



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E1100 OF 2020

BETWEEN

ALLEN WAIYAKI GICHUHI.....APPLICANT

VERSUS

COMMITTEE ON SENIOR COUNSEL1ST RESPONDENT

THE LAW SOCIETY OF KENYA2ND RESPONDENT

RULING

1. This ruling is on two applications, both on the representation of the parties herein. Arising from the conflict in representation, the applicants and the various firms of advocates involved will be described by name, to avoid any misunderstanding. The first application is brought by Allen Waiyaki Gichuhi, the substantive Applicant herein, by way of a Notice of Motion application dated 26th October, 2020, wherein he is seeking the following orders:

a) **THAT** all documents including the notice of Appointment, Applications and Affidavits filed by the firm of Nchogu Omwansa & Nyasimi Advocates herein be struck out with costs to the Applicant to be paid on an indemnity basis

b) **THAT** costs of and occasioned by this application as well as all proceedings occasioned by their appearance be paid by the firm of Nchogu Omwansa & Nyasimi Advocates.

2. The application is supported by the grounds on its face and the supporting affidavit of the Allen Waiyaki, also dated 26th October, 2020. In response to the said notice of motion, the firm of Nchogu, Omwansa & Nyasimi Advocates filed a Notice of Preliminary Objection and a Replying Affidavit sworn by Nelson Havi on 4th November, 2020, on instruction from the President of the Law Society of Kenya.

3. The second application is by Nelson Havi, the President of the Law Society of Kenya, by way of a Notice of Motion dated 15th December 2020, in which he is seeking the following orders : -

a) **The Notice of Appointment of Advocates dated 16th September, 2020, by Kaplan & Stratton Advocates, together with all documents filed herein by the said firm be and are hereby struck out.**

b) **The Notice of Change of Advocates dated 3rd December, 2020, by Murgor & Murgor Advocates, together with all documents filed herein by the said firm be and are hereby struck out.**

c) **The Consent Letter dated 3rd December, 2020, executed by A. Amoko Advocates, Kaplan & Stratton and Murgor & Murgor Advocates be and is hereby expunged from the court record.**

d) **The costs of the Application be paid by A. Amoko Advocates, Kaplan & Stratton and Murgor & Murgor Advocates personally.**

4. The said application is supported by the grounds on its face and the supporting affidavit of Neslon Andayi Havi sworn on 15th December, 2020. In response to the application, the firm of Kaplan & Stratton, who filed a Notice of Appointment by the Committee on Senior Counsel, the 1st Respondent herein, filed Grounds of Opposition dated 4th January, 2021. The firm of Murgor & Murgor Advocates, who filed a Notice of Change of Advocates to appear for the Law Society of Kenya, which is the 2nd Respondent herein, similarly filed Grounds of Opposition dated 7th January, 2021 in response.

5. Submissions were also filed by the various parties on the two applications. W. Amoko Advocate who is on record for Allen Waiyaki Gichuhi, filed three sets of submissions, dated 9th September 2020, 16th October 2020 and 12th November 2020 on the two applications. The President of the Law Society of Kenya filed two sets of submissions, one dated 16th December 2020 by Havi and Company Advocates, and a set of undated supplementary submissions filed by the firm of Nchogu Omwanza and Nyasimi Advocates. The firm of Kaplan and Stratton filed two sets of submissions dated 8th and 16th October 2020 respectively. The firm of Murgor and Murgor Advocates did not file any submissions.

6. A preliminary issue of the capacity of the Committee of Senior Counsel to sue and be sued was in this respect raised in the Notice of Preliminary of Objection filed by the President of the Law Society of Kenya, which will need to be decided first, before the Court addresses the issue of legal representation of the parties herein, and the status of the contested pleadings filed by the various firm of advocates.

The Preliminary Issue

On the Capacity of the Committee of Senior Counsel

7. The President of the Law Society of Kenya in his Notice of Preliminary Objection objected to the application brought by Allen Waiyaki Gichuhi on the following grounds:

a) The entire Application is fatally defective; in so far as the Applicant has enjoined the Committee on Senior Counsel, a non-suited 'Party' that has no capacity to sue or be sued; and

b) The 1st Respondent lacks the capacity to participate further in these proceedings in its own name (Committee on Senior Counsel); no corporate personality having been bestowed upon it by statute.

8. The President of the Law Society of Kenya accordingly sought the striking out of the Committee on Senior Counsel as a Party in these proceedings. It was his submission that the entire application by Allen Waiyaki Gichuhi is fatally defective in so far as he has enjoined the Committee on Senior Counsel, a non-suited party that has no capacity to sue or be sued, and that the 1st Respondent lacks the capacity to participate further in these proceedings in its own name, no corporate personality having been bestowed upon it by statute.

9. The firm of Nchogu Omwanza and Nyasimi Advocates filed supplementary submissions on the preliminary objection, wherein it was submitted that the Committee on Senior Counsel is not a body corporate; with perpetual succession and common seal, capable of suing or being sued, as no legislation confers upon it corporate personality, and its joinder in these proceedings is, in this respect, fatally defective, and it should be struck out as a party for lack of capacity.

10. The cases of **Peter Ngugi Geoffrey & 3 others vs Mithini SDA Church (2019) eKLR**, **Geoffrey Chege Kirundi v Dispute Resolution Committee of Kenya Tea Development Agency Holdings Ltd & Another (2017) eKLR**, and **Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) v Rosaline Njeri Macflari a & another (2016) eKLR** were cited for the position that a body with no corporate personality has no legal capacity to sue or be sued in its own name. The case of **Peter Gichuki Kingara vs Advocates Disciplinary Tribunal of the Law Society of Kenya & Another (2020) eKLR** was distinguished on the grounds that the Advocates Disciplinary Tribunal (ADT) is established as a Tribunal within the meaning of Article 169 (1)(d) of the Constitution pursuant to section 57 of the Advocates Act.

11. Allen Waiyaki Gichuhi's submissions were that the instant proceedings are *sui generis* public law proceedings, as held in **Commissioner of Lands vs Kunste Hotels**, and are brought against statutory entities under the Fair Administrative Action Act, directed at remedying their statutory defalcations. Further, that for purposes of the Fair Administrative Action Act, the Committee on Senior Counsel is an administrator, which term is defined under section 2 as "the person who makes the administrative decision". Therefore, that judicial review proceedings are always brought against the decision maker whose conduct is implicated, and that the notions of capacity to sue and be sued for purposes of private lawsuits or private parties, which is in issue in the authorities cited by the have no application to judicial review proceedings.

12. The firm of Kaplan and Stratton on the other hand submitted that the Committee on Senior Counsel is not a Committee of the Law Society of Kenya, but a multi-institutional Statutory Committee clothed with jurisdiction to appear in litigation pursuant to the provisions of Articles 22(2)(b) and 258(2)(b) of the Constitution of Kenya. Further, that the contention by the President of the Law Society of Kenya that the Committee on Senior Counsel is not a legal entity capable of suing and being sued in its name is a misdirection in law, as it is not necessary in law that the Committee on Senior Counsel be a body corporate to sue and be sued in its name.

13. Reliance was placed on the provisions of Article 47 of the Constitution as read with section 4 of the Fair Administrative Action Act 2015, that every person who makes an administrative decision to ensure that such decisions are made in a manner that is expeditious, efficient, lawful, reasonable and procedurally fair. The provisions of Articles 22 and 258 were also cited for the position that they protect the right of every person to institute proceedings alleging contravention of constitutional rights. Lastly, the definition of a person in Article 260 of the Constitution to include a company, association or other body of persons whether incorporated or unincorporated was also relied upon.

14. Thereby, that the Notice of Preliminary Objection by the President of the Law Society of Kenya is incompetent in so far as it seeks to have the Committee on Senior Counsel struck off these proceedings for not being "a body corporate capable of suing and being sued". Further, the Second Respondent cannot be allowed to shift goalposts at will; it cannot seek to have counsel of its choice represent the Committee on Senior Counsel and at the same time seek to have the said Committee struck off from these proceedings.

15. The authorities cited by the President of the Law Society of Kenya in his supplementary submissions were alleged to be inapplicable to the present issue. The cases of **Peter Ngugi Geoffrey & 3 others v. Mithini SDA Church [2019] eKLR**, **Football Kenya Federation v**

Kenyan Premier League Limited & 4 others [2015] eKLR and **Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) v. Rosaline Njeri Macharia & another [2016] eKLR** were in this respect distinguished on the ground that in those cases, the Court found that the suits by the unincorporated bodies were incompetent since they should have been sued through its officials since the suits concerned an adjudication of private rights between the parties. However, that the present matter concerns a statutory body established pursuant to the Senior Counsel (Conferment and Privileges) Rules in an administrative decision over which the First Respondent is competently named as a party and has the choice to decide its representation.

16. The parties herein do not contest the fact that the Committee on Senior Counsel is only referred to in section 17 of the Advocates Act which provides for Senior Counsel as follows:

(1) The President may grant a letter of conferment to any person of irreproachable professional conduct who has rendered exemplary service to the legal and public service in Kenya conferring upon him the rank and dignity of Senior Counsel.

(2) A person shall not be eligible to be a Senior Counsel unless—

(a) he is a duly enrolled advocate of the High Court of not less than fifteen years' standing; or

(b) being a person to whom section 10 applies, he holds, and has held for a continuous period of not less than fifteen years, one or other of the qualifications specified in section 13(1).

(3) The grant shall be made not later than sixty days upon receipt of a list of names submitted by the Committee on Senior Counsel through the Chief Justice.

17. Further, under section 81 (ee) of the Advocates Act, the Council of the Law Society of Kenya, with the approval of the Chief Justice, may make rules with regard to among other issues, the procedure for the conferment of, and the privileges attached to, the rank of Senior Counsel. The Advocates (Senior Counsel Conferment and Privileges) Rules, 2011 have accordingly been made, and which provide in Rule 3(1) for the composition of the Committee of Senior Counsel as follows:

(1) The Committee on Senior Counsel referred to under section 17(3) of the Act shall consist of-

(a) a Judge of the Supreme Court nominated by the Chief Justice;

(b) a Judge of the Court of Appeal nominated by the Judges of the Court of Appeal;

(c) a Judge of the High Court nominated by the Kenya Judges and Magistrates Association;

(d) the Attorney General;

(e) the Chairperson of the Society;

(f) three Senior Counsel nominated at a meeting of Senior Counsel; and

(g) two Advocates not being senior counsel who shall have at least ten years' experience in practice, elected by the Society.

18. Lastly, Rule 16 and 17 of the said Rules provide that the Committee of Senior Counsel shall regulate its own procedure for meetings held under the rules, and that the Secretariat of the Society shall facilitate the conduct of the affairs of the Committee.

19. It is thus evident that the Committee of Senior Counsel owes its existence to the Advocates Act. The said Act does not confer on the Committee any corporate status, and therefore legally, the Committee is an unincorporated committee. As regards as to whether such an unincorporated committee can be sued as a defendant or respondent in a suit, Order 1 Rule 3 of the Civil Procedure Rules provides that a defendant or respondent is a person is one against whom any right to relief in respect of or arising out of the same act or transaction, or series of acts or transactions is alleged to exist, whether jointly or severally. In the alternative, where separate suits are brought against various persons, they may be joined as defendants or respondents if common question of law or fact would arise. A person is in this regard defined in section 3 of the Interpretation and General Provisions Act to include a company or association or body of persons, corporate or incorporate. A similar definition is provided in Article 260 of the Constitution.

20. In essence therefore, a person can sue or be sued in law if they are a natural person, an unincorporated body of persons or a corporate body, and the only difference in bringing suits against natural, corporate and unincorporated persons is in the manner and procedure employed in suing. This is for the reasons that while natural and corporate persons are bestowed with legal capacity so long as certain conditions exist, unincorporated associations do not have a separate legal personality, and the law does not recognize them as legal entities separate from their natural members.

21. An exception however exists in the case of statutory bodies, particularly in judicial review, and the unincorporated status of a defendant has not been regarded as a bar to being subject to and defending judicial review proceedings. It was stated in this regard that a statute can confer legal status on an unincorporated association in the case of **Baskins v. United Mine Workers (1921) 150 Ark. 398, 401, 234 S. W. 464, 465.1**, wherein it was held that in the absence of enabling statute, an unincorporated association cannot sue or be sued in the common or association name. and all the members must be made parties, since such bodies have, in the absence of statute, no legal entity distinct from

their members.

22. This is mainly for the reason that a statutory body gets its powers and authority from an act of parliament, and is generally established to perform specific functions and make judgments in some area of activity. In this respect, the meaning of a 'statutory body' may change depending upon the legislation, but the defining factor is that all statutory bodies are established and operate under the provisions of their own enabling legislation, which sets out the purpose and specific powers of the agency.

23. It is notable in this respect that in judicial review, the defining factor that gives capacity to a defendant is whether there are certain statutory and legal powers and duties conferred or imposed on the public body or official by a statute or other law. The different rules as regards capacity to sue and be sued in the case of unincorporated associations were the subject of the decision in the English case of *Aireborough Neighbourhood Development Forum v Leeds City Council* [2020] EWHC 45, wherein it was found that an unincorporated association, which in that case was a neighbourhood forum, had capacity to bring both a judicial review and a statutory challenge against the decision of a public authority. The case confirmed that legal capacity to sue is not a critical requirement in determining a claimant's capacity to bring a statutory challenge. Instead the claimant must be a person aggrieved, or in the case of judicial review, have standing to challenge. Such a test does not consider legal capacity but instead, focuses on the critical component of sufficient interest in the decision.

24. The rationale for the different treatment of unincorporated associations in public and private law was explained as follows in paragraph 29 of the said decision:

“...there is a critical distinction between private and public law litigation. In private law the individual has to be able to show that they have a legal right which has been infringed, therefore it is fundamental that they have legal capacity to sue. In contrast the critical question in judicial review or statutory challenge is whether the claimant is a person aggrieved or has standing to challenge, which is not a test of legal capacity but rather one of sufficient interest in the decision...The claim is 'invoking the powers of the court to exercise its supervisory jurisdiction...to quash curb or correct decisions of bodies subject to public law. The personal rights of individual applicants...may never be in play.”

25. Likewise, in *R v Traffic Commissioners of the North Western Traffic Area ex p Brake* [1996] COD 248 Turner J. considered an applicant in judicial review to be invoking the powers of the court to exercise its supervisory jurisdiction to quash, curb or correct decisions of bodies subject to public law, and held as follows:

“In the case of a private law action, it is fundamental that a private law right has been violated. Private law rights can only be enjoyed by those who possess the characteristics of a legal person. Similarly, it is necessary, in such a case, that the defendant who is asserted to have infringed that legal right, has the characteristics of a legal person. The situation in public law cases may be different. For a case to lie in public law... Thus, it will not be in every case that an individual applicant need assert that any right of his has been infringed, rather it is that by the unlawful manner in which a body amenable to public law has reached its decision, or the unlawfulness of the decision itself, they have been directly or indirectly affected by that decision...”

26. Since judicial review is a special supervisory jurisdiction which is different from both ordinary adversarial litigation between private parties and appeal rehearing on the merits, the question that determines the capacity of a defendant is whether there is some recognisable public law wrong that has been committed. A defendant in judicial review proceedings therefore, is the public body or public office holder which made the decision under challenge (or failed to make a decision where that failure is challenged), or where the public body or official has legal responsibility for the relevant matter.

27. This Court therefore finds for the foregoing reasons, that the Committee of Senior Counsel, being an unincorporated body that has been given existence and duties by the Advocates Act, is a statutory and public body that is capable of suing and being sued for purposes of judicial review.

The Substantive Issues

28. Two issues substantive issues remain to be determined arising from the two applications herein. The first is that of the legal representation of the Committee of Senior Counsel and the Law Society of Kenya., while the second is the validity and propriety of various pleadings filed by the contested law firms, including the consent letter dated 3rd December 2020.

On Legal Representation

The Case by Allen Waiyaki Gichuhi

29. Allen Waiyaki Gichuhi contends that on 30th September, 2020, this court in the presence of counsel for all the parties issued a temporary order of interdict restraining the 1st and 2nd Respondents herein from receiving, considering and/or making any decision in relation to any application submitted pursuant to the invitation for applications for conferment of the rank of Senior Counsel as contained in the email to members of the Law Society of Kenya dated 2nd September, 2020. and an advertisement in the Daily Nation edition of 3rd September, 2020. However, in defiance of the court order, the 2nd Respondent on 1st October, 2020, sent an email to members entitled “*List of Applicants for Consideration of Conferment of the Rank of Senior Counsel*” and notified members of the applicants who applied for such conferment.

30. It is further contended that by a letter dated 2nd October, 2020, he, through his advocates wrote to the 2nd Respondent and all members of its council and threatened to take out contempt proceedings if the order was disobeyed. Further, a second letter dated 2nd October, 2020

was sent to all council members of the 2nd Respondent seeking information and documentation, *inter alia*, regarding the authority to instruct the firm of Nchogu Omwanza & Nyasimi Advocates to act for both Respondents and a reminder sent on 16th October, 2020.

31. Allen Waiyaki Gichuhi further avers that on 21st October, 2020, nine (9) Council members signed a joint letter and confirmed that the contents of the case were brought to their attention through social media; the issues in the case have never been tabled before the Council for discussion; in June 2020, the issue of Senior Counsel was discussed by the Council and a resolution was passed to the effect that the Law Society of Kenya did not have the mandate to deal with the issue of conferment of the rank of Senior Counsel; they disclaimed liability for the actions complained.

32. It was further averred that the firm of Nchogu Omwanza & Nyasimi Advocates purporting to act for both Respondents filed documents without lawful authority as they were not instructed by the Council members. Furthermore, it was contended that courts have held that when corporate bodies authorize commencement of legal proceedings, a resolution has to be passed at a company or Board of Directors meeting and recorded in the minutes and in the absence of any resolution, the advocate who has brought the legal proceedings without authority of the purported client becomes personally liable to the opposing party for the costs of the action. Accordingly, the Notice of Appointment and all applications and affidavits filed by the firm of Nchogu Omwanza & Nyasimi Advocates should be struck out with costs to be paid by the advocates personally. Accordingly, the Applicant urged that unless the application is allowed, the integrity of these proceedings will be compromised.

33. These averments were reiterated in the submissions filed by Mr. Gichuhi's counsel, who relied on the provisions on the governance of the Law Society of Kenya, including section 17(1) of the Law Society of Kenya Act which provides that the Council shall be the governing body of the Society, and on Regulations 19 and 20 of the Law Society of Kenya (General Regulations) 2020 on decision making procedures by the Council. According to the counsel, once an advocate's authority to appear before a Court of Law on behalf of any party is credibly challenged as in the present applications, it is incumbent upon such an advocate, show such authorization in accordance with the governing instrument of such a party or subsequent ratification.

34. Reliance was placed on various decisions for this proposition, including **Bugerere Coffee Growers Ltd v Seraduka & Anor. [1970] EA 147**, **Affordable Homes Africa Ltd v Henderson & 2 others [2004] eKLR**, **Assia Pharmaceuticals vs. Nairobi Veterinary Centre Limited [2000] eKLR**, **East African Portland Cement Ltd v Capital Markets Authority & 4 others [2014] eKLR** and **Ibacho Trading Company Limited v Samuel Aencha Ondora & 3 others [2017] eKLR**:

35. It was further submitted that the assertions of the President of the Law Society that he is the official spokesman of the Society has no legal significance to the matters in issue before this Court, and that no one by such designation can usurp the powers and duties of the Council as the governing body of the Society. Likewise that the Council cannot use that statutory designation to usurp the powers of the general meeting of the Society which is the supreme authority of the Society and approves all resolutions and important decisions of the Society.

36. On the representation of the Committee on Senior Counsel, it was submitted by the counsel for Allen Waiyaki Gichuhi that the said Committee is established under the Advocates Act, by the Advocates (Senior Counsel Conferment and Privileges) Rules, 2011, while Committees of the Law Society of Kenya, are established by its Council under section 40 of the Law Society of Kenya Act, 2014.

The Case by The President of the Law Society of Kenya

37. According to the President of the Law Society of Kenya, the Committee on Senior Counsel is a Committee and an agent of the Law Society of Kenya and is not an entity that can be sued and as President, he has the duty to instruct advocates on its behalf. The appointment of Kaplan & Stratton Advocates and filing of documents on behalf of the Senior Counsel Committee was faulted on the ground that the Committee on Senior Counsel is a committee of the 2nd Respondent and is not an entity that can be sued. According to the President of the Law Society of Kenya section 17 (3) of the Advocates Act prescribes that the list of persons recommended for conferment shall be submitted by the Committee on Senior Counsel, but does not define the term Committee on Senior Counsel. Further, that section 81 (1) (ee) of the Act enables the Law Society of Kenya to make rules for the procedure for the conferment of, and the privileges attached to, the rank of Senior Counsel, while section 23 of the Law Society of Kenya Act No 21 of 2014 enables the Law Society of Kenya to set up committees.

38. Additionally, that the Committee on Senior Counsel is established under Rules 2 and 3 of the Advocates (Senior Counsel) Conferment and Privileges Rules, 2011, and that the Rules are made by the Council of the Law Society of Kenya. It follows therefore, that the Committee on Senior Counsel is a creation of and a committee of the Law Society of Kenya. Reliance was placed on the decision in **Jacqueline Okeyo Manani & 5 others v Attorney General & Another [2018] eKLR**, for the proposition that the Committee On Senior Counsel was referred to as a committee of the Law Society of Kenya.

39. Additionally, that the Committee on Senior Counsel is established under Rules 2 and 3 of the Advocates (Senior Counsel) Conferment and Privileges Rules, 2011, and that the Rules are made by the Council of the Law Society of Kenya. It follows therefore, that the Committee on Senior Counsel is a creation of and a committee of the Law Society of Kenya. Reliance was placed on the decision **Jacqueline Okeyo Manani & 5 others v Attorney General & Another [2018] eKLR**, for the proposition that the Committee On Senior Counsel was referred to as a committee of the Law Society of Kenya.

40. On the representation of the 2nd Respondent, the President of the Law Society of Kenya contended that all claims upon the Law Society of Kenya are usually forwarded to him as its President for allocation to advocates by himself and where necessary, in consultation with the Chairperson of the Law Society of Kenya's Public Interest Litigation Committee. It was further his deposition that the original pleadings filed by herein were only brought to him on 29th September, 2020 at about 4.30pm, and in view of the urgency of the matter, he instructed Omwanza Ombati to act for the Committee on Senior Counsel and the Law Society of Kenya.

41. He further averred that there is no resolution of the Council of the Law Society of Kenya made in June, 2020 or at all that the Council

does not have the mandate to deal with the issue of conferment of the rank of Senior Counsel, and that the same is the exclusive function of the Statutory Committee on Senior Counsel. The President of the Law Society of Kenya reiterated that the Committee on Senior Counsel is a Committee of the Law Society of Kenya and that he sits in the said Committee as a representative of the Council. Furthermore, that he is the official spokesperson of the Society and of all its committees including the Committee on Senior Counsel, and he gave a detailed exposition of the leadership changes in the Committee on Senior Counsel.

42. In addition, that the letter dated 21st October, 2020 relied upon by Allen Waiyaki Gichuhi does not support his claim that the Council of the Law Society of Kenya must authorize an Advocate to act through a resolution, or that there is no such resolution in respect to the appointment of Nchogu, Omwansa & Nyasimi Advocates. On the contrary, that the letter only confirms that the Council resolved that the question of conferment of the rank of Senior Counsel be dealt with through the Committee. Furthermore, that all the cases relied upon by the Applicant in support of the claim that a resolution is required to sanction the appointment of an Advocate relate to companies, for which there are express provisions in the Companies Act No 17 of 2015 and the Civil Procedure Rules, 2010 which require written authorization of an agent, under seal of the company to act in a matter. There is no such requirement for the 2nd Respondent.

43. It was further averred that Nchogu, Omwansa & Nyasimi Advocates and/or Havi & Company Advocates act for the Respondents in this matter on his instructions on behalf of the 2nd Respondent. It was also his averment that no meeting of the Council of the 2nd Respondent was held on 20th November, 2020 nor was any resolution made to appoint Murgor & Murgor Advocates and compromise the suit in terms of the Consent Letter dated 3rd December, 2020, or at all. Indeed, he averred that resolutions of the 2nd Respondent are signed by the President and the Secretary on the President's instructions and there is none to that effect.

44. The Notice of Change of Advocates by Murgor & Murgor and the actions taken subsequent thereto is assailed for several reasons. First, that the eight Council Members of the Law Society of Kenya who Murgor & Murgor claims to have received instructions from being Ndinda Kinyili, Faith Odhiambo, Aluso Ingati, Riziki Emukule, Beth Michoma, Caroline Mutheu, Bernhard Ngetich and George Omwansa attended the Council Meeting of 18th June, 2020, made the decisions documented in and approved the minutes on 13th July, 2020, and do not have any what basis through Murgor & Murgor Advocates, to reverse that decision.

45. Second, that no meeting of the Council of the Law Society of Kenya was held on 20th November, 2020, nor was any resolution made to appoint Murgor & Murgor and compromise this suit in terms of the Consent Letter dated 3rd December 2020, or at all. According to the President of the Law Society of Kenya, resolutions of the 3rd Respondent are signed by the President and the Secretary, and all communications to Advocates made by the President or the Secretary on the President's instructions, and that there is none to that effect in this matter.

46. He therefore contended that the Notice of Appointment dated 16th September, 2020, by Kaplan & Stratton Advocates, together with all documents filed herein by the said firm, the Notice of Change of Advocates dated 3rd December, 2020, by Murgor & Murgor Advocates, together with all documents filed herein by the said firm and the Consent Letter dated 3rd December, 2020 executed by W. Amoko Advocates, Kaplan & Stratton and Murgor & Murgor Advocates are an abuse of the court process.

The Case by Murgor and Murgor Advocates

47. The firm of Murgor & Murgor Advocates contended that Nelson Havi is not a party to this suit and in the absence of a resolution of the Council of the Law Society of Kenya, he has no capacity to appear and or file any application on behalf of the Law Society of Kenya. Further, that the firm of Murgor & Murgor Advocates was duly appointed following a resolution by the Council of the Law Society of Kenya communicated by the letter dated 23rd November, 2020. Indeed, that the firm of Murgor & Murgor is properly on record for the 2nd Respondent in terms of Order 9, Rule 5 and Rule 6 of the Civil Procedure Rules having filed and served the Notice of Change of Advocates dated 3rd December, 2020.

48. Consequently, in the absence of a duly executed resolution by the Council of the Law Society of Kenya recalling instructions issued to the firm of Murgor & Murgor Advocates, all documents including the consent dated 3rd December, 2020 are properly on record.

The Case by Kaplan and Stratton Advocates

49. The firm of Kaplan & Stratton contended that the application by the President of the Law Society of Kenya is bad in law, lacks merit and does not disclose any substantial grounds for this Court to exercise its discretion in the Applicant's favour. It was also contended that there is no resolution or authority of the Committee on Senior Counsel appointing the firm of Havi & Company to act for it in this matter or at all, and is accordingly, the is competently represented in these proceedings by the firm of Kaplan & Stratton Advocates. Reliance was in this respect placed the Replying Affidavit sworn by Omesh Kapila, SC, the Chairman of the Committee on Senior Counsel on 25th September, 2020.

50. Furthermore, that the Law Society of Kenya's committees are established pursuant to section 23 of the Law Society of Kenya Act, whereas it is common ground that the Committee on Senior Counsel is a creature of Part V of the Advocates Act and the Advocates (Senior Counsel) Privileges and Conferment Rules, 2011 and not the Law Society of Kenya Act. In particular, the Law Society of Kenya does not have power to replace the members of the Committee on Senior Counsel, except for the persons elected by the Law Society of Kenya, and any attempt to do so would be in excess of jurisdiction. Therefore, that the President of the Law Society of Kenya cannot purport to retain counsel on behalf of the Committee on Senior Counsel, as the two bodies are distinct legal entities and one cannot be substituted for another.

51. Kaplan and Stratton advocates drew similarities between the Committee on Senior Counsel and the Disciplinary Committee of the Law Society of Kenya, and that Section 81(1) (a) of the Advocates Act similarly mandates the Law Society of Kenya to make rules with the approval of the Chief Justice to regulate the professional practice, conduct and discipline of advocates, and that the rules of the Disciplinary Committee are made pursuant to this provision. That this does not, however, make the Disciplinary Committee a Committee of the Law

Society of Kenya, and reliance was placed on the decision in the case of **Wilberforce Nyaboga Mariaria vs. The Law Society of Kenya [2016] eKLR**, where the Court held that the Disciplinary Committee and the Law Society of Kenya are distinct legal entities.

52. Therefore, that the President of the Law Society of Kenya is seeking to arrogate to itself power it does not have under the law in purporting to appoint counsel to represent the Committee on Senior Counsel in these proceedings. Further, that the passage cited in case of **Jacqueline Okeyo Manani & 5 others vs Attorney General & Another [2018] eKLR** was made *per incuriam*, as the issue before the Court in that case related to alleged discrimination in the conferment of the title and rank of Senior Counsel, and not whether the Committee on Senior Counsel is a committee of the Law Society of Kenya.

The Analysis

53. I have considered the arguments made by the parties, and will commence my determination by restating the law on appointment of advocates in civil matters as provided for in Order 9 of the Civil Procedure Rules, Order 9. Rule 1 of the said Rules provides that any application to, or appearance, or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf.

54. Order 9 Rule 5 provides for change of advocate, and a party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal. It is notable in this regard, and as held in **Uhuru Highway Development Ltd & Others vs Central Bank of Kenya Ltd & Others (2) [2002] 2 EA 654**, that it is not the business of the Courts to tell litigants which advocate should or should not act in a particular matter as each party to a litigation has the right to choose his or her own advocate, unless it is shown to a Court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter.

55. In addition, the reasons why it is prudent to resolve any conflict as regards representation of a party and to have one firm of advocates on record two firms on record for a party in a suit were stated **Kenya Commercial Bank Ltd. v. John Benjamin Wanyama**, Civil Appeal No. 97 of 1999; [2007] eKLR as follows:

“There is no provision in the Rules for two firms of Advocates to be on record contemporaneously or concurrently. And this is for good reason. It would be chaotic if there was on record more than one firm. From which firm would pleadings be expected; who would be served; who would take responsibility, or be held responsible for actions or omissions of the party represented by such firms? ...The rationale for requiring an Advocate, or one firm of Advocates to act for a party and sign pleadings and receive service on behalf of such party is designed to ensure that such Advocate or firm, does take responsibility for the matter and is accountable to Court and the client he or it represents. The law does not bar a party utilizing the services of more than one Advocate or more than one firm of Advocates in a matter but where this is done, it is the Advocate or firm of Advocates on record who engage a senior counsel to lead. The rules of practice recognize that in complex matters a senior counsel may be hired to lead, and it is for this reason that costs are sometimes enhanced, and a certificate for two counsel given by Court.”

56. In the instant case, different firms of advocates are contesting representation of both the Committee of Senior Counsel and the Law Society of Kenya. On the representation of the Committee of Senior Counsel, which is the 1st Respondent herein, the President of the Law Society claims that the Committee of Senior Counsel is a committee of the Law Society of Kenya, and that he has the powers to appoint an advocate to represent it. This Court has however already found that the Committee of Senior Counsel is a statutory body created, and with duties given under the Advocates Act. It is therefore independent of the Law Society of Kenya, which is a separate corporate body established pursuant to section 3 the Law Society of Kenya Act.

57. In addition, the provisions and powers as regards formation of committees by the Law Society of Kenya are in two provisions. Section 23 provides as follows as regards Committees of the Council of the Law Society of Kenya:

(1) The conduct of proceedings of the Council, and of every committee of the Council, shall be as may be prescribed from time to time by the Council.

(2) The Council may establish such committees consisting of members of the Council as it may consider necessary for the discharge of its functions.

(3) The Council may, by resolution, engage any person who is not a member of the Council to provide such expertise as may be required for the better discharge of its functions, and the attainment of the objects, of the Society

58. Section 40 also provides for the committees of Society’s members, and states that the Council may establish such thematic committees comprising members of the Society for the purpose of assisting the Society perform, or to advise the society on any matter relating to the performance of its functions, and that there shall be a standing committee of the Society to be known as the Budget and Finance Committee.

59. It is notable that the Committee of Senior Counsel is neither expressly referred to or acknowledged as a Committee of the Law Society of Kenya in the Act, and its operations are not included as part of the Law Society of Kenya’s functions in section 4 of the Act. More importantly it is evident from the Act that Committees of the Law Society of Kenya are established by the Council of the Society, whereas the Rule of the Advocates (Senior Counsel Conferment and Privileges) Rules, 2011 sets out the composition of the Committee of the Senior Counsel and the manner of their appointment, including the extent of the participation of the Law Society of Kenya as indicated hereinabove.

60. Both a literal, informed and purposive interpretation of the Law Society of Kenya Act and the Advocates Act and, therefore lead to the

inevitable conclusion that the Committee of Senior Counsel cannot be deemed to be a committee of the Law Society of Kenya. In addition, the principle *expressum facit cessare tacitum* provides that to express a thing expressly, ends the possibility that something inconsistent with it is implied. Therefore, under this principle, you cannot imply or infer a power that goes against the express words used in an Act. As stated in **Whitemen vs Sadler (1910) AC 524**, “express enactment shuts the door to further implication”.

61. The chief application of this principle is the *expressio unius est exclusio alterius* (*expressio unius*) principle, which provides that to express one thing is to exclude another. Therefore to the extent that the Advocates Act specifically names the Committee of Senior Counsel and its memberships, it also expressly excludes the said Committee from the provisions of the Law Society of Kenya Act. Consequently, the Law Society of Kenya or any of its organs has no power, expressly or implied to instruct lawyers for the Committee of the Senior Counsel under the Law Society of Kenya Act, and there role is only to the extent expressly provided for under the Advocates Act.

62. Lastly, it is also notable that the issue of whether the Committee of Senior Counsel is a committee of the Law Society of Kenya was not expressly urged in **Jacqueline Okeyo Manani & 5 Others vs Attorney General & Another [2018] eKLR** , and the Court therein therefore did not have the benefit of the arguments made herein in this regard.

63. In this respect, the Court notes that the firm of Kaplan and Stratton Advocates filed a Notice of Appointment by the Committee of Senior Counsel dated 16th September 2020, and a replying affidavit by the Chairperson of the Committee of Senior Counsel. The firm of Ashioya, Mogire and Nkatha Advocates thereafter filed a Notice of Change of Advocates dated 19th January 2021 to replace the firm of Kaplan and Stratton Advocates, and submitted in Court that its instructing client was the President of the Law Society of Kenya. In light of the findings made in the foregoing, the Notice of Change of Advocates dated 19th January 2021 filed with respect to representation of the Committee of Senior Counsel by Ashioya, Mogire and Nkatha Advocates is accordingly not properly on record, and is hereby expunged from the record.

64. As regards the representation of the Law Society of Kenya, which is the 2nd Respondent herein, it is evident that the conflict emanates from disagreement between the President of the Law Society of Kenya and some members of the Council of the Society, as regards the Society’s legal representation in this matter. As a result, various firms of advocates have filed Notices of Appointment and of Change of Advocates, starting with Nchogu Omwanza & Nyasimi Advocates that filed a Notice of Appointment dated 30th September 2020; Havi & Company Advocates that filed a Notice of Change of Advocates dated 26th November 2020; the firm of Murgor and Murgor Advocates that filed two Notices of Change of Advocates dated 3rd December 2020 and 8th February 2021; and a Notice of Change of Advocates dated 19th January 2021 filed by Ashioya Mogire and Nkatha Advocates.

65. All the aforesaid firms of Advocates, except that of Murgor and Murgor Advocates, claim to have received instruction from the President of the Law Society of Kenya, which position is also reiterated by the said President. The firm of Murgor and Murgor Advocates on the other hand referred to a letter from some Council members of the Law Society of Kenya giving him instructions to act.

66. Order 9 Rule 1 of the Civil Procedure Rules required an advocate to be appointed by a party. In the case of the Law Society of Kenya, the process of appointment is regulated by the parent statute, being the Law Society of Kenya Act. The process of decision making in the Law Society of Kenya is provided in section as follows in sections 15 to 17 of the Act, and section 15 provides for governance of the Society by the following organs—

- (a) the general meeting;
- (b) the Council;
- (c) the secretariat; and
- (d) the branches.

67. Section 16. provides for the general meeting of the Society as follows:

- (1) The general meeting shall be the supreme authority of the Society which shall approve all resolutions and important decisions of the Society.**
- (2) The general meeting shall consist of all the members of the Society.**
- (3) The secretary shall be the secretary to the general meeting.**
- (4) The expenses of the annual general meeting shall be defrayed from the general funds of the Society.**
- (5) The quorum of the general meeting shall be at least five percent of all the members of the Society.**
- (6) The president of the Council shall preside at the general meeting and in the absence of the president, the vice-president shall preside at the meeting.**
- (7) In the absence of both the president and the vice president, the Council shall nominate one among its members to preside.**

68. Under section 17, the Council of the Society shall be the governing body of the society and sets out its membership, who are elected by all the members of the Society in accordance with this Act. Governing is it is evident that the decision-making body of the Law Society of Kenya is the general meetings, and the day-to-day implementation of the decisions lies with the Council. To reinforce this interpretation, section 33 of the Act provides as follows with respect to resolutions by the Society:

(1) Except for any purpose for which a special resolution is expressly required by this Act or by any regulation made under this Act, all resolutions of the Society in general meeting shall be by simple majority vote.

(2) In this Act a "special resolution" means a resolution passed by not less than two-thirds of such members of the Society as may be present and vote thereon at a general meeting of the Society, duly convened with notice of the intention to propose such resolution.

69. It is notable in this respect that Allen Waiyaki Gichuhi and the firm of Murgor and Murgor Advocates rely on letters from some council members as the basis for their respective cases on legal representation of the Law Society of Kenya. The President of the Law Society of Kenya also claims that he can make the appointment of advocates on behalf of the Law Society of Kenya. Both of these claims and arguments have no legal basis in the Law Society of Kenya Act as shown by the foregoing provisions on decision making, which includes the appointment of advocates, by the Law Society of Kenya.

70. It is also notable that the resolution of the Law Society of Kenya that is the basis of the appointment of the firm of Ashioya, Mogire and Nkatha Advocates is the subject of separate court proceedings. It was in this regard orally submitted by Mr. Murgor SC in Court during the hearing of the applications, and not contested by the other parties, that the said resolution has since been suspended by the High Court in the said proceedings. From the recent and current happenings in the Law Society of Kenya, it is evident that the law as regards decision making by the Society as regards appointment of its advocates needs to be better managed, and the law strictly enforced in this regard. I am therefore in agreement with the holding by Rika J. in **Murigi Kamande v Nelson Andayi Havi & another; Mercy Kalondu Wambua (Interested Party) (2020) eKLR** that the most suitable forum to resolve the issues in dispute is the General Meeting.

On the Validity and Propriety of Pleadings

71. Arising from the findings made in the foregoing, the pleadings filed by Kaplan and Stratton Advocates on behalf of the Committee on Senior Counsel are found to be properly on record. As regards the pleadings filed by the Law Society of Kenya, given that the claim herein arises from actions alleged to have been undertaken by the Law Society of Kenya, it needs to be properly represented before this matter can proceed. In the same vein, it is only once there is such proper legal representation that documents that are on record to be relied on can be confirmed or properly filed on its behalf.

The Disposition

72. In the premises the application by Allen Waiyaki Gichuhi dated 26th October, 2020 and the application by Nelson Havi, the President of the Law Society of Kenya, dated 15th December 2020, are dispensed with in the terms of the following orders:

- I. The notice of Appointment, filed by the firm of Nchogu Omwansa & Nyasimi Advocates be and is hereby struck out.**
- II. All the pleadings and documents filed by Nchogu Omwansa & Nyasimi Advocates and Havi & Company Advocates on behalf of the Law Society of Kenya and the Committee on Senior Counsel are hereby expunged from the court record.**
- III. The Notices of Change of Advocates dated 3rd December, 2020 and 8th February 2021, by Murgor & Murgor Advocates with respect to representation of the Law Society of Kenya be and are hereby struck out.**
- IV. The Consent Letter dated 3rd December, 2020, executed by W. Amoko Advocates, Kaplan & Stratton and Murgor & Murgor Advocates be and is hereby expunged from the court record.**
- V. The Notice of Change of Advocates dated 19th January 2021 filed with respect to representation of the Committee of Senior Counsel by Ashioya, Mogire and Nkatha Advocates is hereby struck out.**
- VI. The prayer that the Notice of Appointment of Advocates dated 16th September, 2020, by Kaplan & Stratton Advocates, together with all documents filed herein by the said firm be struck out is hereby declined, and the firm of Kaplan and Stratton is found to be properly on record for the Committee of Senior Counsel, the 1st Respondent herein.**
- VII. The Notice of Change of Advocates dated 19th January 2021 filed with respect to representation of the Law Society of Kenya by Ashioya, Mogire and Nkatha Advocates shall remain on record pending the determination of the validity of the resolution of the appointment of the said law firm and/or the presentation of a new resolution of the General Meeting of the Law Society of Kenya as regards the lawyer or law firm that shall represent it in the present suit, whichever is the earlier.**
- VIII. The proceedings herein are hereby stayed pending the determination of the validity of the resolution of the appointment of the Ashioya, Mogire and Nkatha Advocates and/or the presentation of a new resolution of the General Meeting of the Law Society of Kenya as regards the lawyer or law firm that shall represent it in the present suit, whichever is the earlier.**
- IX. There shall be no orders as regards the costs of the applications dated 26th October, 2020 and 15th December 2020.**

X. The status quo to be maintained during the stay of proceedings shall be in the terms of the orders granted herein on 30th September 2020, which shall remain in force during the period of stay of proceedings.

XI. This matter shall be mentioned virtually by video-link on 4th October 2021 at 3.pm to confirm the status and any developments in this matter, and the Deputy Registrar shall put this matter on the causelist on that date, and shall send the parties the electronic link for the virtual mention.

73. Orders accordingly.

DATED AND SIGNED THIS 11TH DAY OF MAY 2021

P. NYAMWEYA

JUDGE