



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. E018 OF 2021

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAW SOCIETY OF KENYA ACT NO. 21 OF 2014

AND

IN THE MATTER OF THE LAW SOCIETY OF KENYA GENERAL REGULATIONS, L.N 32/2020

BETWEEN

JAMLIC MURIITHI.....PETITIONER/APPLICANT

VERSUS

THE LAW SOCIETY OF KENYA.....1ST RESPONDENT

THE LAW SOCIETY OF KENYA

BRANCH CHAIRS CAUCUS.....2ND RESPONDENT

AND

MATHEW NYABENA.....1ST INTERESTED PARTY

ERIC THEURI.....2ND INTERESTED PARTY

LINDA KIOME.....3RD INTERESTED PARTY

JUSTUS MUTIA.....4TH INTERESTED PARTY

JOSHUA MARITIM.....5TH INTERESTED PARTY

SUSSY RAUTTO.....6TH INTERESTED PARTY

WILKINS OCHOKI.....7TH INTERESTED PARTY

OCHANG AJIGO.....8TH INTERESTED PARTY

RULING

1. The Petitioner/Applicant approached this Court by way of Petition accompanied by a Notice of Motion Application dated 25th August 2021 which was certified urgent by the Court (J. N. N. NJagi J on the 26th August 2021. The Court granted Prayers Nos. 3 and 4 of the

application in the interim with the effect of granting a conservatory order staying the Law Society of Kenya Special General Meeting scheduled for 27th August 2021 pending the hearing and determination of the application *inter partes*.

2. The Applicant was directed to serve the application on the Respondents and the Interested Parties and attend mention before the duty Judge on 1st September 2021. Parties appeared before the Court on 1st September 2021 and Mr. Manwa for the Petitioner indicated that he had served the application.

3. Ms Kamende for the 1st Respondent indicated that they do not oppose the application.

4. Mr. Theuri for the 2nd Respondent confirmed that he was served with the court order but disputed service of pleadings and he urged that failure to serve the pleadings disabled him from responding to the application and they could thus not proceed with the hearing. He urged that the Petitioner intended to steal a march by deliberately failing to serve the pleadings as they continue enjoying the order. He urged the Court to set aside the orders issued on 26th August 2021.

5. Ms. Kiome for the Interested Parties associated herself with the submissions by Counsel for the 2nd Respondent. She indicated that the documents they were served with via WhatsApp were not clear and it was not clear why the Petitioner could not serve hard copies while their offices were close enough to each other, less than 1km apart. She urged that the orders be vacated.

6. Mr. Manwa for the Petitioner in rebuttal indicated that there was no reason why the Petitioner could have refused to serve the Petition. He urged that the averment that the documents served were not clear is preposterous and that it cannot be that one party admits to have been served yet the other party says otherwise. He urged that the Interested Parties are in contempt of court and they ought to purge the contempt.

Issues before the court

7. The Court has considered the representations made by Counsel. The question is whether the orders of stay should be extended in the pendency of the hearing of the application on a date when the respondents and application will have been served with the complete or clear pleadings. The contestation to extension of the orders is hinged on the averment that the Petitioner/Applicant deliberately omitted to serve the pleadings in the matter. This Court however observes that service was effected as confirmed by the affidavit of service sworn by Erick O. Jaoko confirming service of the pleadings as well as the order upon the Respondents and the Interested Parties. There is also another affidavit by Otieno Willy Calvin Advocate, confirming service of the application and Petition upon the interested parties. The affidavit expresses the date of service as 27th October 2021. This point was not taken up in submissions and in any event, the proper way to challenge the contents of an affidavit is to pray to be allowed to cross examine the deponent as per Order 19 Rule 2 of the Civil Procedure Rules, 2010.

Request for time to file responses

8. The court considers that the request all round for the respondents and Interested Parties to file responses to the application is reasonable as the 2nd Respondents and the Interested Parties who oppose the application had not filed any responses when the application came for hearing. The 1st Respondent who did not oppose the application asked to put on record certain matters concerning related proceedings before other Court. In the interests of the right to fair hearing entrenched under Article 50 (1) of the Constitution, the Court will grant the Respondents and opportunity to file their responses within a limited time in view of the urgency of matter which has already been so certified. Whereas the rules of court (Order 5 rule 22 B and 22 C of the Civil Procedure Rules) allow for service of summons and other court process by electronic media and mobile-enable messaging including WhatsApp, the request by Counsel for the Interested Parties for the supply of hard-copy versions on the ground that the copies served were unclear is not unreasonable. As regards the 2nd Respondent's Counsel, there is evidence only of service of the court order and not the pleadings and his requests by WhatsApp and email albeit to a wrong address (i.e calloti@gmail.com instead of calloti9@gmail.com) of the Counsel for the Petitioner was right and proper in the circumstances. The court considers that fair hearing requires the service of the hard copy versions of the pleadings and affidavits in the case.

Allegation of abuse of court process

9. The allegation of what amounts to an abuse of the court process by the applicants in seeking to have the interim order extended despite failure to serve the complete or clear pleadings on the respondent and the Interested Party is a serious indictment on the Counsel for the Petitioner. The balance of probability test requires cogent evidence in proof for such serious allegation. Dealing with an allegation of sexual abuse, in the House of Lords' decision *Re H (Minors)* [1996] AC 563, 586C, Lord Nicholls held:

“Where the matters in issue are facts the standard of proof required in non-criminal proceedings is... the balance of probability. ..

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor [...] that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. ...

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.”

10. On the evidence before the court, it is not established that the petitioner is guilty of abuse of the court process as to warrant the setting aside, or non- extension, of the interim conservatory order.

Conclusion

11. The court finds merit in the request by the Respondents for time to file responses in view of the importance of the matter. The Court also finds that the serious imputation of abuse of court process by the Applicants in allegedly failing to serve pleadings on the counsel for 2nd Respondent and hard copies of the pleadings on Counsel for the Interested Parties has not been proved on a balance of probabilities by cogent evidence necessary for such a serious charge.

12. The justice of the matter appears to be in the expedited hearing and determination of the dispute and in the meantime, the interim conservatory order to preserve the subject matter of the dispute will be extended, in accordance with the court's power under Order 40 Rule 4 (2) to extend an *ex parte* order once for 14 days.

13. For purposes of expedited hearing of the matter, the Application dated 25th August 2021 and the subsequent application for contempt of Court dated 31st August 2021 shall be heard together, and the Respondents shall have opportunity to respond thereto before hearing.

ORDERS

14. Accordingly, for the reasons set out above, the Court makes the following orders and directions:

1. The Applicant shall serve in hard copy the petition, applications and the supporting affidavits on the Respondents and the Interested Parties before close of business today.

2. The Respondents and the Interested Parties shall file their responses to the applications dated 25th August 2021 and the contempt of Court application dated 31st August 2021 within the next three days latest by noon Monday the 6th September 2021. The Applicant shall have leave to file a supplementary affidavit in response, if necessary, before close of business on 7th September 2021.

3. The Hearing of the two Applications is set for Wednesday 8th September 2021 at 10.00am.

4. In the meantime, the order for interim conservatory order granted by the court on 26th August 2021 is extended until then.

Order accordingly.

DATED AND DELIVERED ON THIS 2ND DAY OF SEPTEMBER, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Manwa & Mr. Otieno for the Petitioner/Applicant

Ms. Kamende, Ms. Odiya, Ms. Kabita & Mr. Havi for the 1st Respondent

Mr. Theuri & Mr. Nyabena for the 2nd Respondent

Ms Kiome for the Interested Parties