



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E1146 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NELSON ANDAYI HAVI.....1ST RESPONDENT

MERCY KALONDU WAMBUA.....2ND RESPONDENT

LAW SOCIETY OF KENYA.....3RD RESPONDENT

AND

CAROLYNE KAMENDE.....1ST INTERESTED PARTY

ROSELINE ODEDE.....2ND INTERESTED PARTY

BERNHARD NG'ETICH.....3RD INTERESTED PARTY

GEROGE OMWANSA.....4TH INTERESTED PARTY

ALUSO INGATI.....5TH INTERESTED PARTY

CAROLYNE MUTHEU.....6TH INTERESTED PARTY

FAITH ODHIAMBO.....7TH INTERESTED PARTY

BETH MICHOMA.....8TH INTERESTED PARTY

NDINDA KANYILI.....9TH INTERESTED PARTY

RIZIKI EMUKULE.....10TH INTERESTED PARTY

HERINE KABITA.....11TH INTERESTED PARTY

ESTHER ANG'AWA.....12TH INTERESTED PARTY

EX-PARTE APPLICANT:

GAD AGUKO

JUDGMENT

3rd Respondent herein. The said *ex parte* Applicant filed an application by way of a Notice of Motion application dated 7th December, 2020, seeking the following orders:

1. **THAT** the Court be and is hereby pleased to grant an order of Certiorari to remove into this Court for purpose of being quashed the 1st Respondent's letter dated 23rd October, 2020 addressed to Collins Odhiambo, directing that arrangements be made to enable the holding of the Special General Meeting.

2. **THAT** the Court be and is hereby pleased to grant an order of Certiorari to remove into this Court for purposes of being quashed the 2nd, 3rd and 4th agendas/motions of the Special General Meeting that is to be convened on 5th December, 2020 or any other day as contained in the various Notices Requisitioning the Special General Meeting.

3. **THAT** the Court be and is hereby pleased to grant an order of prohibition to restrain the 1st Respondent from convening, purporting to convene on behalf of the Council of the 3rd Respondent or directing any of his agents to convene a Special General Meeting on behalf of the Council of the 3rd Respondent having agreed as a whole to convene a Special General Meeting.

4. **THAT** the Court be and is hereby pleased to grant an order of prohibition to restrain the General Meeting on 5th October, 2020 or any other day, including the 1st Respondent from declaring or further purporting that an external auditor has been appointed unless one is recommended by the Council of the 3rd Respondent and approved by the General Meeting.

5. **THAT** costs of this Application be provided for.

6. Any other order that the court may deem fit and expedient to grant.

2. The application is supported by the grounds in a Statutory Statement and the *ex parte* Applicant's Verifying Affidavit all dated 2nd December, 2020.

Before I proceed with an exposition of the *ex parte* Applicant's, this Court decided to *suo moto* expunged from the record the 2nd, 3rd and 4th sentences of paragraph 2 of the *ex parte* Applicant's verifying affidavit sworn on 2nd December 2020, which contained offensive statements about the 1st Respondent, which could not possibly have been in the *ex parte* Applicant's knowledge, and which were not supported by any evidence. While the courts will not prevent parties from stating their parties, the rules on the court process do not permit allegations to be made in pleadings that are scandalous, indecent, offensive and oppressive and which do not serve the ends of justice.

3. In this regard, Order 19 rule 1 of the Civil Procedure Rules provide that affidavits will be confined: -

“to such facts as the deponent is able of his own knowledge to prove, provided that in interlocutory proceedings, with leave of the court, an affidavit may contain statements of information and belief showing the source and grounds thereof.”

4. Likewise, in the case of Musikari N Mazi Kombo vs Moses Wetangula & 2 Others (2013) eKLR the court held as follows as regards affidavit evidence:

“But it should be understood that, the law still requires such allegations to be made within the law;

That is to say, within the legal thresholds I have stated herein above as a way of preventing prejudice to, unfair charge on or infringement of a person's rights. The allegations or averments in an affidavit should also not be irrelevant; having no probative value; not tending to prove or disapprove a matter in issue. See Black's Law Dictionary, 17th Edition. One more requirement; the averments should be supported by evidence within the affidavit itself or by some other person in the proceedings, in this case, by a witness through an affidavit in court...”

5. The *ex parte* Applicant contended in the remainder of the said affidavit that on 14th September, 2020, the Council of the 3rd Respondent met to consider among other agendas, Agenda No. 12 on Conduct of Senior Staff in Performance of Contractual Duties and that as a result, the Council resolved to consider the removal of the 2nd Respondent from the office of the Secretary/Chief Executive Officer of the 3rd Respondent on the grounds of incompetence and gross misconduct. That vide a letter dated 14th September, 2020, the 2nd Respondent was notified of the intention by Council in line with Section 26(6) of the Act and was suspended from the office and barred from carrying out any of her duties during the pendency of the disciplinary proceedings against her.

6. That the 2nd Respondent filed her response on 29th September, 2020 and made oral representation before the Council during the hearing held on 6th October, 2020 whereby it was agreed that each of the Council member shall write their own ruling in regard to the allegations levied against the 2nd Respondent. It was contended that after considering the 2nd Respondent's response and oral presentations made during the hearing, nine (9) of the members of the Council that is, the 2nd to 10th Interested Parties voted against the motion to remove her from office. Consequently, vide a letter dated 19th October, 2020, the 2nd Respondent was informed of the decision and asked to resume her duties.

7. However, the 1st Respondent by his ruling dated 19th October, 2020 decided that the evidence against the 2nd Respondent was sufficient to remove her from the said office under the grounds of incompetence and gross misconduct. It was averred that despite the 1st Respondent's

position being by the minority of the Council members, the 1st Respondent informed the 2nd Respondent that her contract of service had been terminated effective immediately by a letter dated 19th October, 2020. That the 1st Respondent did so despite Regulation 20(4) of the Kenya Law Society (General) Regulations, 2020 providing that members of the Council are collectively responsible for a decision or resolution made by the Council or by the majority of the Council members. However, that the 2nd Respondent being aware of the decision of the Council resumed work and continued to carry out her duties.

8. The 1st Respondent was also alleged to have made false accusations against the nine (9) council members who voted against the motion to remove the 2nd Respondent from office. That vide a letter dated 23rd October, 2020, the nine (9) Council members who voted against the motion to remove the 2nd Respondent from office, wrote to all members of the 3rd Respondent reassuring them that they did not vote against the motion and voiced their concerns about the 1st Respondent claiming otherwise.

9. Thereafter, it is averred that the 1st Respondent initiated a campaign to collect at least 5% of the signatures of members or each branch of the 3rd Respondent, so that a Special General Meeting could be requisitioned. That according to section 31(2)(d) of the Act, once the signatures are collected, the requisition ought to be submitted to the 2nd Respondent as the Secretary of the 3rd Respondent and after such requisition, it is the Council, as per Section 31(3) that ought to convene the Special General Meeting, within fourteen (14) days of receiving the requisition.

10. However, it is averred that the 1st Respondent vide a letter dated 23rd November, 2020 and addressed to one Collins Odhiambo as the purported Acting Secretary/CEO of the 3rd Respondent requested him to make arrangements to enable the holding of the said Special General Meeting on 5th December, 2020. It is the *ex-parte* Applicant's case that the 1st Respondent, though the President of the 3rd Respondent, cannot proceed to convene the Special General Meeting without a decision being made by the Council as a whole. Furthermore, the names, admission numbers and the signatures of the members requisitioning for the Special General Meeting have not been verified by the Council to confirm that they are indeed members of the 3rd Respondent. The *ex parte* Applicant in this regard made reference to a complaint made by a member of the 3rd Respondent via email complaining that though he did not append his signature on the requisition, his name appeared on the same.

11. It was further averred that the 1st Respondent's actions of instructing the said Collins Odhiambo were illegal, tainted with illegality and therefore acting *ultra vires*. Further, that at the said Special General Meeting, one of the agendas that was to be discussed is whether the General Meeting should allow a notice of recruitment of a Secretary/Chief Executive Officer of the 3rd Respondent. It is the *ex parte* Applicant's position that the said office is not vacant. In addition, that the said agenda/motion that falls out of the jurisdiction of the General Meeting and will amount to an illegality because section 26 of the Act gives the Council the power to appoint or dismiss the Secretary/CEO of the 3rd Respondent. Furthermore, that on 1st December 2020, the court granted conservatory orders staying any discussion or decision making on the said agenda in **ELRC Petition No. 9 of 2020**.

12. The *ex parte* Applicant also contended the 2nd item on the agenda of the proposed Special General Meeting that a forensic audit should be conducted in terms of an agreement made with Parker Randall Eastern Africa was illegal, unprocedural and without jurisdiction as the General Meeting has not approved their appointment. According to the *ex parte* Applicant, on 23rd July, 2020 during the Ordinary Meeting, the members of the 3rd Respondent resolved that the Council should recommend to the Society an external auditor for approval by members for the purpose of auditing the accounts of the 3rd Respondent, in line with Regulation 52(1) of the Kenya Law Society (General) Regulations, 2020. That to date, the General Meeting has neither received any recommendation from the Council of an external auditor neither has it approved the appointment of any external auditor. Be that as it may, it was averred that no external auditor could have been approved by the members of the 3rd Respondent since no other General Meeting has been convened after the one held on 23rd July, 2020.

13. Further, that agenda 4 of the proposed Special General Meeting proposes a motion on whether any communication by the 3rd Respondent should first be allowed by the President of the 3rd Respondent before being dispatched thus elevating the office of the President of the 3rd Respondent above the Council which is the governing body of the Society. Therefore, by considering the said motion, the General Meeting will be acting beyond its jurisdiction. That the said agenda is also in contravention of Regulation 18 of the Kenya Law Society (General) Regulations, 2020. Moreover, it was averred that the role of the 1st Respondent is only to chair the Council meetings.

14. It was also the *ex parte* Applicant's contention that Regulation 19(1) of the Kenya Law Society (General) Regulations, 2020 provides that the quorum for a meeting of the Council shall be five (5) members, excluding the Secretary, and as long as quorum is achieved and all members duly notified within the stipulated time, it is inconsequential as to who called and/or approved the Council meeting. Further, that the only Council meeting that the 1st Respondent can call unilaterally is an extra ordinary meeting as per Regulation 21 of the Kenya Law Society (General) Regulations, 2020.

15. In conclusion, the *ex parte* Applicant averred that the much as the General Meeting is the supreme authority of the 3rd Respondent, proceeding to deliberate the aforementioned items of the agenda will amount to abuse of power, and therefore need intervention by this Court.

The Responses

16. The 1st and 3rd Respondents opposed the application and filed two Replying Affidavits, both sworn by the 1st Respondent on 10th December 2020. The 2nd Respondent and 2nd Interested Party did not file any response. The 1st, 11th Interested Parties, and 12th Interested Parties also filed a Replying Affidavits dated 14th December, 2020, 11th December 2020, and 14th December 2020 respectively, in opposition of the notice of motion application dated 7th December 2020. They largely reiterated various aspects of the position taken by the 1st and 3rd Respondents in their respective affidavits. The 3rd to 10th Interested Parties on their part filed a Replying Affidavit sworn by

Riziki Emukule on 15th December, 2020 in support of the application

The 1st and 3rd Respondents Case (Incorporating the 1st 11th and 12th Interested Parties Cases)

17. The 1st and 3rd Respondents averred that the 2nd Respondent was until 19th October, 2020, the Secretary of the Council and CEO of the 3rd Respondent. Further, that the relationship between the 2nd Respondent and the 3rd Respondent was contractual as was evidenced by the contracts of service of 1st March, 2016 and 1st March, 2019 as well as the letters of appointment of 21st March, 2016 and 12th February, 2019. It was further averred that the 2nd Respondent was removed as Secretary of the Council and Chief Executive of the 3rd Respondent for gross misconduct incompetence as per the Council's decision of 19th October, 2020 and the same was communicated to the 2nd Respondent in the presence of the entire Council on the same date but the 2nd to 10th Interested Parties given a chance to communicate their findings did not. As a result, the 1st Respondent delivered to the 2nd Respondent a letter of even date terminating her contract for service.

18. According to 1st Respondent, the letter purporting to communicate the findings of the nine Council members is not a decision as defined by Section 2 of the Fair Administrative Actions Act, 2015 and cited the holding of **Richard Bwogi Birir v Narok County Government & 2 Others (2014) eKLR**. It was further his averment that a dispute in respect to a termination of a contract of service and the recruitment of the successor of the 2nd Respondent is not a cause for redress through judicial review proceedings but through the Employment and Labour Relations Court.

19. Be that as it may, the 1st Respondent deposed that on 26th November, 2020 a claim seeking orders similar to those sought herein was filed by proxy and on behalf of the 2nd Respondent and the 2nd to 10th Interested Party in **ELRC Petition No. 087 of 2020, Murigi Kamande vs Nelson Andayi Havi, Law Society of Kenya & Mercy Kalondu**. That on 3rd December, 2020, the court hearing Petition No. 087 of 2020 extricated deliberations of agenda item no. 3 of the Notice Requisitioning Special General Meeting signed by members of the 3rd Respondent and received by the 2nd Respondent, and the 1st Respondent on 20th November, 2020 directed that the Special General Meeting proceeds in so far as rest of the agenda items were concerned.

20. That on 1st December, 2020, a claim seeking orders similar to those sought herein was also filed by the 2nd Respondent in the **ELRC Petition No. E090 of 2020, Mercy Kalondu Wambua v Nelson Andayi Havi & Council of the Law Society of Kenya**. That the court again in this matter extricated deliberations of agenda item no. 3 and the recruitment of the 2nd Respondent's successor but did not stop the Special General Meeting scheduled for 5th December, 2020. In his view and based on the facts deposed to above, he averred that the entire claim in so far as it relates to the removal and recruitment of the 2nd Respondent's successor is an abuse of the court process and the leave granted ought to be set aside.

21. It was further the 1st Respondent's averment that he did not initiate and collect signatures for the Special General Meeting requisitioned for 5th December, 2020 by members of the 3rd Respondent, and that the Law Society of Kenya Act No. 21 of 2014 and the Law Society of Kenya (General) Regulations, 2020 do not direct the verification of signatures by the Council in a notice by members of the 3rd Respondent requisitioning for a Special General Meeting as alleged. In addition, that the Notice Requisitioning Special General Meeting to be held on 5th December, 2020 was signed by members of the 3rd Respondent and received by the 2nd Respondent and himself on 20th November, 2020 complete with a date endorsed thereon. That by his letter dated 23rd November, 2020, he instructed the Acting Secretary, Collins Odhiambo to facilitate the holding of the Special General Meeting which he would have chaired by virtue of Section 16(6) of the Law Society of Kenya Act No. 21 of 2014 and Regulation 78 of the Law Society of Kenya (General) Regulations.

22. The 1st Respondent denied unilaterally appointing Parker Randal Eastern Africa to undertake a forensic audit, and stated that the said appointment did not require a proposal by the Council for approval by members of the 3rd Respondent in an Annual General Meeting as alleged by the *ex parte* Applicant. He further stated that in the Annual General Meeting of the 3rd Respondent held on 23rd July, 2020, the members disputed several unexplained expenditure in the financial statements despite attempts by the 2nd Respondent to explain the same and resolved that a forensic audit by an independent auditor recruited by the Council be undertaken on the accounts and balance sheet of the Law Society of Kenya for the period 1st January, 2019 and 31st December, 2019 as evidenced by the 3rd Respondent's video on the zoom platform.

23. Therefore, that it was proposed by members of the 3rd Respondent that a poll be taken on that issue and members given time to vote, and it was averred that two thousand one hundred and twenty-eight members voted in favour of the forensic audit being done by an independent auditor as opposed to five hundred and twenty-five members who voted in favour of an inquiry by the Finance Committee. Further, that in the Annual General Meeting of 23rd July 2020, members of the 3rd Respondent resolved not to retain the external auditor who presented the financial statements and mandated the Council to recruit and recommend a replacement to members for approval in terms of Regulation 52 of the Law Society of Kenya (General) Regulations, 2020.

24. Accordingly, that the forensic auditor was to be recruited by the Council whilst the external auditor would be recommended to the members for approval in a Special General Meeting or at an Annual General Meeting. The 1st Respondent therefore averred that Parker Randall Eastern Africa was recruited by the Council and not by himself as per the resolutions referred to above, and engaged on 9th November, 2020. He further deposed that after removal of the 2nd Respondent on 19th October, 2020 and upon the issuance of his instructions to the 1st, 2nd and 3rd Interested Parties to pay the deposit due to the auditor, a deliberate attempt to frustrate and sabotage the conduct of the forensic audit was contrived by the 2nd Respondent and executed in conjunction with the 2nd to 10th Interested Parties.

25. Consequently, that on 16th November, 2020, together with the Vice President, the 1st Respondent issued two statements to members of the 3rd Respondent explaining the process leading to the engagement of the auditor on 9th November, 2020 and asking the 2nd and 3rd

Interested Parties to sign the payment cheque for the deposit due to the auditor and for the audit process to begin. However, that between 16th November, 2020 and 7th December, 2020, the 2nd Respondent and the 3rd to 10th Interested Parties purported to appoint another forensic auditor, Klynveld Peat Marwick Goerdele (KPMG) at a cost of Kshs. 5,492,434.50/- . It was contended that this actions was undertaken in total disregard of the resolution made by members of the 3rd Respondent at the Annual General Meeting on 23rd July, 2020, the resolution made at the Council meeting of 10th August, 2020 and outside the framework of the decision-making structure of the Council in an enterprise intended to frustrate and sabotage the conduct of the forensic audit. The 1st Respondent annexed various documents to support his averments.

26. The 1st Respondent further contended that the actions of the 2nd Respondent and the 3rd to 10th Interested Parties were undertaken between 19th October, 2020 and 1st December, 2020 when the 2nd Respondent was not authorized to act as she did, in view of the fact that the decision for her removal was stayed on 2nd December 2020 and not earlier. As such, the conduct of the 2nd Respondent and the 3rd to 10th Interested Parties in respect to the conduct of the forensic audit subsequent to the making of the order of 3rd December, 2020 in **Petition E087 of 2020**, the order of 2nd December, 2020 in **Petition E090 of 2020** and the order of 4th December, 2020 herein have no legal propriety. It was further contended that the actions of the 2nd Respondent and the 3rd to 10th Interested Parties further indicate that they arrogated themselves powers of the Council of the 3rd Respondent as well as that of its President.

27. It was thus the 1st Respondent's contention that he, the Vice-President, and the 11th and 12th Interested Parties are not aware of the offer letter made to KPMG as claimed in the Notice dated 4th December, 2020 from the 2nd Respondent to members of the 3rd Respondent, and that efforts to inquire from KPMG what was happening has not yielded any fruits. In his view, the 3rd to 10th Interested Parties have in an effort to sustain the 2nd Respondent in office despite her removal, created a non-existent dispute over the conduct of the forensic audit which members of the 3rd Respondent resolved in the Annual General Meeting of 23rd July, 2020. Furthermore, that they have created two centres of power in the management of the Council with a view to forcing the retention of the 2nd Respondent as the Secretary of the Council.

28. It was also asserted that in an effort to discourage the holding of the member-requisitioned Special General Meeting on 5th December, 2020, the 2nd Respondent together with the 3rd to 10th Interested Parties contrived to bring a motion dated 25th November, 2020 for his removal from office. Be that as it may, he averred that the rift between 2nd to 10th Interested Parties on one hand and the 1st, 11th and 12th Interested Parties and himself on the other hand has undermined his service to members of the 3rd Respondent. He was also of the view that the division in the Council cannot be resolved through a court process however, under Section 16 of the Law Society of Kenya Act No. 21 of 2014, the Special General Meeting is the supreme authority of the 3rd Respondent with power to approve all resolutions and important decisions of the 3rd Respondent including any function reserved for the Council and unlocking any stalemate between the parties.

29. Reference was made to the authorities in **Gower and Davies' Principles of Modern Company Law, 8th Edition** and **Barron v Potter (1914) Ch 895**, that the Special General Meeting of the 3rd Respondent is authorized to deliberate upon and resolve all the agenda items set out in the Notice Requisitioning Special General Meeting by members of the 3rd Respondent received on 20th November, 2020. The 1st Respondent in conclusion averred that as set out in numerous decisions of this court, it has been held that the court does not interfere in the internal affairs of the 3rd Respondent and the same should be remedied through the alternative dispute mechanism under Regulations 95 and 96 of the Kenya Law Society (General) Regulations, 2020. Further, that the questions of law involved in this matter are not any different from those referred to previously litigated matters in which the court held that it had no jurisdiction. As such, that the filing of this suit was blatant an abuse of the court process.

30. The above averments as regards requisitioning of the special general meeting, the appointment of auditors, and removal of the 2nd Respondent from office were reiterated by the 1st, 11th Interested Parties, and 12th Interested Parties in their replying affidavits.

The 3rd to 10th Interested Parties Case

31. The 3rd to 10th Interested Parties averred that section 26(1) of the Law Society of Kenya Act, 2014 establishes the office of the Secretary of the Council of the Law Society of Kenya (the 3rd Respondent), who is appointed by the Council through a transparent and competitive recruitment process. Further, that pursuant to that section, the 2nd Respondent was re-appointed the Secretary to the Council on 1st March, 2019 for a further term of three (3) years. However, during her tenure under the current Council, some members of the Council of the 3rd Respondent and particularly the 1st Respondent, raised complaints against her conduct in performance of her contractual duties.

32. Accordingly, that on 14th September, 2020 the Council met to consider among other agenda items *inter alia*, Agenda No. 12: Conduct of Senior Staff in Performance of Contractual Duties, when it became apparent that there was need to investigate these complaints. Further, that the said complaints of incompetence and gross misconduct were reduced in writing, and vide a letter dated 14th September, 2020, the 2nd Respondent was issued with a notice in reference to the intention of the Council to remove her as Secretary and suspended from office to pave way for investigations.

33. It was averred that the 2nd Respondent on 28th September 2020, through her advocates, wrote to the Council a preliminary response to the grounds put forward against her. Subsequently, that a physical hearing was held on 6th October, 2020 where all the Council members were present, and thereafter retired to make a decision whereby each Council member was to write his/her own ruling for delivery on 16th October 2020, and the outcome of each decision was to form each Council member's vote. That the Council then met to deliberate and vote, and that on 16th October, 2020 the 2nd to the 10th Interested Parties voted against the motion to remove the 2nd Respondent from office on 16th October, 2020. It was the 3rd – 10th Interested Parties' averment that Regulation 20 (4) of the Law Society of Kenya (General) Regulations, 2020 provides that members of the Council are collectively responsible for a decision or resolution made by Council or by the majority of the Council. As such, the nine members, being the majority, bound the whole Council by this decision and vide a letter dated 19th October, 2020, the 2nd Respondent was informed of this decision and was asked to resume to her duties.

34. However, the 1st Respondent 19th October, 2020, contrary to the Council's decision wrote a letter to the 2nd Respondent informing her that she been removed from the said position, and falsely communicated this information to members of the society via social media platforms to be the position of the Council. Further, that the 1st Respondent embarked on making false accusations against the 2nd to 10th Interested Parties (the nine Council members) who voted against the motion. It is averred that the 1st Respondent also called for a Special General Meeting under Section 31 of the Act for this purpose. According to the 3rd to 10th Interested Parties, such a requisition needs the support of at least 5% of the members from each branch which support is demonstrated by them writing their names, admission numbers and signing the said requisition.

35. It was contended that on diverse dates from 20th November, 2020 to 23rd November, 2020, the 3rd Respondent received Notices Requisitioning a Special General Meeting of the Society from a section of the membership, and the said notice had scheduled the Special General Meeting to be held on 5th December, 2020 at the Law Society of Kenya Offices at 11am. That the 1st Respondent wrote a letter to one Collins Odhiambo, who is the Deputy Secretary, referring to him as Acting Secretary/Chief Executive Officer of the 3rd Respondent requesting him to make arrangements to enable the holding of the said Special General Meeting on 5th December, 2020. It is further contended that the said letter was not written with the authority of the 3rd Respondent and the 3rd to 10th Interested Parties, yet they constitute the majority of the Council members.

36. It is further the 3rd to 10th Interested Parties' contention that to date, the Council has never met to pass a resolution that the Special General Meeting be convened in line with section 31 of the Act. Therefore, that without the authority of the Council, the 1st Respondent is acting outside his jurisdiction when he issued the instructions as contained in the letter dated 23rd November, 2020 neither does the addressee of the said letter have powers to execute those instructions. Furthermore, that the Council is yet to meet and verify the names, signatures and admission numbers of the members said to be requisitioning the Special General Meeting. It was also her contention that the General Meeting as the supreme authority that approves all important decisions is regulated by the Law Society of Kenya Act as well as the Law Society of Kenya (General) Regulations, 2020, and hence the need to ensure that the same is properly requisitioned.

37. Regarding the forensic audit and audit services for the period 2020-2020, the 3rd to 10th Interested Parties averred that at a meeting of 14th September 2020, it was drawn to the Council's attention that only one audit firm, being Parker Randall, applied for the said services, and the Council passed a resolution to extend the application period for audit firms to submit quotations for a further fourteen (14) days. That as at 30th September, 2020, quotations were received from two audit firms, namely Parker Randall East Africa and KPMG. However, the 1st Respondent on 9th November, 2020 unilaterally purported to appoint a forensic auditor, Parker Randall, without any Council resolution.

38. According to the 3rd to 10th Interested Parties, the Council as a result issued a letter to Parker Randall clarifying that the Council had not appointed any forensic auditor. Further, that the process of appointment of a forensic auditor by the Council of the 3rd Respondent as resolved by members during its Annual General Meeting on 23rd July, 2020 is still ongoing. Lastly, the 3rd to 10th Interested Parties averred that the law has clearly circumscribed functions for the Council and General Meeting, and that the matters in all the agenda items contained in the Notices Requisitioning for the Special General Meeting of 5th December 2020 were outside the mandate of the General meeting.

The Determination

39. The instant application was canvassed by written submissions. The *ex parte* Applicant filed written submissions dated 16th December, 2020, while the 1st Respondent's written submissions are dated 10th December 2020, and those of the 3rd Respondent are dated 11th February, 2021. The 1st Interested Party also filed written submissions dated 15th December, 2020, while the 3rd to 10th Interested Parties filed written submissions dated 17th December, 2020.

40. A number of preliminary issues about this Court's jurisdiction were raised by the 1st and 3rd Respondents and 1st Interested Party parties that need to be addressed first. The two main preliminary issue raised are whether the *ex parte* Applicant's application is competently before this Court for want of exhaustion of alternative remedies, and its amenability to judicial review.

On the Exhaustion of Alternative Remedies

41. The 1st Respondent in this respect submitted that alternative dispute resolution, counsel submitted that jurisprudence abound that disputes pertaining to the internal affairs of the 3rd Respondent are matters that courts have declined to exercise jurisdiction on in view of the alternative dispute resolution mechanism available under Regulations 95 and 96 of the Law Society of Kenya (General) Regulations. To that end the 1st Respondent counsel cited the holdings of **Deynes Muriithi & Others vs Law Society of Kenya & Another (2015) eKLR, Nelson Andayi Havi v Law Society of Kenya & 3 Others (2018) eKLR, Majimbo Georgiadis v Law Society of Kenya, Nairobi Branch & 11 Others (2018) eKLR, Mark Ndungu Ndumia vs The Law Society of Kenya, Ptn No. 94 of 2019 (UR) and County Government of Turkana v National Land Commission & Others, Civil Appeal No. 138 of 2019 (UR).**

42. The 3rd Respondent similarly submitted that the proceedings herein are fatally defective since the *ex parte* Applicant has not exhausted the internal mechanism for dispute resolution as provided for in Section 9 of the Fair Administrative Actions Act. Furthermore, counsel submitted that the Law Society through Regulation 96 of the Law Society (General) Regulations has provided an elaborate procedure of resolving disputes within the confines of the Law Society of Kenya. Further that, it is well settled law that when a statute provides for an internal mechanism of dispute resolution, then the same must be adhered to unless with the leave or exemption provided for in law. The decisions in **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others, High Court Misc. Application No. 25 of 2019** and the case of **Micheal Osundea Sakwa vs Chief Justice and President of the Supreme Court of Kenya & Another (2016) eKLR** were cited in this respect.

43. The *ex parte* applicant in rejoinder submitted that the doctrine of exhaustion does not completely lock out an applicant from accessing the doors of this Court to seek judicial review orders, as there are exceptional circumstances when once could be excused and permitted. To that end, counsel cited the case of **Republic v Council for Legal Education Ex-parte Desmond Tutu Owuoth (2019) eKLR** where the court observed that the High Court may in exceptional circumstances find the exhaustion requirement would not serve the values enshrined in the Constitution or the law and permit the suit before it. In counsel's view, owing to the circumstance of this case and the level of public interest involved, it qualifies for the requisite exemption.

44. It is not in dispute that there is an alternative dispute resolution provided for members of the 3rd Respondent by Regulations 95 and 96 of the Law Society (General) Regulations, which provides as follows:

(1) Where a dispute arises—

(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[1]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.

(5) The number of arbitrators so appointed shall not, in relation to any one dispute, exceed three persons.

(6) Where a dispute is between— (a) a member and another member; or

(b) a member and a branch executive or chapter committee, and the parties to the dispute cannot agree on an arbitrator within 14 days, the president shall appoint an arbitrator to hear and determine the dispute.

(7) Where a dispute involves— (a) the Council; or

(b) a member of the Council, and any other party, and the parties cannot agree on an arbitrator within 14 days of lodging of the dispute, the arbitrator shall be appointed by the Chairperson of the Chartered Institute of Arbitrators, Kenya Chapter.

(8) The arbitrator or arbitrators shall hear and determine a dispute in accordance with the law for the time being regulating arbitration, and the decision shall be final and binding on all parties to such dispute.

(9) The time provided under this regulation for lodging or taking other step in dispute resolution process is subject to regulation 45 where the dispute concerns elections.

45. The exhaustion of alternative remedies is now both a constitutional and legal imperative under Article 159 (2)(c) of the Constitution and section 9(2) and (3) of the Fair Administrative Action Act, and as exemplified by emerging jurisprudence on the subject. Article 159(2)(c) of the Constitution obliges this Court to observe the principle of alternative dispute resolution.

46. Specifically, with respect to the exercise of the judicial review jurisdiction of this Court, sections 9(2) (3) and (4) of the Fair Administrative Action Act state as follows:

“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

47. The Court of Appeal first embodied the doctrine of exhaustion in Speaker of National Assembly vs Karume (1992) KLR 21, and further clarified the doctrine under the current constitutional dispensation in Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR 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 fora of last resort and not the first port of call the moment a storm brews..... 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 the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

48. Likewise, it was held by the High Court In the Matter of the Mui Coal Basin Local Community (2013) e KLR, R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya and Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR that in reaching a decision as to whether an exception applies, courts will undertake an analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved, the polycentricity of the issues and the ability of a statutory forum to determine them.

49. It was also held as follows in Krystalline Salt Limited vs Kenya Revenue Authority [2019] eKLR:

“... this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy”

50. I am persuaded by and in agreement with the holdings in the foregoing. It is in this regard not in contest that the dispute herein principally involves the *ex parte* Applicant as a member of the 3rd Respondent and some members of the 3rd Respondent’s Council on one side; and the 1st Respondent who is a member and President of the 3rd Respondent, and some its Council members on the other side; as regards the convening of the Special General Meeting of the 3rd Respondent. It is thus a dispute involving members of the Law Society of Kenya qua members, and also in relation to actions of its President and Council members.

51. In addition, the Law Society of Kenya Act in section 16 provides that the general meetings are the supreme authority of the Society, which shall approve all resolutions and important decisions of the Society. Sections 30 to 32 of the Act consequently regulates the convening of Ordinary and Special General Meetings. A dispute as regards the convening of a general meeting is therefore one that touches on the management of the 3rd Respondent, as well as the rights of its members in this regard, and is amenable to arbitration pursuant to Regulation 95 of the Law Society (General) Regulations . Regulation 95 also provides that parties to such a dispute may attempt to reach settlement by negotiation; conciliation; or mediation.

52. The *ex parte* Applicant has urged that this case ought to be exempted from the alternative dispute resolution mechanisms owing to the circumstance of this case and the level of public interest involved. The *ex parte* Applicant did not however particularise, nor explain how and why the circumstances of this case and the public interested qualify it from exemption from the proceedings provided.

53. It is my view that it is in the public interest that the members of the 3rd Respondent be given the opportunity to resolve the apparent differences amongst themselves using all laid down procedures, before seeking the intervention of this Court. In this respect it is notable that in the event that the available alternative mechanisms are not utilized or are not efficient and effective, aggrieved parties still have recourse to the Courts. The next section of this judgment also address the circumstances and nature of the issues raised in this application in greater detail, and particularly why they are issues that cannot be determined by a judicial review Court.

On Amenability to Judicial Review

54. The second limb of the competence of the application is its amenability to judicial review, particularly as regards the 2nd Respondent’s employment and the appointment of auditors for the 3rd Respondent, that were put forward by the *ex parte* Applicant as grounds for quashing the intended Special General Meeting.

55. The 1st Respondent in this regard submitted that the claims of the 2nd Respondent and the 2nd to 10th Interested Parties are civil and not administrative in nature and it is trite law that civil claims are not remedied through judicial review proceedings. The case of Kenya Bus Ltd & 2 Others vs Attorney General & 2 Others (2005) eKLR whereby the court held that the rights of individual interests are taken care of in the province of private law and are invariably redressed as such was cited in this respect. Reliance was also placed on the case of Uhuru Muigai Kenyatta vs Nairobi Star Publications Limited (2013) eKLR whereby an objection on the ground that a violation of rights cannot be addressed against a private individual was sustained and the petition struck out.

56. The 1st Respondent further submitted that the claims of the 2nd Respondent and the 2nd to 10th Interested Parties are matters before the Employment and Labour Relations Court in Petition No. E087 of 2020 and Petition No. E090 of 2020 with subsisting orders in the two matters, and the instant suit is therefore an abuse of the court process. The case of Nishit Yogendra Patel vs Pascale Mireille Baksh & Another (2009) eKLR where it was held that a remedy cannot be pursued simultaneously in different forums was cited in this respect.

57. It was the 3rd Respondent's submission that judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision as was held in **Republic vs Attorney General & 4 Others Ex-parte Diamond Hashim Lalji & Another** and in **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**. Further, that the *ex parte* Applicant has failed to show procedural unfairness/illegality but instead emphasizes on the merits and correctness of these decisions.

58. The 1st Interested Party's position was that this being a judicial review process, the court cannot be called upon to evaluate the evidence before the Council in its deliberations of 19th October, 2020 as the same would amount to reviewing the merits of the decision itself. Further, that the *ex parte* Applicant seems to be dwelling on the reasons why the Special General Meeting should not go on, which is beyond the purview of judicial review.

59. To further buttress her argument, the 1st Interested Party cited the cases of **Municipal Council of Mombasa v Republic & Umoja Consultants Limited (supra)**, **Republic vs Kenya Revenue Authority Ex Parte Yaya Towers Ltd (2008) eKLR**, **Republic v Secretary of State for Education and Science Ex-parte Avon County Council (1991) 1 All ER, 282** and **Peter Oketch Kadama v Municipal Council of Kisumu (1985) KLR 954** for the proposition that judicial review is not concerned with the private rights or merits of the decision being challenged, but the decision-making process.

60. The 1st Interested Party further submitted that the jurisdiction of this court is a special one, in that it is neither civil nor criminal, and cited the cases of **Commissioner of Lands v Kunste Hotel (1995-98) EA1** and **R v Communications Commission of Kenya (2001) EA 199** for the proposition. Further, that this court cannot act as an appellate court neither can it prohibit a party from performing its functions. According to the party, judicial review is an examination of the manner in which a decision was made or an act done or not done as defined in the case of **Chief Constable of North Water Police v Evans (1982) 1 WLR 1155**, and emphasized by the Court of Appeal in **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others (2016) KLR**.

61. The *ex parte* Applicant's position that the process of convening the Special General Meeting was marred with procedural irregularity and illegalities, further, the proposed agendas were outside the 1st and 3rd Respondents' jurisdiction and ought to be prohibited. The *ex parte* Applicant reiterated and elaborated on the aspects of illegality of the 1st and 3rd Respondents' decisions. Further, that pursuant to the decision by Court of Appeal in **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others (supra)** and the decision in **Republic v Kenya Revenue Authority & 2 Others Ex-parte Kungu Gatabaki & 4 Others, JR Misc. App. No. 336 of 2018**, judicial review orders can be issued against any person making an administrative decision, and the said person need not be a public body.

62. It was further submitted that it is now settled law that whenever the court is faced with a question of illegality then it must be inclined towards hearing and determining the suit as opposed to referring the same to any others dispute resolution mechanism. The decision in **County Government of Isiolo & 10 Others vs Cabinet Secretary, Ministry of Interior & Coordination of National Government & 3 Others, (2017) eKLR** was cited for this proposition. Lastly, that the *ex parte* Applicant being a member of the 3rd Respondent whose Council is chaired by the 1st Respondent, stands affected by the decisions of the Respondents and Interested Parties herein.

63. The 3rd to 10th Interested Parties on their part submitted that the present proceedings concern the exercise of power by various organs of the 3rd Respondent, and that the law regarding exercise of power by a body that is not clothed with the said power is well settled in **Pastoli v Kabale District Local Government Council and Others (supra)** and **Daniel Ingida Aluvaala & Another v Council of Legal Education & Another (2017) eKLR**. Therefore, that the court must examine the nature of the impugned agenda items and make a determination whether the General Meeting of members of the Society can deliberate upon the items and pass resolutions in respect thereof.

64. In addition, that the role of the President of the 3rd Respondent as provided for in the Act is very limited and does not extend to discharging an executive role in the Society, which is the responsibility of the Secretary. To buttress their argument, the 3rd to 10th Interested Parties cited the case of **R vs Commissioner for Co-operatives Ex-parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd (1999) 1 EA 245, 249** where the Court of Appeal held that it is axiomatic that statutory power can only be exercised validly if they are exercised reasonably.

65. It is necessary to restate the parameters of its judicial review jurisdiction in determining this issue. It was in this respect stated in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid

down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

66. Judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right to fair administrative action, and section 7 of the Fair Administrative Action Act in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. In addition, it was emphasized by the Court of Appeal in ***Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.***

67. **Lastly**, Article 165(6) of the Constitution also provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person’s rights.

68. The issue therefore is whether an examination of the arguments put forth to impugn the Special General Meeting requisitioned for 5th December 2020, especially as regards the status of the 2nd Respondent’s employment, and the appointment of auditors, is within this Court’s merit review. It is notable that the different parties dispute the facts of the two events, and all the parties gave lengthy explanations as regards their background, and their own version of the events that occurred. These versions were also set out in great detail in this judgment for this reason.

69. It is my view and finding that a determination of the issues raised in this regard will go beyond the remit of this Court as a judicial review Court for various reasons. Firstly, it will require this Court to make a value and qualitative judgment as regards the merits of the different arguments put forward by the parties, which is a merit review that will be beyond the standards set in judicial review as set out in section 7(2) of the Fair Administrative Action Act.

70. The standards of merit review set out in section 7 (2) of the Act are as follows:

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person’s case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to-

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power

71. Secondly, engaging in a comparison of the different arguments and versions of events presented by the various parties will require this Court to make a primary decision as to which party is right, and in doing so, this Court will be usurping the roles of trial Courts and other public bodies that have this specific function, which is a forbidden in judicial review, as has been noted in various decisions including Meixner & Another vs. Attorney General [2005] 2 KLR 189 and Council of Legal Education (Petitioner); Kenya Law Reform Commission & 4 others (Interested Parties) (2020) eKLR where the court held that, it is the Commission for Higher Education and not the Courts that is tasked with ensuring that there exists uniform standards in the learning, accreditation, licencing and qualifications in the provision of university education in Kenya.

72. In addition, this is a fact-finding and fact resolution exercise that is normally suitable in the first instance for the normal civil process in a trial court, or a body with statutory authority to undertake such an exercise such as the general meetings and Council of the 3rd Respondent. Judicial review, being a *sui generis* process, is generally not suitable for resolution of questions of contested facts.

73. Lastly, any decision as regards the status of the 2nd Respondent employment invites a risk of giving conflicting decisions, as it is not disputed that this is an issue that is already before the Employment and Labour Relations Court for determination in ELRC Petition No. 087 of 2020, Murigi Kamande vs Nelson Andayi Havi, Law Society of Kenya & Mercy Kalondu, and ELRC Petition No. E090 of 2020, Mercy Kalondu Wambua v Nelson Andayi Havi & Council of the Law Society of Kenya.

The Disposition

74. Arising from the foregoing findings, this Court orders as follows:

i. The *ex parte* Applicant's Notice of Motion application dated 7th December, 2020 is incompetently filed before this Court and is hereby struck out, and the dispute herein as regards the procedure for convening of the 3rd Respondent's general meetings by the 1st Respondent is referred to arbitration in accordance with the provisions of Regulation 96 of the Law Society of Kenya (General) Regulations.

ii. The stay and suspension orders granted herein on 3rd December 2020 are hereby vacated.

iii. There shall be no order as to the costs of the Notice of Motion application dated 7th December, 2020.

75. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF MAY 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this judgment was delivered electronically by videolink and transmission to the email addresses of the *ex parte* Applicant's and Respondents' and Interested Parties' Advocates on record.

P. NYAMWEYA

JUDGE