contemporaneous with the Summons, the Society took out a Motion on Notice under **sections 1A, 1B, 3A, 63 (e) of the Civil Procedure Act, Order 37 Rule 11 and Order 51 Rules 1, 2 and 3 of the Civil Procedure Rules**. It sought that pending the hearing and determination of the suit, **Carolyn Kamende Daudi** and **Mercy Kalondu Wambua** be permitted to operate the said accounts outside the operating mandate requiring three signatories.

4. The Motion was supported by the affidavit of **Carolyn Kamende Daudi** sworn on 29/1/2021. The grounds for the application were that; the Society held the said accounts with the defendant whereby the signatories were **Bernhard Ngetich, Roseline Odede, Mercy Kalondu** and **Carolyn Kamende Daudi**. That **Roseline Odede** and **Bernhard Ngetich** have since resigned or have been suspended as Council Members on 18/1/2021.

5. It was further contended that the replacement to the two signatories is scheduled in a General Meeting on 25/3/2021. That in the meantime, the Society required to meet its financial obligations, immediate of which were, salaries and bills for day to day running of the Society, fee for forensic audit, external auditors fees, and expenses for elections of the Society’s representative to the Judicial Service Commission and members of the disciplinary committee.

6. **Mr. Havi** teaming with **Ms Kamande, Ms Kabita** and **Ms Angawa** submitted that it was common knowledge that there were wrangles within the Society’s Council which had hampered the operations of the society. That the said wrangling should not be allowed to ground the operations of the Society. That there were immediate expenses which required to be settled by the Society but could not be met because of lack of enough of the mandated signatories.

7. **Mr Havi** set out the urgent expenses as; salaries and day to day bills of the society amounting to Kshs. 7 million per month, Kshs. 900,080/= being fees due to **Grant Thornton**, the Society’s external auditors, Kshs. 2,241,180/= for forensic audit, Kshs. 3.5 million to I.E.B.C for the election of the Society’s representative to JSC and members of the Advocates Disciplinary Committee.

8. It was further submitted that the defendant will not be acting in breach of the contract with the Society if it complied with the orders sought since the same do not seek to vary the primary terms of the said contract. That the request was for a limited period of upto 25/3/2021 when the Council would be fully constituted. Counsel cited the text of **Paget’s Law of Banking, 13th Edn and Francis Ayoo Jala &**

Others vs Bonne Nicholas Barasa [2014] eKLR in support of the said submission.

9. **Mr. Fraiser S.C** teamed up with **Mr. Ondieki** in opposing the application. He submitted that the relationship between the Society and his client was basically contractual. That under the said contract, the account operating instructions were that there had to be 3 signatories in relation to any instructions on the said accounts. That the Court did not have jurisdiction to grant the orders sought as granting the same would amount to re-writing the contract between the parties. The case of **National Bank of Kenya vs Pipeplastic Samkolit Kenya Ltd & Anor [2001] eKLR** was cited in support of that submission.

10. He further submitted that under **section 17(2) of the Law society of Kenya Act** the quorum for the council is 5 which the Society currently does not have. That in the premises no lawful decision can be made on behalf of the Society. He further submitted that **under regulation 48(1) of the Law Society of Kenya Regulations 2020** the accounts of the Society should be operated as authorized by the Council. He concluded that any payment that may be made by the defendant outside the mandate given by the society would be a debt by the bank to the Society.

11. The court allowed **Mr Omwansa** advocate to address it. He held brief for Mr. Ouma Advocate who had been instructed by one of the Council Members Mr. Bernhard Ngetich. Although Mr. Ouma had not filed any Notice of Appointment the court nevertheless gave Mr. Omwansa audience. He notified the Court that the said **Bernhard Ngetich** was willing to sign cheques towards meeting the financial obligations of the Society.

12. In rejoinder **Mr Havi** noted that the Society had complied with **Regulation 48 of the Regulations** aforesaid. That **Mr. Ngetich** cannot purport to sign documents as he had been suspended. That the surviving Council members were willing to give indemnity for the grant of the orders.

13. I have considered the averments on record and the submission of Learned Counsel. The first issue for determination is whether this court has jurisdiction to entertain the matter before it. Mr. Frazer SC. Submitted that the court had none.

14. **In R vs Karisa Chengo [2017] eKLR** the Supreme Court of Kenya held:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

15. Further, in **Samuel Kamau Macharia & anor vs Kenyac Commercial Bank Ltd & 2 Others [2012] Eklr**, the Supreme Court held:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

16. Before Court is an application on behalf of the Society to allow the operation of its accounts by 2 signatories instead of the required 3. It can safely be termed to be an application to vary some terms of the contract between the Society and its bankers, the defendant. As submitted by **Mr Fraiser S.C**, that contract, as contained in the evidence produced, requires that the accounts held by the Society with the defendant be operated by 3 signatories and not otherwise.

17. **Mr Havi** informed the court that due to internal wrangling by the Council that requirement of 3 signatories cannot be met. The Court has considered the provisions of the law relied on by the Society as well as the **Society’s Act Cap 108, Laws of Kenya** and there appears to be no express provision that exists to provide for the circumstances at hand.

18. In this regard, when there is no express provision of the law and the court is called upon to intervene in a matter for the interest of justice, I believe the court has to resort to its inherent power for ends of justice. It is for this reason that **section 3 A of the Civil Procedure Act** was enacted. This power however, cannot be resorted to where there exists express provision of the law.

19. In **Wangui Kathryn Kimani vs Disciplinary Tribunal of Law Society of Kenya and Anor [2017] Eklr**, the court cited with approval the holding in **Elephant Soap Factory Ltd vs Nahashon Mwangi and Sons NRB Hcc No 913 of 1971 (sic)** wherein it was stated:

“Similarly, it is my view that where the court has been deprived of jurisdiction it will not draw upon its reserve under the inherent jurisdiction to confer upon itself such nonexistent jurisdiction.”

20. In the instant case, it is contended that the Council of the Society is not fully constituted as several members were suspended. **Regulation 23 of the Law Society of Kenya (General) Regulations 2020** provides for the filling of vacancies in the Council when they occur. This means that the Society is able to fill its Council, if any; any vacancies in the council and get signatories to the accounts as per its contract with the defendant. This however, can only be done during its AGM scheduled on 25/3/2021.

21. In **Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [2016] eKLR** the Court quoted from **Halsbury’s Laws of England 4th Edn. Vol. 37 Para. 14** inherent jurisdiction. It is stated therein:

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

22. In view of the foregoing and for the reasons that there are no express provisions of the law, I hold that this court has jurisdiction through its inherent power to consider the application and, if merited, grant the orders sought.

23. The question before the court is whether the court can interfere with the instructions mandate between the Society and the defendant. It is clear from the evidence on record that the bank can only act on instructions executed by 3 signatories. However, I do not think that if the bank was to act on the direction of the court it would be acting in breach of its contract with the society as it was submitted. The court cannot give such orders preemptorily. It must be satisfied that there are good grounds for doing so.

24. As regards **Mr. Omwansa’s** submission that **Mr Ngetich** one of the signatories was willing to sign cheques for the expenses the subject of the application before court, that was a submission from the bar. Secondly, there is a record copies of draft resolutions which are said to have been made by the society regarding suspension or otherwise of some Council Members. This court is not about to rule on the legality or regularity of the said resolutions or otherwise.

25. There is evidence on record, and it was admitted by both **Mr. Havi** and **Mr. Fraiser S.C**, that the Council of the Society is in disarray. No proper resolutions can be made However, the Society must operate. The Society owes obligations which must be satisfied whether or not the Council is in disarray. Its employees must be paid as they bear obligations to third parties including probably rent, school fees, food or even periodic payments for those who may have loans.

26. The question is, should the court fold its hands when called upon to come to the salvation of such people, on the grounds that the Council of the Society is in-operational? I don’t think so. This is a court of law and justice. In my view, the court can sanction the settlement of due obligations that cannot wait until the AGM on 25/3/2021.

27. In **Pagets Law of Banking 13th Edn Pg 484**, the writer note as follows:

“It is a principle of equity that a person who has paid the debts of another without authority is allowed to take advantage of his payment. A classic statement is that of Lord Selborne in Blackburn Building Society v Cunliffe, Brooks & Co who referred to:

‘..the general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people’s money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts.’

28. In view of the foregoing, I hold that the Court can sanction and direct the defendant to make payments for settlement of lawful debts of the Society which have either been acknowledged by the Council before it was disbanded or those that are lawfully due.

29. The Court notes that for undisclosed reasons, those elected to lead the Society have either neglected to do so or have been impeded. With such wrangles in the Council, it is doubtful whether the Society is capable of undertaking its objects under the law as set out at the beginning of this ruling. This court will not direct the members of the Society on how they should run their affairs, but it will intervene where their actions through the Council would affect third parties.

30. From the record, the payments sought to be made relate to:

a) Internal operations of the Society (audit)- The audit reports would be required at the AGM of the society to be held on 25/3/2021. This is an expense that cannot wait until the full council is constituted.

b) Its relationship with its employees (salaries) – The employees of the society have their obligations which they must meet. Those employees cannot meet their obligations unless the Society pays them for their services. They are not to wait until after the Council is re-constituted. That would be servitude.

c) Operations of the JSC and Advocates Disciplinary Committee (elections)- The elections are slated for 25/3/2021. The representation of the Society at the Judicial Service Commission is crucial in the administration of justice in this country. This cannot wait especially at this time when it is common knowledge that the said Commission is about to recruit the Chief Justice of this country.

28. In view the foregoing I am satisfied that the expenses sought to be defrayed are lawful. They are for the benefit of the Society. I therefore allow the application as follows:

a) Pending the hearing and determination of the OS, the defendant is directed to accept cheques drawn and act upon instructions given by **Carolyn Kamende Daudi** and **Mercy Kalondu Wambua**, for the payment of monies out of into Account Nos **0102095866700, 0102095866701, 0102096866702, 0102096866703, 0102096866705** and **0102096866706** operated by the society outside the operating mandate requiring 3 signatories.

b) The total amount to be withdrawn is capped as follows:

i) For salaries – Ksh 14 million being the salaries for the months of January and February 2021 only.

ii) Kshs 900,080/= to Grant Thornton for the audit of the Society's accounts for the period 1st January 2020-31st December 2020.

iii) Kshs 1, 120,560/= for forensic audit

iv) Ksh 3.5 million for elections

c) No further monies should be withdrawn from the said accounts without the authority of the Council as shall be constituted after the 25/3/2021.

d) The foregoing order would only come into effect after the remaining Council Members headed by the President of the Society, executes personal indemnities guaranteeing to apply the funds for the purposes ordered for and to hold the defendant free from any harm or loss for complying with the orders of this Court to be filed with the Court and served upon the defendant.

e) The Society to file the accounts on the said expenditure with the Deputy Registrar of this Court within 45 days of the date of this ruling

f) The costs of the application is awarded to the defendant in any event.

It is so ordered.

DATED and DELIVERED at Nairobi this 2nd day of February, 2021.

A. MABEYA, FCI Arb

JUDGE