



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MACHAKOS

IN THE JUDICIAL REVIEW DIVISION

JR/ MISCELLANEOUS APPLICATION NO 3 OF 2021

IN THE MATTER OF: AN APPLICATION BY ALFONSE KILONZO MULI FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2020, THE CIVIL PROCEDURE ACT, THE FAIR ADMINISTRATIVE ACTION ACT, THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT AND THE LAW SOCIETY OF KENYA ACT

IN THE MATTER OF: THE REPRESENTATIVE OF THE LAW SOCIETY OF KENYA TO THE SELECTION PANEL FOR APPOINTMENT OF COMMISSIONERS OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

BETWEEN

REPUBLIC.....APPLICANT

AND

PARLIAMENTARY SERVICE COMMISSION.....1ST RESPONDENT

LAW SOCIETY OF KENYA.....2ND RESPONDENT

MERCY KALONDU WAMBUA.....3RD RESPONDENT

AND

MORRIS KIMULI.....1ST INTERESTED PARTY

DOROTHY JEMATOR KEMENGICH.....2ND INTERESTED PARTY

RULING

1. On this 26th April, 2021, this Court upon granting leave to the ex parte applicant herein to commence judicial review proceedings, directed that the issue of the said leave operating as a stay of the proceedings in question be heard *inter partes* on 29th April, 2021.
2. On 29th April, 2021, **Mr Havi**, the Learned President of the Law Society of Kenya (hereinafter referred to as “the Society”) together with the Society’s Learned Vice-President, **Ms Carolyne Kamende**, and the Law Society of Kenya’s Council Members, **Ms Esther Angawa** and **Ms Herine Kabita** informed the Court that they were appearing for the 2nd Respondent, the Law Society of Kenya. On the other hand, **Mr Nderitu, SC** informed the Court that he, together with **Mr Onyango**, had been instructed to appear for the 2nd Respondent, the Law Society of Kenya and the 3rd Respondent, **Ms. Mercy Kalondu Wambua**, an Advocate of the High Court of Kenya, the Chief Executive Officer and Secretary of the 2nd Respondent, the Law Society of Kenya.
3. In light of the foregoing, I directed the parties to address the issue of the Law Society’s representation.
4. By an affidavit sworn by the 3rd Respondent, who deposed that she had been authorized by an Order of Council of the 2nd Respondent

(hereinafter referred to as “the Council”) to do so, it is averred that by virtue of her office and Section 26 of the *Law Society of Kenya Act, 2014* (hereinafter referred to as “the Act”) she is in charge of the 2nd Respondent’s Secretariat which is responsible to the Council for the day-to-day administration and management of the Secretariat and the affairs and functions of the Society as the Council shall determine.

5. The 3rd Respondent deposed that she received copies of the Pleadings in this matter through the 2nd Respondent’s email lsk@lsk.or.ke and copied to her official email address mercy.wambua@lsk.or.ke served upon the 2nd Respondent by **Mr Kilonzo Muli**- Advocate- the *ex parte* Applicant through Kilonzo Advocates kilonzom18advocates@gmail.com. She immediately transmitted the said Pleadings to the Council of the 2nd Respondent through email on lskcouncil2020_22@lsk.or.ke and notified them that the matter was scheduled to be heard on 29th April 2021. It was deposed that on 28th April 2021, the members of Council of the 2nd Respondent namely **Mr Okenyo Omwansa, Ms Carolyne Mutheu, Ms Beth Michoma, Ms Aluso Ingati, Ms Ndinda Kinyili, Mr Bernhard Ng’etich** and **Ms Riziki Emukule** issued an Order of Council to the effect appointing the firm of **M/S Ekusi Lore & Co Advocates** alongside **Mr. Wilfred Nderitu**, Senior Counsel as lead counsel to act for it in the matter.

6. Based on legal advice, the 3rd Respondent averred that natural justice provides for the right for a party, whether person or corporate body, to be represented by an advocate of their own choice and that by virtue of Section 3 (2)(a) and (e) of the Act, the Society has the right to be represented by an Advocate of its own choice. In addition, under Section 17 of the Act, the Council of the 2nd Respondent is the governing body of the 2nd Respondent and that the decisions of the 2nd Respondent’s Council are made by a majority vote in line with the principles of democratic governance and Regulation 20(1) of the *Law Society of Kenya (General) Regulations, 2020*.

7. It was therefore her position that a majority of the 2nd Respondent’s Council having appointed the 2nd Respondent’s Counsel on record, their appearance on behalf of the 2nd Respondent is valid and regular and that in the absence of a contrary resolution by the Members of the 2nd Respondent in an ordinary or special General meeting, the decision of a majority of members of the 2nd Respondent stands.

8. Based on the same legal advice, it was deposed that under Order 9 Rule 1 of the *Civil Procedure Rules, 2010*, 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, 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. In this case the 2nd Respondent, not being a natural person, is incapable of acting on its own, and can only appear in court by an Advocate duly appointed to act for it.

9. It was averred that the Council of the 2nd Respondent has neither appointed **Mr Nelson Havi, Ms Carolyne Kamende, Ms Esther Ang’awa** nor **Ms Herine Kabita** to act for it in this matter and that no such resolution or order of Council has ever been made.

10. It was disclosed that by a Resolution of the 2nd Respondent’s Council dated 8th February 2021, the 2nd Respondent suspended **Mr Nelson Havi** from office of the President of the Law Society of Kenya pending an Ordinary General Meeting which was postponed to 27th May 2021. Accordingly, it was deposed that as a result of his said suspension from office, **Mr Nelson Havi** is not an authorized or recognized agent, or an officer of the 2nd Respondent duly authorized under Order 9 of the *Civil Procedure Rules, 2010*.

11. Since the 2nd Respondent’s Counsel filed a Notice of Appointment of Advocates in this matter, the deponent averred that the firm of Ekusi Lore & Company Advocates and the appearances of Messrs **Wilfred Nderitu**, Senior Counsel and **Moses Onyango** in Court on behalf of the 2nd Respondent is valid and regular and that the 2nd Respondent will suffer great prejudice if **Mr Nelson Havi, Ms Carolyne Kamende, Ms Esther Ang’awa** and **Ms Herine Kabita** act for it in this matter as their appointment has not been made by the majority of the members of 2nd Respondent’s Council.

12. In a further affidavit the same deponent averred that the Affidavit of **Nelson Andayi Havi** sworn and filed herein is fatally defective insofar as it purports to be made on behalf of **Ms Carolyne Kamende, Ms Esther Ang’awa** and **Ms Herine Kabita**; but without an appropriate authority document as required under the mandatory provisions of Order 1 Rule 13 (2) that provides that *the authority (to plead) shall be in writing signed by the party giving it and shall be filed in the case*.

13. Based on legal advice, it was deposed that this Court on 29 April 2021 directed affidavits and submissions to be filed should be limited to scope of the motion before it; namely representation by the 2nd Respondent’s Advocates or **Mr Nelson Andayi Havi, Ms Carolyne Kamende, Ms Esther Ang’awa** and **Ms Herine Kabita**. The Court was therefore urged to disregard and/ or expunge the offending Paragraphs of **Mr Nelson Havi’s** Replying Affidavit. According to her, since the contest before this Court relates to the representation of the 2nd Respondent, the issues raised by **Mr Nelson Andayi Havi** relating to his election as President of the 2nd Respondent (then) are irrelevant to the issue in controversy.

14. The deponent reiterated that the decision subject of these proceedings was made by the Council of the 2nd Respondent and not by her and based on legal advice, she believed that the Notice of Appointment purported to have been filed by **Mr Nelson Havi, Ms Carolyne Kamende, Ms Herine Akoth Kabita** and **Ms Esther Adero Ang’awa** is improperly on the Court’s record as the 2nd Respondent’s Counsel on record had already filed a Notice of Appointment of Advocates on 28th April 2021.

15. In the deponent’s view, the Statement of Assumption of Office has no legal effect, and according to her, there has never been a decision or resolution of the 2nd Respondent’s Council to the effect that all the communications shall be made by the **Mr Nelson Havi** or the Vice President, or by the Chief Executive Officer with the prior authority of **Mr Havi** or the **Vice President**. She averred, based on legal advice, that the President and Vice President are members of the 2nd Respondent’s Council who are subject of the provisions of Section 22 of the LSK Act and Regulation 22 of the LSK General Regulations.

16. According to the 3rd Respondent, the issues relating to the suspension from office of **Mr Nelson Havi** are matters of public notoriety and that the substance of his suspension though not in issue in these proceedings, have never been successfully challenged before a competent

Court of law. It was asserted that the doctrine of presumption of Constitutionality holds that any action is presumed to be constitutional unless its constitutionality is successfully challenged in the appropriate forum. While the purported suspension of Council members and of the CEO have been successfully challenged/ stayed by this Court, **Mr Havi's** suspension by the Council remains uncontroverted.

17. It was averred that **Mr Nelson Havi's** Replying Affidavit is mired in falsehoods and refer to matters actively under consideration before other Courts and are unrelated to the matters in issue in these proceedings hence ought to be disregarded. It was disclosed that the appointments purported to have been made by **Mr Nelson Havi** as referred to have since been revoked by the 2nd Respondent's Council. According to the deponent, **Mr Nelson Andayi Havi** has not controverted the allegations of their glaring conflict of interest to act for the 2nd Respondent in this matter hence the allegation is therefore admitted and is true. She asserted that **Mr Nelson Havi, Ms Carolyne Kamende, Ms Herine Akoth Kabita** and **Esther Adero Ang'awa** have no authority to appoint themselves to represent the 2nd Respondent in the matter.

18. In support of the said averments, it was submitted that The 2nd Respondent is a body corporate entity established under Section 3 of the **Law Society of Kenya Act** and just like any other person or entity, has the right to be represented by an advocate of their own choice. On the other hand, the Council of the Law Society of Kenya is the governing body of the 2nd Respondent and that decision making by the 2nd Respondent is by a majority of Council members.

19. It was submitted that the law applicable to the appointment of Counsel to act for a corporate entity is Order 9 of the **Civil Procedure Rules** while the law applicable to the running and decision- making of the 2nd Respondent is the **Law Society of Kenya Act** and the **Law Society of Kenya (General) Regulations, 2020**. It was submitted that the 2nd Respondent's processes and operations are also governed by the provisions of the Constitution of Kenya (2010) including the national values and principles of governance such as democracy, good governance transparency and accountability while appearance or disqualification of Advocates from appearing in matters before Court is governed by the provisions of Rule 8 of **Advocates (Practice) Rules**.

20. It was submitted that the firm of Ekusi Lore & Company Advocates, **Mr Wilfred Nderitu** and **Mr Moses Onyango**; though members of the 2nd Respondent, do not sit or participate in the decision- making process of the 2nd Respondent's Council. Under the **Indoor Management rule** or **Tarquand's rule**, as persons dealing with the 2nd Respondent, a corporate entity, since the obligations of the 2nd Respondent were communicated to the said firm and Senior Counsel by the 2nd Respondent's authorized officers with ostensible authority, they need not inquire into the indoor management but could assume that its requirements had been complied with, a position is fortified in the case of **Royal British Bank vs. Turguand (1885) E& B 327**. Though the doctrine and principle in the Targuand's case is often applied in Corporations and Company law, it was submitted that it is also applicable to the 2nd Respondent and that this was held in the case of **Law Society of Kenya v Standard Chartered Bank Kenya Limited [2021] eKLR** where the Judge applied the rule on *locus standi* in companies, to the LSK.

21. Reliance was placed on the **Law Society of Kenya Act** as read with the **Law Society of Kenya (General) Regulations, 2020**, particularly Section 17(1) which provides thus, '*the Council shall be the governing body of the society.*' Further reliance was placed on Section 26 which creates the Secretariat of the 2nd Respondent headed by the 3rd Respondent herein, responsible to the Council for the day-to-day administration and management of the Secretariat and the affairs and functions of the Society as the Council shall determine. Under Regulation 20(1) of the **Law Society of Kenya (General) Regulations, 2020**, the decisions of the Council of the 2nd Respondent are made by the majority decision of the Council members.

22. Therefore, a determination on who acts for the 2nd Respondent is determined by the Council of the 2nd Respondent; whose decision is made by a majority thereof. Since a majority of the members of Council of the Law Society of Kenya appointed the firm of Ekusi Lore & Company Advocates acting in the lead of **Mr Wilfred Nderitu, Senior Counsel**, then that decision is a valid decision of the 2nd Respondent and that **Mr Nelson Havi** and the 3 Council members of the 2nd Respondent have neither the authority of the 2nd Respondent's membership, nor the decision of the majority of the Governing Council. In support of the submissions the case of **Murigi Kamande vs. Nelson Andayi Havi & another; Mercy Kalondu Wambua (Interested Party) [2020] eKLR** as holding that **Mr Nelson Havi's** appointed firm of Advocates was validly on record for the Law Society of Kenya. The court emphasized that, "*It should not be the role of the Court to fan the fires of factionalism.*" In that case, it was submitted, the Court emphasized the doctrine of *locus standi*, abhorring a member or even official from joining proceedings for the interest of the Law Society of Kenya yet a firm of Advocates had been appointed to act for the Society. This Court was urged to similarly find that **Mr Nelson Havi, Ms Carolyne Kamende, Ms Esther Ang'awa** and **Ms Herine Kabita's** appearance or attempt to act for the 2nd Respondent undermines the doctrine of *locus standi* and that their decision to unilaterally, and without any authority to appoint themselves to act for the 2nd Respondent is an action of abuse and acting without the requisite authority. It is a capricious habit that this Court should stop, by declining their appearance for the Law Society of Kenya. On the authority of the case of **Karuru Francis Nderitu vs. Mwalimu National Cooperative Savings Credit Society Limited [2019] eKLR** the Court was urged to hold that **Mr Havi** and *group's* objection is without merit.

23. It was submitted that the law provides for a number of situations when a firm of Advocates, or an Advocate can be disqualified from acting for a party in a matter and these include situations of conflict of interest where an Advocate is likely to be a witness in the proceedings. This submission was based on Rule 8 of the **Advocates (Practice) Rules (Rev 2012)**.

24. Since the gravamen of the present proceedings are decisions to forward the Interested Parties' names to the 1st Respondent for Presidential appointment to the selection panel of the IEBC Commissioners and at the center of the controversy is the transmission made by **Mr Nelson Andayi Havi**, with the blessings of **Ms Carolyne Kamende, Ms Esther Ang'awa** and **Ms Herine Kabita**, key participants in the impugned decision, and for the purpose of making a determination on the issues in dispute, they may be required to give evidence. As such, it would not be in the interest of justice for them to act for the 2nd Respondent or any other party in the proceedings.

25. On the other hand, it was submitted Messrs **Wilfred Nderitu, SC** and **Moses Onyango** or anyone instructed by the firm on record, did not participate in the impugned decisions and are therefore not likely to be called as witnesses to give evidence. In support of this position,

reliance was placed on the case of **Mercy Wanjiru Mburu v Elizabeth Wanjira Evans & 8 others [2019] eKLR** where the Court disqualified the Advocates on the ground that they may be called as a witness in the matter.

26. It was argued that this is a Constitutional moment for this Court to pronounce itself on the issue of legal representation of the Law Society of Kenya. While the said **Mr Nelson Andayi Havi, Ms Carolyne Kamende, Ms Esther Ang'awa** and **Ms Herine Kabita** may have different opinions from their counterparts representing the majority of members of Council of the Law Society of Kenya, the electoral mandate is given to each Council member individually. While the President may have a casting vote under the provisions of Regulations **20(2) and 83(1)** of the LSK Regulations, this casting vote is only exercised in the case of equality of votes, which is not the case in this case, as in any event, the President stands suspended. The Court was therefore urged to pronounce itself on whether members of Council can in their numerical minority, go against a valid decision of a majority of the Council members made in unanimity.

27. It was therefore urged that the group of Advocates comprising **Mr Nelson Andayi Havi, Ms Carolyne Kamende, Ms Esther Ang'awa** and **Ms Herine Kabita** are not validly appointed as Advocates to act for the 2nd Respondent, they are conflicted in interest and they should therefore be expunged and disqualified from acting for the Law Society of Kenya.

28. The foregoing position was challenged by way of affidavit sworn by **Nelson Andayi Havi**, an Advocate of the High Court of Kenya and the President of the Law Society of Kenya. According to him, the said affidavit was sworn on his own and on behalf of **Carolyne Kamende Daudi, Herine Akoth Kabita** and **Esther Adero Ang'awa** with whom they appear and act for the Law Society of Kenya in this matter.

29. It was deposed that these judicial review proceedings seek to quash and prohibit the implementation of the actions and decisions of the 1st and 3rd Respondents undertaken on 21st and 26th April, 2021 submitting the name of the 2nd Interested Party for appointment as a representative of the Law Society of Kenya to the Selection Panel for the appointment of Commissioners of the Independent Electoral and Boundaries Commission. It was averred that the decision challenged by the Ex-Parte Applicant was made by the 3rd Respondent on 21st April, 2021 without the authority of the Law Society of Kenya. It was averred that the deponent, **Carolyne Kamende Daudi, Herine Akoth Kabita** and **Esther Adero Ang'awa** filed a Notice of Appointment on 29th April, 2021 to act for the Law Society of Kenya in their capacity as elected officials recognized agents of the Law Society of Kenya.

30. On the other hand, it has transpired that **Ekusi Lore & Company Advocates** have filed a Notice of Appointment of Advocates for the Law Society of Kenya, claiming to be authorised by "an Order of Council" dated 28th April, 2021 indicated to have been signed by **George Omwansa, Carolyne Mutheu, Beth Michoma, Aluso Ingati, Ndinda Kinyili, Bernhard Ng'etich, Riziki Emukule** and **Faith Odhiambo**. A question has arisen on representation for the Law Society of Kenya based upon the following two assertions made in the Affidavit of the 3rd Respondent sworn on 29th April, 2021 that the deponent was suspended on 8th February, 2021 and is therefore, not authorised to act as President of the Law Society of Kenya and appear for it in this matter and that a decision of a majority of the Council of the Law Society of Kenya has been taken on 28th April, 2021 instructing Ekusi Lore & Company Advocates and authorising the 3rd Respondent to swear affidavits in this matter on behalf of the Law Society of Kenya.

31. According to the deponent, he was duly elected as President of the Law Society of Kenya on 27th February, 2020, assumed office pursuant to the statement of assumption dated 24th March, 2020 and took oath of office on 23rd July 2020 at the Annual General Meeting of the Law Society of Kenya. According to him, it was express from the statement of assumption to office that all communications of the Society would be made to the public and members in writing by himself or the Vice President in the event that he is incapacitated and/or by the CEO with his prior authority or that of the Vice President as the case may be.

32. According to the deponent, the affairs of the Law Society of Kenya are governed by the **Law Society of Kenya Act No 21 of 2014, The Law Society of Kenya (General) Regulations, 2020**, and the **Council Charter – Revised 2018**. He set out the composition of the Council of the Society, the eligibility criteria for one to be elected as President or Vice President or as a member of the Council. He then averred that Section 22 of the **Law Society of Kenya Act** provides for *inter alia*, removal of the President from office by a General Meeting by a vote of at least two-thirds of all members present and eligible to vote, on the grounds, amongst others, of suspension or expulsion as provided for under the **Law Society of Kenya Act**. Any such suspension or expulsion warranting removal of the President under Section 22 is one contemplated under Section 13 of the **Law Society of Kenya Act** being suspension or expulsion as a Member of the Law Society of Kenya. On the other hand, the suspension and removal of a member of the Council is elaborately provided for in **Regulation 22 of The Law Society of Kenya (General) Regulations, 2020** and commences with a recommendation of the Council to the General Meeting, which General Meeting considers the recommendation within 60 days of its making and makes a decision as it deems fit.

33. In his view, the deponent averred that his alleged suspension on 8th February, 2021 is void and null *ab initio* for the following reasons:

- a. There is no power under Section 22 of the **Law Society of Kenya Act** nor under Regulation 22 of the **Law Society of Kenya (General) Regulations, 2020** given to the Council of the Law Society of Kenya to suspend the President or the Vice President;
- b. The power of the Council to recommend suspension under **Regulation 22 of The Law Society of Kenya (General) Regulations, 2020** is limited and relates to a member of the Council and not the President or the Vice President;
- c. There is no power to suspend the President or the Vice President from their offices either under the **Law Society of Kenya Act** or **The Law Society of Kenya (General) Regulations, 2020**; and
- d. The President and the Vice President can only be removed from office and any such removal must be done by the General Meeting in the manner and on the grounds set out under Section 22 of the **Law Society of Kenya Act**.

34. In view of the foregoing matters, it was averred the claim by the 3rd Respondent that the deponent was suspended and therefore, not authorised to act as President of the Law Society of Kenya is without any legal or factual basis.

35. It was further averred that **George Omwansa, Carolyne Mutheu, Beth Michoma, Aluso Ingati, Ndinda Kinyili, Bernhard Ng’etich, Riziki Emukule** and **Faith Odhiambo** do not have the power or authority of the Law Society of Kenya to instruct Ekusi Lore & Company Advocates to act for it in this matter and to authorise the 3rd Respondent to swear affidavits on behalf of the Law Society of Kenya for the reasons set out herein below:

a. Section 17 (2) of the **Law Society of Kenya Act** provides that the Council of the Law Society of Kenya shall consist of the President, Vice President and eleven members of the Council. There can be no Council of the Society comprised only of members of the Council whatever their number, properly constituted and capable of making decisions on behalf of the Law Society of Kenya, without the President and the Vice President of the Law Society of Kenya;

b. Decisions of the Law Society of Kenya at the General Meeting or the Council are evidenced by minutes and resolutions signed by the President as provided for in Regulations 84 and 85 of **The Law Society of Kenya (General) Regulations, 2020**;

c. Meetings of the Council of the Law Society of Kenya are called by or on the instruction of the President under Regulations 18 of **The Law Society of Kenya (General) Regulations, 2020**, and **Clause 10.4** of the Charter;

d. In the absence of the President, the Vice President calls for and chairs meetings of the Council of the Law Society of Kenya in terms of Section 16 of the **Law Society of Kenya Act** and Clause 12.2 of the Charter; and

e. The President is the spokesperson of the Law Society of Kenya in all matters relating to the Law Society of Kenya and the only person authorised to communicate the position of the Law Society of Kenya in any matter as provided for in Clause 12.1.9 of the Charter.

36. It was disclosed that in the first meeting of the Council of the Law Society of Kenya upon the deponent’s assumption to office held on 16th April, 2020, the Council of the Law Society of Kenya affirmed that it was the general practice governing the holding of meetings and also corporate governance to have agenda exercised through the Chairperson and therefore Council members wishing to have new agenda introduced in the agenda of a meeting should have the same done through the President and it was resolved that that position remains. By way of exemplification, it was deposed that the business of the Council of the Law Society of Kenya has been conducted in the manner referred to herein above and averred that between 19th October, 2020 and now, there has been an unlawful attempt orchestrated by the 3rd Respondent with the connivance of **George Omwansa, Carolyne Mutheu, Beth Michoma, Aluso Ingati, Ndinda Kinyili, Bernhard Ng’etich, Riziki Emukule** and **Faith Odhiambo** to create a parallel system of governance which he proceeded to enumerate.

37. According to the deponent, the invalid decision purporting to suspend him is inconsequential as he has continued to perform his role as President of the Law Society of Kenya. However, there is a concerted effort between the 3rd Respondent who submitted the name of the 2nd Interested Party to the 1st Respondent and **George Omwansa, Carolyne Mutheu, Beth Michoma, Aluso Ingati, Ndinda Kinyili, Bernhard Ng’etich, Riziki Emukule** and **Faith Odhiambo** to perpetuate the transgressions by themselves to defeat the interest of members of the Law Society of Kenya and defeat the ends of justice on the issue of representation by the Law Society of Kenya in the selection panel the subject matter of this claim. This Court was urged not permit the 3rd Respondent to abuse the structures of the Law Society of Kenya to conceal her wrong doing by creating parallel representation for the Law Society of Kenya in a deliberate effort to scuttle the determination of the substantive dispute occasioned by her manifestly unlawful action. In his view, the concurrence of the **George Omwansa, Carolyne Mutheu, Beth Michoma, Aluso Ingati, Ndinda Kinyili, Bernhard Ng’etich, Riziki Emukule** and **Faith Odhiambo** is not needed to authorize the representation by **Carolyne Kamende Daudi, Herine Akoth Kabita, Esther Adero Ang’awa** and himself in this matter.

38. It was contended that the Court has power to preclude Ekusi Lore & Company Advocates and the 3rd Respondent from purporting to act for the Law Society of Kenya in this matter, and to permit **Ms Carolyne Kamende Daudi, Ms Herine Akoth Kabita, Ms Esther Adero Ang’awa** and himself to represent the Law Society of Kenya as its recognized agents being duly elected officials.

39. The foregoing issues were reiterated in the submissions in which it was contended that there is no power in the **Law Society of Kenya Act No 21 of 2014** or **The Law Society of Kenya (General) Regulations, 2020** made thereunder for the suspension of the President or Vice-President of the Law Society of Kenya. A reading of Section 22 of the Act indicates that the President and the Vice-President can only be removed from office. One of the grounds for removal is suspension from membership of the Law Society of Kenya under Section 13 of the Act. Unlike the President and the Vice President, it was submitted that a member of the Council can be suspended from the Council under Regulation 22 of **The Law Society of Kenya (General) Regulations, 2020**. The body of the said Regulation 22 as well as the marginal notes to Regulation 22 of **The Law Society of Kenya (General) Regulations, 2020** titled “Suspension & removal of Council Member” support the argument made against the decision purportedly taken on 8th February, 2021 against **Mr Nelson Havi**.

40. As regards the relevancy of marginal notes in interpreting a statute, reliance was placed on the **Matter of the Estate of Shamji Visram & Another versus Shankerprasad Maganlal Bhatt & Others [1965] E.A 789** and **The Commissioner of Lands & Another versus Coastal Aquaculture Limited [1997] eKLR**.

41. It was submitted that since **Mr Nelson Havi** has continued to perform his functions as President of the Law Society of Kenya as evidenced by activities and decisions made and communicated subsequent to the purported suspension, this is a confirmation that the alleged suspension in respect of which there was no power to effect in first place is inconsequential, invalid and null and void *ab initio* based on **Macfoy versus United Africa Company Limited [1961] 3 All E.R 1169** and **Omega Enterprises (Kenya) Limited versus Kenya Tourist Development Corporation & 2 Others [1998] eKLR**.

42. It was reiterated that the Council of the Law Society of Kenya and the General Meeting are the decision-making organs of the Society and that the Council is constituted of the President, the Vice President and members of the Council as provided under Section 17(2) of the **Law Society of Kenya Act**. The decisions of the Law Society of Kenya at the General Meeting or the Council are evidenced by minutes and resolutions signed by the President as provided for in Regulations 84 and 85 of **The Law Society of Kenya (General) Regulations, 2020**.

Further, meetings of the Council are called by or on the instructions of the President under Regulation 18 of **The Law Society of Kenya (General) Regulations, 2020** and Clause 10.4 of the Council Charter. In addition, the President is the spokesperson of the Law Society of Kenya in all matters relating to the Society and the only person authorised to communicate the position of the Society in any matter as provided for in Clause 12.1.9 of the Council Charter. Lastly, in the absence of the President, the Vice President calls for and chairs meetings in terms of Section 16 of the **Law Society of Kenya Act** and Clause 12.2 of the Council Charter.

43. It was submitted that with the clear law on the issue of constitution of the Council, and decision making and communication of the same, it is evident that the 3rd Respondent cannot speak on behalf of the Law Society of Kenya in this matter. At the same time, members of the Council, no matter their majority in number, cannot lawfully constitute themselves as the Council of the Society absent the President and Vice President for purposes of decision making on behalf of the Law Society of Kenya, neither can they arrogate to themselves the duties and roles of the President as they have purported to do in appointing Ekusi Lore & Company Advocates to act for the Law Society of Kenya in this matter or authorizing the 3rd Respondent to swear Affidavits on behalf of the Law Society of Kenya.

44. It was submitted that there are no minutes or a resolution of the Law Society of Kenya in the manner demanded by Regulations 84 and 85 of **The Law Society of Kenya (General) Regulations, 2020** authorising Ekusi Lore & Company Advocates to act for the Law Society of Kenya. Similarly, there are no minutes or a resolution of the Law Society of Kenya authoring the 3rd Respondent to swear Affidavits for the Law Society of Kenya. The 3rd Respondent should restrict her response to herself and let the Law Society of Kenya be represented by its officials or Advocates appointed in the manner required by law. In support of the submissions, reliance was placed on the case of **Bugerere Coffee Growers Limited versus Sebaduka & Another [1970] E.A 147** and it was submitted that the letter dated 28th April, 2021 by **George Omwansa, Carolyne Muthu, Beth Michoma, Aluso Ingati, Ndinda Kinyili, Bernhard Ng'etich, Riziki Emukule and Faith Odhiambo** upon which Ekusi Lore & Company Advocates claim authority to act for the Law Society of Kenya is a suspect for the reason that no meeting is claimed to have been called, held and a decision made to validate and legitimize the contents of the letter. In fact, no such meeting could have been called or held without the authority of the President or in his absence, the Vice President. A majority of Council Members cannot lawfully constitute the Council of the Law Society absent the President and Vice President, nor can they in such case validate or legitimize an action taken against the very law through which the Council of the Law Society of Kenya is mandated to make decisions. Reliance was placed on **Trade Bank Ltd vs. LZ Engineering Ltd & Others (1995-1998) 1 EA 317 (CAK)**. It was submitted that the principle in **Royal British Bank vs. Turguand (1885) E & B 327** is inapplicable in this case for the reason that the provisions of **Law Society of Kenya Act, The Law Society of Kenya (General) Regulations, 2020** and the **Council Charter-2018** are or ought to be within the knowledge of Ekusi Lore & Company Advocates who are members of the Law Society of Kenya and reliance was placed on the decision in **Kabundu Holdings Limited versus Sky Club Restaurant [2005] eKLR**.

45. It was submitted that since **Nelson Havi, Carolyne Kamende, Herine Kabita and Esther Ang'awa** as officials and agents of the Law Society of Kenya on one hand and Ekusi Lore & Company Advocates on the other hand have diametrically opposed interests in this matter, the Court should determine who between the two sets of Advocates should represent the Law Society of Kenya on the basis of the submissions made on the preceding issues and further, on the strength of several decisions of guidance on the matter. In this regard the Court's attention was drawn to the cases of **Kuri Tea Factory Limited versus Kenya Tea Development Agency Limited & 4 Others [2013] eKLR, Tatu City Limited & 3 Others versus Stephen Jennings & 6 Others [2016] eKLR** and **Manchester Outfitters (Suiting Division) Limited & Another vs. Standard Chartered Financial Services Limited & 2 Others [2017] eKLR**.

46. It was argued that case law on representation confirms that Ekusi Lore & Company Advocates does not have authority to act for the Law Society of Kenya. It is also clear that two Advocates with competing interests cannot act for the Law Society of Kenya. In the circumstances, the course that the Court should take is to strike out documents filed by the said firm for the Law Society of Kenya and allow **Nelson Havi, Carolyne Kamende, Herine Kabita and Esther Ang'awa** to represent the Law Society of Kenya.

Determination

47. I have considered the issues placed before me by the parties herein. The matter before me is restricted, at least at this stage, on who or by whose authority should the Law Society of Kenya, the 2nd Respondent herein be represented in these proceedings.

48. It is contended that a majority of the Members of the Council of the Law Society appointed the firm of Ekusi Lore & Company Advocates led by **Mr Winfred Nderitu, SC** to appear for the Law Society of Kenya in this matter. It is disclosed that the said appointment was not made by all the members of the Council and that **Nelson Havi, Carolyne Kamende, Herine Kabita and Esther Ang'awa** were not amongst the Council members who passed the said resolution to appoint the said advocates. The record does not disclose the reason why **Carolyne Kamende, Herine Kabita and Esther Ang'awa** did not participate in the said proceedings. It is however contended that **Mr Nelson Havi**, the current President of the Law Society of Kenya is on suspension.

49. From the divergent views expressed by the parties herein, it is clear that there is no agreed position as regards the purported suspension of **Mr Havi**. That, however is not an issue that this Court can, in this ruling determine with finality. *Prima facie*, the President may be suspended by the General Meeting. No legal provision, if any exists, has been cited before me that states otherwise. As I have stated am not able to determine that issue conclusively, at this stage.

50. What is however clear is the composition of the Council of the Law Society of Kenya. the Council of the Law Society of Kenya and the General Meeting are the decision-making organs of the Society and that the Council is constituted of the President, the Vice President and members of the Council as provided under Section 17(2) of the **Law Society of Kenya Act**. That section provides that the Council of the Law Society of Kenya shall consist of the President, Vice President and eleven members of the Council. It is arguable whether absence, the President and the Vice President, the Council of the Law Society of Kenya can be said to be properly constituted. Again that is a matter that cannot be conclusively determined in this ruling.

51. That the Law Society of Kenya plays a major role in this country appears from its objectives as set out in section 4 of the **Law Society of Kenya Act**, which objectives include assisting the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya, upholding the Constitution of Kenya and advancing the rule of law and the administration of justice and

protecting and assisting the members of the public in Kenya in matters relating to or ancillary or incidental to the law. It is these objectives and functions that have made the Law Society a key player in matters relating to the rule of law hence the necessity for it to actively participate in crucial decision making matters such as the one the subject of these proceedings.

52. A simplistic, formalistic and positivist view, based purely on technical matters of procedure may well deny the Law Society its rightful place in advancing the rule of law if the effect of such a decision amounts to shutting it out of such crucial proceedings. It is when such matters come before the Court that the Court is expected to consider the bigger picture and make a decision which will advance the course of justice rather than to stifle it. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.

53. In this case, upon hearing the dispute if properly placed before the Court, it may well turn out that **Mr Nelson Havi** was properly suspended as the President of the Law Society of Kenya. Conversely, it may well turn out that his purported suspension was of no legal consequence. This Court must therefore make a decision which either way will not lock out either the Council of the Law Society of Kenya or **Mr Havi** from these proceedings. I can do no better than to quote **Rika, J** in Murigi Kamande v Nelson Andayi Havi & another; Mercy Kalondu Wambua (Interested Party) [2020] eKLR when he expressed himself as follows:

“13. It is clear therefore, that there is a fundamental conflict within the Council of the LSK. This conflict is not just about the appointment of a Law Firm, or Law Firms, to represent the LSK in this Petition, and related Petitions. It is about the governance of the LSK.

14. The Court will not be assisting the Parties, by endorsing Mr. Kurgat, or Mr. Muhoro, or other Learned Counsel, over the other, in representation of the LSK. By making a ruling for one against the other, the Court will have shown where its mind lies, with regard to the larger dispute. The Court will be fanning the flames engulfing the LSK. It will be prejudicial to the Parties, to say at this stage, that the decision made by the President and his faction in the Council, or that made by the CEO and Council Members in her faction, is the right decision. It should not be the role of the Court to fan the fires of factionalism. The Law Society of Kenya Act, has provisions, which in the view of the Court, empower the President and /or the Council, in appointment of Lawyers, and other professionals, to act for the LSK. Both the President and the Council can appoint a Lawyer to act for the LSK. The law however, presumes that the President and the Council stand on the same platform. Their voice is meant to be a collective voice. Their decisions are meant to be collective. They are all elected by the LSK Members.

15. The most suitable forum to resolve the preliminary and the main issues in dispute, is the General Meeting. Part 3, Section 15, of the LSK Act, deals with effective governance of the LSK. It creates 4 organs of governance: the General Meeting; the Council; the Secretariat; and the Branches. Section 16 of the Act, states that the General Meeting shall be the supreme authority of the Society.

16. The LSK Act presupposes that there is a single Council of the LSK. Throughout, the LSK Act refers to ‘the Council.’ There is one Council. Its decisions are made through majority vote. There is one President, who is a Member of the Council. There is one LSK. Section 3 of the Act establishes one LSK. What the disputants herein are doing, is to pluralize the LSK. The law does not contemplate a situation where the President and the Council act at cross-purposes. As it is, it is not possible to grant orders which can practicably be executed, for or against the LSK. It is not known who the LSK in the dispute is. How will the orders be enforced" One faction could compromise the Petition against the other, risking the resources of the membership at large. The LSK cannot enjoy client-advocate confidentiality with multiple, differently instructed Lawyers. It cannot have control over the litigation. No Court ought to approve this anomaly. The LSK needs to be placed in a position where it has a conventional advocate-client relationship. There is need for some coherence, which the Court is not able to hand to the Parties.

17. Should it happen that the President and the Council are involved in a dead heat, as they seem to be, the Society ought to ask for intervention of the supreme authority of the Society. The President, the Council and the Secretariat are subordinate to the General Meeting. The intervention of the Court as sought, does not result in, or promote, effective governance of the LSK. It would only fan, the fires of factionalism.”

54. As regards the alleged conflict of interest, in William Audi Ododa & Another vs. John Yier & Another Civil Application No. Nai. 360 of 2004, it was held, citing Delphis Bank Ltd vs. Channan Singh Chatthe & 6 Others Civil Application No. Nai. 136 of 2005; Geveran Trading Co. Ltd vs. Skjevesland [2003] 1 All ER 1, King Woolen Mills Ltd & Anor vs. M/S Kaplan & Stratton [1993] LLR 2170 (CAK) Civil Appeal No. 55 of 1993; 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 and 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, the parties must be allowed to choose their own counsel...Each case must be decided purely on its facts and for a Court to deprive a litigant of his right under section 70(a) of the Constitution which guarantees citizens protection of the law, there must be clear and valid reason for doing so.”

55. Having considered the conflicting positions taken in this matter, in order to ensure that the ex parte applicant’s application proceeds without being derailed by the disputes surrounding the management of the Law Society of Kenya and while not purporting to determine the said disputes, the order which commends itself to me and which I hereby make is that for the purposes of the conduct of these proceedings,

and only for that purpose, the 2nd Respondent shall be represented by the Council of the Law Society of Kenya through its President, **Mr. Nelson Havi** or any other advocate appointed for the purpose by the Council through him.

56. For avoidance of doubt, the 3rd Respondent is at liberty to be represented by an advocate of her own choice.

57. It is so ordered.

Read, signed and delivered virtually this 3rd day of May, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nthiwa for Mr Kilonzo for the applicant

Mr Havi, Ms Kamende, Ms Angawa and Ms Kabita for the Law Society of Kenya.

Mr Nderitu, SC with Mr Onyango for the 2nd and 3rd Respondent

Mr Nyamodi for the 2nd interested party

Mr Ongoya for the 1st interested party.

CA Geoffrey