



Advocates Bovelement Association & 8 others v Law Society of Kenya & 4 others (Civil Case E662 of 2021) [2021] KEHC 38 (KLR) (Commercial and Tax) (8 September 2021) (Judgment)

Neutral citation: [2021] KEHC 38 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E662 OF 2021
WA OKWANY, J
SEPTEMBER 8, 2021**

IN THE MATTER OF MONEY HELD BY THE LAW SOCIETY OF KENYA ON BEHALF OF THE ADVOCATES BENOVELENT ASSOCIATION AND THE LAW SOCIETY OF KENYA NAIROBI BRANCHI COAST BRANCHL RIFT VALLEY BRANCH. WEST KENYA BRANCH. SOUTH WEST BRANCH. NORTH RIFT BRANCH. SOUTH EASTERN BRANCH & MT. KENYA BRANCH IN ACCOUNT HELD AND OPERATED BY THE LAW SOCIETY OF KENYA WITH STANDARD CHARTERED LIMITED ACCOUNT NUMBERS 0102XXXXXXXXXX, 0100XXXXXXXXXX, 0100XXXXXXXXXX, 0100XXXXXXXXXX, 0100XXXXXXXXXX.

BETWEEN

- ADVOCATES BENOVELENT ASSOCIATION 1ST PLAINTIFF**
- LAW SOCIETY OF KENYA NAIROBI BRANCH 2ND PLAINTIFF**
- LAW SOCIETY OF KENYA COAST BRANCH 3RD PLAINTIFF**
- LAW SOCIETY OF KENYA RIFT VALLEY BRANCH 4TH PLAINTIFF**
- LAW SOCIETY OF KENYA WEST KENYA BRANCH 5TH PLAINTIFF**
- LAW SOCIETY OF KENYA SOUTH WEST BRANCH 6TH PLAINTIFF**
- LAW SOCIETY OF KENYA NORTH RIFT BRANCH 7TH PLAINTIFF**
- LAW SOCIETY OF KENYA SOURH EASTERN BRANCH 8TH PLAINTIFF**
- KENYA MT. KENYA BRANCH 9TH PLAINTIFF**

AND

- LAW SOCIETY OF KENYA 1ST DEFENDANT**
- CAROLINE KAMENDE DAUDI 2ND DEFENDANT**



MERCY KALONDU WAMBUA 3RD DEFENDANT
BERNHARD NGETICH 4TH DEFENDANT
STANDARD CHARTERED BANK 5TH DEFENDANT

JUDGMENT

1. The 9 plaintiffs herein, the Advocates Benevolent Association (hereinafter, “the ABA”) and its 8 branches sued the defendants through the Originating Summons (OS) dated 2nd July 2021 claiming monies held by the 1st defendant in accounts number 010xxxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx.
2. The Plaintiffs seek the following reliefs in the Originating Summons: -
 - a. That the Honourable Court be pleased to issue a mandatory order compelling the Defendant to surrender to the Plaintiffs all monies received by them on behalf of the Plaintiffs.
 - b. The Honourable Court be pleased to issue an order compelling the 1st, 2nd 3rd & 4th Defendant to sign and execute all documents necessary to facilitate the release and transfer of Kshs 38,479,900 being monies received by the 1st Defendant on behalf of the 1st Plaintiff and held in the account numbers 010xxxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx maintained by the 5th Defendant.
 - c. The Honourable Court be pleased to issue an order compelling the 1st, 2nd 3rd & 4th Defendants to sign and execute all documents necessary to facilitate the release and transfer of Kshs 32,430,150 being monies received by the 1st Defendant on behalf of the 2nd-9th Plaintiffs and held in the account numbers 010xxxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx maintained by the 5th Defendant.
 - d. The Honourable Court in the alternative be pleased to issue an order compelling the 5th Defendant to release to the 1st Plaintiff the sum of Kshs 38,479,900 being monies received by the 1st Defendant on behalf of the 1st Plaintiff and held in account numbers 0102095866700, 01002095866701, 01002095866702, 01002095866705, 01002095866706 maintained by the 5th Defendant.
 - e. The Honourable Court be pleased to issue an order compelling the 5th Defendant to release to the 2nd - 9th Plaintiffs the sum of Kshs 32,430,150 being monies received by the 1st Defendant on behalf of the 2nd-9th Plaintiffs and held in account number 010xxxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx maintained by the 5th Defendant.
 - f. Costs of this summons be provided for.
3. The Originating Summons is brought under Order 37 Rule 1 of the Civil Procedure Rules and Section 34 of the *Civil Procedure Act*. It is supported by the affidavits of Mr. John Onyango Oriri & Justus



Mutia, the chairpersons of the 1st and 8th plaintiffs respectively, and is premised on the following main grounds:

- a. THAT the Advocates' Benevolent Association, the welfare arm of the Law Society of Kenya that exists to support and help members who are in need, in distress or in difficulties, is unable to meet its financial obligations because the 1st Defendant is holding Kshs. 38,479,900 collected from advocates who have taken out practicing certificates as at 31st May, 2021 belonging to the Association which amounts the 1st Defendant has either refused, ignored, or neglected to authorize the transfer of.
 - b. THAT the activities of the plaintiffs are funded from a grant of 1 Million given by the Council as well as from proceeds of the Devolution & Regional Integration Fund out of which each advocate applying for a practicing certificate pays a levy of Kshs 4,000 and that as at 31st May, 2021 a total of 11,379 members had taken out practicing certificates in which case, the 1st Defendant is holding Kshs 32,430,150 due to the 2nd-9th Plaintiffs.
 - c. THAT the funds are collected by the Law Society of Kenya on behalf of the association & branches and that their refusal to remit is in contravention of the Law Society of Kenya Regulations and unless the funds are released immediately the operations of the plaintiff's will grind to a halt thereby denying members of the society services offered by the plaintiff's.
4. The 1st defendant opposed the Originating Summons through the replying affidavit of its President, Mr. Nelson Andayi Havi, who avers that the plaintiffs claim does not fall under the actions that can be commenced and pursued by way of an originating summons in the manner set out in Order 37 (1) of the Civil Procedure Rules. He states that the present action is one in respect of which there is an Alternative Dispute Resolution Mechanism (ADR) under Regulations 95 and 96 of the Law Society of Kenya (General) Regulations, 2020 which avenue has not been invoked and/or exhausted by the Plaintiffs.
 5. Mr. Havi further states that this court has no jurisdiction to entertain the Originating Summons and the Notice of Motion and that the two ought to be struck out and dismissed. He avers that he is a member of the Board of Management (BOM) of the Advocates Benevolent Association by virtue of his position as the President of the 1st Defendant and that he is not aware of any meeting of the 1st Plaintiff in which the claim in the Originating Summons was tabled and deliberated or a decision for the filing of this claim discussed. He maintains that the claim by the 1st Plaintiff was filed without authority of the Board of the 1st Plaintiff and the same is therefore incompetent. He further states that the 1st Defendant is not privy to the computation and ascertainment of the sum of Kshs 38,479,900.00 as due and owing to the 1st Plaintiff from the 1st Defendant and the same is, in any event, not payable for several reasons including the fact that the accounts of the 1st plaintiff have not been audited, that the forensic and annual audits of the accounts of the 1st Defendant have not been conducted to-date so as to enable the holding of an Annual General Meeting of the 1st Defendant in terms of Sections 30 and 38 of the [Law Society of Kenya Act](#) No 21 of 2014.
 6. The 1st defendant's case is that no payments can be made by the 1st Defendant to the 1st Plaintiff in the absence of approved annual estimates and accounts audited by an external auditor appointed in the manner stated in Regulation 52 of the Regulations, 2020.



7. The 1st defendant's deponent contends that the 3rd Defendant has not disclosed to the 1st Defendant, the 2nd Defendant or himself the statements of the accounts operated with the 5th Defendant and that this was one of the grounds upon which the 3rd defendant was removed from office on 19th October, 2020. He further states that the 5th Defendant has refused to avail the statements of accounts notwithstanding several demands. He states that the refusal by the 5th Defendant to release the statements is as result of the action, by the 3rd Defendant, to conceal the said accounts whose disclosure will unearth theft from members of the 1st Defendant. He adds that he is not privy to the computation and ascertainment of the sum of Kshs 32,430,150.00 as due and owing to the 2nd to 9th Plaintiffs from the 1st Defendant and that the same is in any event, not payable.
8. Mr. Havi states that the orders sought in the Originating Summons are intended to enable the Chairpersons of the 2nd to 9th Plaintiffs and the 3rd Defendant, who was removed from office on 19th October, 2020 for amongst others, failure to disclose accounts of the 1st Defendant, continue stealing from members of the 1st Defendant. He adds that the grant of the orders sought in the Originating Summons would amount to directing the 1st Defendant to act in contravention of express provisions of statute.
9. The 3rd Defendant, Ms Mercy Kalondu Wambua, the 1st Defendant's Chief Executive Officer and Secretary, filed a replying affidavit in response to the Originating Summons wherein she explains the critical governance organs of the 1st Defendant as provided for under the *Law Society of Kenya Act*. She states that the Advocates Benevolent Association (ABA) is the welfare arm of the society whose primary mandate is to cater for the educational needs of the children of Deceased members of the society but that the mandate has been enlarged to include intervention for assistance to Advocates who fall ill and last expense benefits plus any assistance generally applicable under its welfare objectives.
10. Ms Wambua states that in order to facilitate the achievement of the welfare objectives of the Advocates Benevolent Association, members of the 1st Defendant make an annual payment of Kenya shillings 3,500 contemporaneously with the applications for the annual practicing Certificate and that the funds collected on behalf the Advocates Benevolent Association have always been released to the Advocates Benevolent Association periodically. She states that through a letter dated 13th June, 2021 the first Plaintiff wrote to the 1st Defendant requesting for details of the amounts due to it and that she forwarded the letter to the Chief Accountant, Mr. Owen Kibunja, who informed her that the sums due to the 1st Plaintiff as at 31st May 2021 was Kenya shillings 38,479,900. She further states that the members of the Board of the Advocates Benevolent Association met on 21st January, 2020 and resolved to promptly release the said funds to the 1st Plaintiff so as to facilitate its smooth operations.
11. The 3rd Defendant avers that after complying with all the requisite procedures, the 1st Defendant's accounts clerk issued cheques to the respective plaintiffs and forwarded the same to the mandatory signatories but that the cheques were yet to be signed by the 2nd Defendant. She confirms that she is a signatory to the 1st Defendant's various bank accounts alongside the 2nd and 4th Defendants and adds that all the bank signatories have access to the Bank Statements and balances.
12. The 4th Defendant, Mr. Bernhard Kipkoech Ngetich, who is the 1st Defendant's Chair of the Devolution Committee and Treasurer, also filed a replying affidavit wherein he explains the background of the stalemate facing the Council of the 1st Defendant and also states that he is a signatory to the 1st Defendant's bank accounts held with the 5th Defendant alongside the 2nd Defendant and one Ms Roseline Odede who resigned from the Council during an acrimonious Special General Meeting held on the 18th January, 2021. He states that the 1st Defendant has been in a state of partial functional paralysis due to constant wrangling ever since the President of the Law Society attempted to override



the Council decision that voted against his agenda to dismiss the Secretary/Chief Executive Officer and substitute her with his unilateral decision to sack the Chief Executive Officer / Secretary.

13. Mr. Ngetich accuses the President of the 1st Defendant of several misdeeds including disobedience of court orders and unlawful removal/dismissal of the society's Chief Executive Officer which actions have led to a series of court cases. He states that the dues collected on behalf of the Advocates Benevolent Association as well as the Branches are not Council expenditure and that the responsibility to account for the money collected and remitted does not lie with the Law Society but with the respective board of management.
14. The 4th defendant avers that the expenditure of the Law Society of Kenya is, pursuant to regulation 49 of the Law Society of Kenya (General) Regulations 2020, approved by the Council and does not include the funds collected on behalf of the Plaintiff's except a grant of One (1) Million given to each Branch by the Law Society of Kenya. He adds that as the chair of the Council Devolution Committee, he convened a meeting on the 21st January, 2021 where the disbursement of the Devolution Fund to the Branches that had complied with the obtaining accountability requirements as recommended by the internal auditor was approved. He states that following the approval, he signed cheques to facilitate the transfer of the funds to both the Branches and the Advocates Benevolence Association.
15. Mr. Ngetich avers that the cheques were then forwarded to the 2nd defendant who declined to sign them with a view to frustrating the Plaintiffs' operations of the Plaintiffs thus creating an artificial crisis to justify their objective of removal of the Chief Executive Officer and the eight (8) Council Members. He contends that there is no valid reason why funds collected for and on behalf of the Plaintiffs should not be released to them.
16. The 5th Defendant filed the replying affidavit of Dr. Davidson Mghanga Mwaisaka, who confirms that 1st defendant operates account numbers 0102xxxxxxxx, 0102xxxxxxxx, 0102xxxxxxxx, 0102xxxxxxxx, 0102xxxxxxxx, 0102xxxxxxxx and 0102xxxxxxxx (hereinafter collectively referred to as "the accounts") with the 5th defendant. He states that the 1st Defendant indicated that the mandate to operate the accounts is that the three authorized signatories must sign and adds that the 5th defendant can only act on instructions issued in accordance with the mandate for the operation of the accounts.
17. Parties canvassed the Originating Summons by way of written submissions which they highlighted at the hearing. I have carefully considered the pleadings filed by the parties herein, their submissions together with the authorities that they cited. I have identified the two main issues for determination to be as follows: -
 - a. Whether the dispute between the parties herein should be referred to Alternative Dispute Resolution.
 - b. Whether the plaintiffs have made out a case for the granting of the orders sought in the Originating Summons.
18. Before I delve into determining the above issues, I am minded to observe that there was an initial dispute regarding the representation of the 1st defendant that prompted the filing of the application dated 7th July 2021 wherein the 1st Defendant's President, Mr. Nelson Havi, sought orders to strike out the Notice of Appointment filed by the law firm of Allamano & Company Advocates. It is however, noteworthy that the said application was compromised thus leading to the exit of the said law firm of Allamano & Company from the matter.

Alternative Dispute Resolution



19. The 1st Defendant argued that the plaintiffs' claim for the sum of Kshs 38,479,900.00 and Kshs 32,430,150.00 due to the 1st and 2nd to 9th Plaintiffs respectively is a disputed claim as there were no verifiable statements to authenticate those sums or indicate how they were ascertained. The 1st defendant's case is that the claim does not fall under the actions that can be commenced and pursued by way of originating summons in the manner set out in Order 37 (1) of the Civil Procedure Rules but is one in respect of which there is an Alternative Dispute Resolution Mechanism (ADR) under Regulations 95 and 96 of the Law Society of Kenya (General) Regulations, 2020. It was submitted that the ADR avenue had neither been invoked nor exhausted by the Plaintiffs. The 1st defendant further argued that this court has no jurisdiction to entertain the Originating Summons and added that the same should be struck out and/or dismissed.
20. The 1st Defendant also accused the 3rd Defendant of concealing the bank statements on all collections from members and argued that the Plaintiffs' accounts had not been audited for purposes of approving the claimed payments. It was submitted that it is only the 3rd Defendant, an employee of the Law Society of Kenya who claims, but does not want her claim verified, that the funds belong to the Plaintiffs.
21. The 1st defendant submitted that Order 37 (1) of the Civil Procedure Rules is exhaustive on the claims that can be initiated by originating summons and that a disputed claim for money is not one such claim. The 1st Defendant urged this Court to decline the invitation by the Plaintiffs, acting in conjunction with the 3rd and 4th Defendants and the seven other former Council Members, to procure the payment of disputed sums from accounts of the Law Society of Kenya operated with the 5th Defendant.
22. The 1st Defendant cited the decision by the Court of Appeal decision in *Wakf Commissioners vs Mohamed Bin Umeya Bin Abdulmaji Bin Mwijabu* wherein it was held that the originating summons procedure is intended for settlement of simple matters without the expense of a full trial and not for serious complex issues suffices.
23. The 1st Defendant noted that the public interest underlying the need to exhaust the internal dispute resolution mechanism in Regulations 95 and 96 is ring-fenced in Article 159 (2) (c) of the Constitution. Reference was made to the decision in *Mark Ndungu Ndumia vs The Law Society of Kenya*, (UR) wherein it was held that:

“I find in such circumstances the courts of Law should not move into the arena of dispute between the parties and interfere in the internal running and management of affairs of societies and their members. The parties are under obligation before moving to courts to exhaust all alternative dispute Resolution mechanism as per their constitution and Regulations...

The matters in dispute should have been put up for determination under the dispute resolution mechanism of Law Society of Kenya. I find that the jurisdiction of this court, is as such barred by virtue of existence of alternative mechanism of resolution of the dispute. I find that this matter is for hearing and determination through alternative dispute Resolution Mechanism. The same is for striking out for want of jurisdiction.”

24. Reliance was also placed on the High Court decision in *Republic vs Nelson Andayi Havi & others, Ex Parte Gad Aguko*, (UR) where the Court expressed itself as follows: -

“ 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...

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.”

25. In a rejoinder, the plaintiffs submitted that the case concerns money received from members of the Law Society of Kenya and collected by the 1st Defendant on the express provisions of the statute and regulations. The Plaintiffs submitted that there was no contention on the amount due to the Plaintiffs. It was the Plaintiffs’ case that the instant case is not about leadership wrangles dogging the Law Society of Kenya but concerns children of deceased lawyers who are seeking maintenance from the 1st Plaintiff. The Plaintiffs argued that the 1st Defendant’s contention that the it is not aware of the sums due to the Plaintiffs or that the amount due is the subject of an audit cannot be true as the 3rd and 4th Defendants had clearly set out the amount due in their respective replying affidavits and are not contesting the fact that the amount is due to the Plaintiffs.
26. The Plaintiffs further submitted that owing to the existence of bitter wrangles within the Law Society of Kenya, it is not possible or practical to resolve the matter through Alternative Dispute Resolution. Counsel urged the court to negate arbitration while stating that there are exceptional circumstances that necessitate the said proposition more so considering the fact that the 1st Defendant had refused to release funds to the Plaintiffs thus bringing their operations to a near halt. In a nutshell, the plaintiffs submitted that since the amount due to them is not disputed, there was in essence no dispute capable of being referred to arbitration.
27. From the rival positions taken by the parties herein, the question that arises is whether the court is seized with the jurisdiction to hear and determine the dispute or if it is one that ought to have been referred to arbitration in line with the provisions of Regulations 95 and 96 of the Law Society of Kenya (General) Regulations. Regulation 96 (1)(a) and (b), (4) and (7) of the Regulations stipulate as follows: -
1. Where a dispute arises-
 - a. Relating to the exercise of the mandate or 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 or 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...
 - 4. The secretary or 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...
- (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, Kenyan Chapter.
28. A simple reading of the above Regulations shows that it was the intention of the lawmakers that disputes involving the Council and its members be resolved through arbitration. At this juncture, the court is called upon to determine if there is indeed a dispute capable of being referred to arbitration or any other form of Alternative Dispute Resolution Mechanism. The plaintiffs' case was that there was no dispute capable of being referred to arbitration while the 1st Defendant argued that the following 5 issues are disputed: -
- a. The amount due to the plaintiff.
 - b. Whether the amount due is payable without the approval of the expenditure estimates under Regulation 49 of the LSK Regulations.
 - c. Whether the plaintiffs can demand payment of financial estimates that have not been audited as required by Regulation 52 of the LSK Regulations.
 - d. Whether the disputed claims can be paid from the accounts held by the 5th defendant whose details are not disclosed.
 - e. Whether the order of compulsion can be made when the 3rd and 4th defendants are ex facie not signatories to the 1st defendant's accounts.
29. My finding is that all the above alleged disputed issues were demystified/answered by none other than the 3rd defendant, the 1st Defendant's Chief Executive Officer and Secretary who, in her sworn replying affidavit confirmed that the 1st defendant received the claimed amount in question on behalf of the plaintiffs and that the 1st defendant's own Chief Accountant, Mr. Owen Kibunja, informed her that the said sums were due to the Plaintiffs as at 31st May 2021. She further confirmed that members of the Board of the Advocates Benevolent Association met on 21st January, 2020 and resolved to promptly release the said funds to the Plaintiffs so as to facilitate their smooth operations. The 3rd defendant further confirmed that after following all the requisite procedures, the 1st Defendant's accounts clerk issued cheques to the respective plaintiffs and forwarded the same to the mandatory signatories but that the cheques were yet to be signed by the 2nd Defendant. She also confirmed that she is a signatory to the 1st Defendant's various bank accounts alongside the 2nd and 4th Defendants. She added that all the bank signatories have access to the Bank Statements and balances.



30. The 4th Defendant, Mr. Bernhard Kipkoech Ngetich, the 1st Defendant's Chair of the Devolution Committee and Treasurer confirmed the position presented by the 3rd defendant and averred that the expenditure of the Law Society of Kenya is, pursuant to regulation 49 of the Law Society of Kenya (General) Regulations 2020, approved by the Council and does not include the funds collected on behalf of the Plaintiff's except a grant of One (1) Million given to each Branch by the Law Society of Kenya. He further confirmed that after complying with all the requisite approvals, he signed cheques to facilitate the transfer of the funds to the Plaintiffs which cheques were then forwarded to the 2nd defendant but that she declined to sign them with a view to frustrating the Plaintiffs' operations. Mr. Ngetich was categorical that there is no valid reason why funds collected for and on behalf of the Plaintiffs should not be released to them.
31. From the position presented by the parties in this case, I note that the following facts were not disputed:
- a. That the 1st Defendant collected the amount of money sought by the plaintiffs herein on behalf of the plaintiffs and that the said sums were ascertained by none other than the 3rd and 4th defendants who are officials/employees of the 1st defendant.
 - b. That the 2nd 3rd and 4th Defendants are signatories to the 1st Defendant's accounts held with the 5th Defendant;
 - c. That the Plaintiffs are entitled to the monies collected on their behalf by the 1st Defendant; and
 - d. That the 1st Defendant leadership is involved in incessant wrangles that have paralyzed its operations.
 - e. That all the modalities relating to the disbursement of the funds due to the plaintiffs have been complied and the cheques due to the plaintiffs drawn but that the 2nd defendant declined to sign the said cheques thus stalling the release of the funds to the plaintiffs.
32. From the above undisputed facts, I find that this is a straight forward claim involving release of funds held by the 1st Defendant on behalf of the plaintiffs. The 1st defendant did not state that it has any claim over the sums of money it collected on behalf of the plaintiffs and neither did it state that any audit queries had been raised by any of the members of the Advocates Benevolent Association so as to justify its claim that the amounts due to the plaintiffs was the subject of any such queries. I also note that even though the 1st defendant alleged that the plaintiffs acted in conjunction with the 3rd and 4th defendants and some unnamed former members of the Council in order to procure payment of the disputed sums, no material was placed before this court to show that such a conspiracy took place.
33. I further find that the 1st defendant's claim that it is not able to ascertain the amount due to the plaintiffs due to lack of the bank statements does not hold any water in light of the 5th defendant's position that all the account signatories have access to the said bank statements. In view of the clear averments of the 3rd and 4th defendants regarding the payments due to the plaintiffs, I am not persuaded that there is a dispute capable of being referred to Alternative Dispute Resolution as this is clearly an admitted claim. I am guided by the decision in *UAP Provincial Insurance Company Ltd vs Michael John Beckett* [2013] eKLR where the court held that it is not sufficient for the Respondents just to state that all disputes must be referred to Arbitration, they are enjoined to demonstrate the specificity and nature



of the dispute. A similar position was taken in *County Government of Kirinyaga vs African Banking Corporation Ltd* [2020] eKLR where the Court held that: -

“The onus of proving that the matters in dispute fell within a valid and subsisting arbitration clause is on the party applying to the court for a stay of proceedings, once this burden has been discharged then the burden shifts to the opposing party to show cause why effect should not be given to the arbitration clause.

In this case the applicant in the supporting affidavit has not stated the nature of the dispute which has arisen between the parties. The grounds in support of the application do not disclose the dispute if any. It only refers to letters marked BM-2-. In one of the letters the applicant has stated that it was demanding an outstanding amount. The amount has not been stated. It is not sufficient for the applicant to state that under clause 26 of the agreement it is stipulated that any and all disputes arising out of or in connection with the agreement including and not limited to a dispute over its validity

shall be referred to arbitration. The applicant must specify the dispute and the nature of the dispute.’

34. Order 37 Rule 11 of the Civil Procedure Rules stipulates as follows: -

“Any person claiming to be interested under a deed, will, or other written instrument, may apply in chambers by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested.”

35. It is trite that the procedure of originating summons is not intended for complex matters or matters where facts are contested. This is the position that was taken in *Kenya Commercial Bank Ltd vs. Osede* [1982] eKLR where it was held that: -

“The procedure of originating summons is intended for simple matters and enables the court to settle them without the expense of bringing an action. The procedure is not intended for determination of matters that involve serious questions. The procedure should not be used for the purpose of determining disputed questions of fact.

The procedure of originating summons is designed for the summary or ad hoc determination of points of law, construction or certain specific facts for obtaining of specific directions of the court such as trustees, administrators or the courts execution officers”.

36. In the present case, the Plaintiffs seek the release of the money held on their behalf by the 1st Defendant. As I have already noted in this judgment, the defendants do not deny that they have money belonging to the Plaintiffs. I therefore find that the Plaintiffs’ claim is a simple case where the facts are not disputed.

37. The court takes judicial notice of the fact that all is not well with the operations of the 1st Defendant owing to leadership wrangles which, in the words of the 4th Defendant, have had the effect of partially paralyzing the operations of the Society. With such paralysis, this court is at a loss as to how an Alternative Dispute Resolution Mechanism would be effected assuming that the court was to find that there is a dispute capable of being referred to arbitration as was suggested by the 1st defendant.

38. It is also instructive to note that this case is not between the members of the Law Society of Kenya per se, but directly involves and affects the beneficiaries of the Advocates Benevolent Association who stand to lose their benefits under the benevolence scheme as the war within the Council continues.



This court is concerned that there seems to be no end in sight over the said wrangles that have evidently had the effect of delaying the release of funds due to the children of the deceased advocates' beneficiaries thus necessitating the filing of this OS. Needless to say, it is quite regrettable that the Law Society of Kenya, a reputable professional body of yesteryears, whose core function is to protect and uphold the rule of law is unable to resolve a simple issue regarding the release of funds it collected on behalf of the children of its deceased members under the benevolence scheme.

39. Having noted that this is a straight forward claim that is admitted by the 3rd and 4th defendants and having noted that there is no end in sight in the wrangles within the council of the Law Society of Kenya, I find that no useful purpose can be achieved by referring the matter to Alternative Dispute Resolution. It is my further finding that in the circumstances of this case, the court is clothed with the jurisdiction to hear and determine the Originating Summons.

Misjoinder

40. The 2nd Defendant submitted that the suit against her should be struck out for misjoinder. The 1st defendant also argued that because the dispute is between the Plaintiffs and the Law Society of Kenya, the 3rd and 4th Defendants have been misjoined in the case with the sole purpose of procuring a compromise of the claim which is a tactic that has been adopted in many matters concerning the Law Society of Kenya by the eight former Council Members acting in cohorts with 3rd Defendant.
41. The plaintiffs, on the other hand, submitted that the 2nd, 3rd and 4th Defendants are necessary parties to the proceedings as there are the co-signatories to the bank accounts that are the subject of the prayers sought in the Originating Summons.
42. It is trite law that misjoinder or non-joinder of a party to a suit cannot defeat the suit. Indeed, Order 1 Rule 9 of the Civil Procedure Rules makes it clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. The said Order stipulates as follows:
- “9 No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.
43. Having regard to the above provision of the statute I find that the issue of alleged misjoinder of the 2nd, 3rd and 4th Defendants is inconsequential to the determination of the matter. I further find that the explanation offered by the Plaintiffs, for including the said defendants to the suit, is plausible as they have established that they are not only co-signatories to the subject bank accounts but are also seized with relevant critical information regarding the amount claimed by the plaintiffs. My take is that owing to the admitted wrangles and stalemate that is obtaining at the Law Society of Kenya no harm or prejudice would be occasioned to any party if the respective individual officials of the Society appear in court to shed light on the issue at hand. As I have already noted in this judgment, no material was placed before this court to show that there was any conspiracy between the plaintiffs and the 3rd and 4th defendants to procure a compromise of the claim.
44. In a nutshell and having regard to the findings and observations that I have made in this ruling, I find that the plaintiffs have made out a case for the granting of the orders sought in the Originating Summons and I therefore make the following final orders: -
- a. A mandatory order is hereby issued compelling the 1st Defendant to surrender/pay to the Plaintiffs, all monies received by them on behalf of the Plaintiffs.



- b. The 1st, 2nd 3rd & 4th Defendants and/or any other signatories to the 1st defendant's accounts shall, within 3 days from the date of this order, sign and execute all the necessary documents to facilitate the release and transfer of Kshs 38,479,900 being monies received by the 1st Defendant on behalf of the 1st Plaintiff and held in the account numbers 0102xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx maintained by the 5th Defendant.
- c. The 1st, 2nd 3rd & 4th Defendants and/or any other signatories to the 1st defendant's bank accounts shall, within 3 days from the date of this order, sign and execute all the necessary documents to facilitate the release and transfer of Kshs 32,430,150 being monies received by the 1st Defendant on behalf of the 2nd-9th Plaintiffs and held in the account numbers 0102xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx maintained by the 5th Defendant.
- d. In the event of failure by the 1st to 4th defendants and/or signatories to the 1st defendant's bank accounts to comply with orders in a) to c) hereinabove, the 5th Defendant shall immediately release to the 1st Plaintiff the sum of Kshs 38,479,900 and to the 2nd-9th Plaintiffs the sum of Kshs 32,430,150 being monies received by the 1st Defendant on behalf of the Plaintiffs and held in account numbers 0102xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx, 0100xxxxxxxx maintained by the 5th Defendant.
- e. The costs of this summons are awarded to the Plaintiffs and shall be met by the 1st Defendant.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF SEPTEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Amana, Mr. Theuri and Mr. Murunga for the Applicants.

Ms Kamande for the 2nd Defendant and holding brief for Mr. Havi for the 1st Defendant.

Mr. Janmohammed and Mr. Lore for the 3rd and 4th Defendants.

Mr. Ondieki for the 5th Defendant.

Court Assistant: Sylvia.

