REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 23 OF 2019

CHAMA CHA MAWAKILI LIMITED.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

REGISTRAR OF COMPANIES….....2ND RESPONDENT

AND

LAW SOCIETY OF KENY.....INTERESTED PARTY

JUDGEMENT

1.The Petitioner, Chama Cha Mawakili Limited, filed the petition dated 21st January, 2019 alleging a violation of Articles 10, 36 and 47 of the Constitution of Kenya by the Attorney General (the 1st Respondent) and the Registrar of Companies (the 2nd Respondent). The Petitioner named the Law Society of Kenya as an Interested Party.

2.This matter concerns the direction to the Petitioner by the 2nd Respondent through a letter dated 9th January, 2019 to change its name within 14 days or be deregistered. The Petitioner claims that it was not given the opportunity to state its case and by threatening to de-register it, the 2nd Respondent acted in excess of his jurisdiction and the power conferred upon him under Section 58 of the Companies Act, 2015.

3. The Petitioner therefore seeks the following reliefs:-

a) A declaration be and is hereby issued that in so far as section 58(5) does not give a right to fair hearing before a registration is cancelled, the same is contrary to Article 36(3)(b) hence unconstitutional and invalid;

b) A declaration be and is hereby issued that the Respondent's decision dated 9th January, 2019 is in violation of Articles 10, 36 and 47 of the Constitution of Kenya, 2010;

c) An order of certiorari be and is hereby issued to remove into this court and quash the decision dated 9th January, 2019;

d) An order of prohibition be and is hereby issued prohibiting the Respondent from deregistering the Petitioner on the basis of the letter dated 9th January, 2019;

e) Costs of the Petition against the Respondents or in the alternative there be no costs order.

4.The Petitioner's case is as per the petition; the affidavit sworn by Georgiadis Majimbo in support of the petition; a notice of motion application dated 21st January, 2019; the notice of motion applications and supporting affidavits dated 22nd August, 2019; certificate of urgency and supporting affidavit dated 1st December 2019; written submissions dated 4th October, 2019; and supplementary affidavits dated 13th December, 2019.

5. The undisputed facts disclose that the Petitioner was registered by the 2nd Respondent on 19th December, 2018 as a company limited by guarantee. On 9th January, 2019 the 2nd Respondent wrote to the Petitioner indicating that he had received reservations and objections to its registration from the Interested Party. The 2nd Respondent directed the Petitioner to change its name within 14 days, failing which the 2nd

Respondent would invoke the provisions of Section 58 of the Companies Act, 2015 and have the Petitioner deregistered.

6. The Petitioner's case is that it was not given an opportunity to be heard prior to the making of the decision. Further, that it was never served with a written copy of the Interested Party's reservations and objections despite requesting for the same.

7.The Petitioner contends that the decision by the 2nd Respondent infringes Article 10 of the Constitution as it goes against the national values and principles of governance. Additionally, it is claimed that the decision violates the right to fair administrative action under Article 47 as read with section 4 of the Fair Administrative Action Act, 2015. Particularly, the Petitioner avers that it was not given an opportunity to state its case on the objection by the Interested Party and was only presented with a final decision to either change its name within 14 days or be deregistered under Section 58 of the Companies Act.

8.The Petitioner avers that at the time of its registration the Interested Party is not an entity whose name appeared or ought to have appeared in the 2nd Respondent's index of company names under Section 58(1)(a) and (b) of the Companies Act. Further, that the Interested Party is not a company but is in fact a statutory body established by Section 4 of the Law Society of Kenya Act, 2014. It is therefore the Petitioner's case that the impugned decision was influenced by an error of law.

9.Additionally, it is contended that the 2nd Respondent's decision is beyond his jurisdiction and power as he has threatened to deregister the Petitioner outside the limits of Section 58(1)(a) and (b) of the Companies Act. Further, that the decision was irrational, unreasonable and did not take into account the relevant factors being the difference in the legal status of the Interested Party which is a statutory body and the Petitioner which is a company limited by guarantee; the Petitioner's right to freedom of association; the distinction between the Petitioner's name, Chama Cha Mawakili, and the Interested Party's name, Law Society of Kenya; and the proportionality of the interests or rights affected.

10.The Petitioner further claims its right to freedom of association under Article 36 of the Constitution has been unduly limited as the decision of the 2nd Respondent violates the right under Article 36(3)(b). The Petitioner avers that the limitation of this right is not reasonable or justifiable in an open and democratic society.

11.It also stated that Section 58(5) of the Companies Act is contrary to Article 36(3)(b) and therefore unconstitutional and invalid, as it does not provide for the right to a fair hearing before cancellation of registration, which is an administrative decision, is made.

12.By way of a Supplementary Affidavit sworn by Georgiadis Majimbo on 13th December, 2019, it is deposed that the 2nd Respondent did not abide by the rules of natural justice once confronted with the objection by the Interested Party.

13. Mr. Majimbo who is a director of the Petitioner also avers that after the petition was filed it was served with a letter dated 23rd January, 2019 from the 2nd Respondent inviting it and the Interested Party to a meeting on 25th January, 2019 in order to reach an amicable settlement to the dispute. The Petitioner asserts that this meeting cannot be equated to the pre-decision fair hearing that it was not afforded in contravention of Articles 36(3), 47 and 50 of the Constitution.

14. Mr Majimbo further avers that the arguments posed by the 2nd Respondent and Interested Party that the name 'Chama cha Mawakili' and 'Law Society of Kenya' are similar is untrue. This assertion is supported by reference to a supplementary affidavit sworn on 13th December, 2019 by Rufus Karani, a lecturer, and a professional translator and interpreter at the Centre for Translation and Interpretation of the University of Nairobi.

15. According to the Petitioner, the respondents and the Interested Party have not adduced evidence to challenge the Petitioner's expert evidence or to show that the two names are similar. Further, that the respondents and the Interested Party have failed to put forward any evidence to prove their allegation that the Petitioner's name has caused confusion to the members of public and therefore the reason for the change of name is unsubstantiated. It is the Petitioner's case that the newspaper cuttings and online excerpts relied on by the Interested Party to substantiate its claim that the names are similar amounts to hearsay evidence and is thus inadmissible and has no probative value.

16. It is also the averment of Mr. Majimbo that the Interested Party is not a "company" but a "society" and therefore Section 57 of the Companies Act cannot apply as it only refers to similarity of names between companies. He therefore avers that deregistration of the Petitioner would not serve a legitimate purpose. Further, that the 2nd Respondent has failed to show how the Petitioner's registration was a mistake as the 2nd Respondent clearly exercised due diligence as demonstrated by the refusal to accept five other names the Petitioner had proposed.

17.In his supplementary affidavit, Rufus Karani confirms that 'Chama Cha Mawakili' does not directly translate to or correspond with 'Law Society of Kenya.' He claims that neither phrase can be taken to be a version of the other in the other language. He avers that he performed a Back-Translation Test (BTT) in assessing the translations of the two terms and affirmed that the **"semantic fields in these two entities do not overlap"** and they are therefore distinct from one another.

18. The 2nd Respondent opposed the application through the replying affidavit sworn on 25th October, 2019 by Joyce Koech, an Assistant Registrar of Companies. She avers that through a letter dated 8th January, 2019 the Interested Party expressed its objection to the registration of the Petitioner as its name is strikingly similar to their name and posed a risk of confusing the public, stakeholders and partners.

19. It is averred that upon perusal and consideration of the Interested Party's letter the 2nd Respondent ascertained that the Law Society of Kenya is a corporate body; that the name 'Chama cha Mawakili' had been inadvertently registered contrary to the provisions of regulation 11(f) of the Companies (General) Regulations, 2015 ("the Regulations"); and that the name 'Chama Cha Mawakili' is strikingly similar to the name 'Law Society of Kenya' so much so that it is likely to cause confusion to the general public.

20.The 2nd Respondent avers that in light of the Petitioner's objection to the registration, and in compliance with the provisions of Article 47 of the Constitution and the Fair Administrative Action Act on fair hearing, the Interested Party and Petitioner were invited for a consultative meeting on 25th January, 2019 in order to reach an amicable solution to the matter. In a further consultative meeting held on the 4th February, 2019 attended by both the Law Society of Kenya and Chama Cha Mawakili, the parties filed and submitted affidavits laying out their positions which were received and taken into consideration.

21.The 2nd Respondent avers that by virtue of the provisions of Division 3 of the Companies Act, whenever the 2nd Respondent inadvertently registers two companies under a similar name or under names that are so strikingly similar, the 2nd Respondent is obliged to call upon the last registered company to change its name.

22.It is the 2nd Respondent's case that the Companies Act and the regulations made thereunder enjoy a presumption of legality, and the Petitioner has not satisfactorily demonstrated the alleged unconstitutionality of Section 58 of the Companies Act.

23.In response to the Petitioner's allegation that the impugned decision violates Articles 10 and 47 of the Constitution, the 2nd Respondent avers that he adhered to the provisions of Article 47 of the Constitution as well as the Fair Administrative Action Act and gave the Petitioner an opportunity to be heard as evidenced by the letters dated 9th January, 2019 and 23rd January, 2019 as well as the meeting held on 4th February, 2019.

24. The 2nd Respondent denies violating the Petitioner's right to freedom of association under Article 36 of the Constitution and asserts that he was only enforcing his statutory duty and did so in accordance with the law. According to the 2nd Respondent, the right to a hearing is protected as a company is asked to change its name rather than being de-registered. Further, that the Petitioner has not been barred from belonging to any association. Additionally, the 2nd Respondent posits that the right under Article 36 of the Constitution is not absolute, and must be read in conjunction with Article 24(1) so that any limitation, must be reasonable and justifiable in an open and democratic society.

25.Finally, it is contended by the 2nd Respondent that the Petitioner's rights as guaranteed under Article 47 were not violated by the letter dated 9th January, 2019 as the letter specifically notified the Petitioner to change its name or demonstrate within 14 days why it could not change the name. It is contended that the letter was a mere notification in accordance with Section 58(1) and (3) of the Companies Act and the parties would have undergone other processes before the gazettement of deregistration under Section 58(5) and (6) of the Companies Act.

26. The Interested Party opposed the petition and took a position similar to that of the respondents.

27.The Petitioner filed its submissions dated 17th December, 2019 and submits that the issues for determination are:-

a) The constitutionality of Section 58 of the Companies Act, 2015 for failing to afford or require a fair hearing before a company is compelled to change its name;

b) The constitutionality of the 2nd Respondent's decision to compel the Petitioner to change its name without a fair hearing;

c) Whether there is a similarity in the names "Chama cha Mawakili Limited" and "Law Society of Kenya"; and

d) Whether the Petitioner's right to freedom of association was violated.

28.On the first issue it is contended that Section 58 of the Companies Act, 2015 is unconstitutional as it does not afford or require a fair hearing prior to the making of a decision by the 2nd Respondent. It is submitted that a legislation can be deemed to be unconstitutional if it is found to have an unconstitutional effect or purpose as was decided in the cases of **Law Society of Kenya v Attorney General & 2 others [2016] eKLR** and **Wambui Shadrack Kinyanjui v Law Society of Kenya & another; Kenya School of Law & another (Interested Parties) [2019] eKLR.**

29.The Petitioner refers to the case of **Maendeleo Chap Chap Party & 2 others v Independent Electoral and Boundaries Commission & another [2017] eKLR** as expounding on the content and scope of the right to freedom of association as envisaged under Article 36 of the Constitution. The Petitioner contends that Section 58 of the Companies Act, 2015 violates Article 36(3) by failing to require a fair hearing prior to deregistration.

30. On the second issue the Petitioner refers to Articles 47 and 50 of the Constitution as read with Section 4(1) of the Fair Administrative Action Act, 2015 and submits that the provisions guarantee the rights to a fair hearing and fair administrative action. It is urged that the right to fair administrative action has an overriding nature, as was explained in the case of **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR.**

31.The Petitioner states that upon receiving the letter dated 23rd January, 2019, which came after the petition was filed, it agreed to meet with the 2nd Respondent and Interested Party in compliance with Article 159(2)(c) which commands promotion of alternative forms of dispute resolution, and did so in good faith. The Petitioner, however, rejects the argument by the Respondent and the Interested Party that it was afforded a fair hearing because of attending these meetings, and asserts that the post-petition meetings aimed at arriving on amicable settlement cannot be equated to the fair hearing which should have been afforded to it before the decision of 9th January, 2019. It is therefore the Petitioner's firm position that the decision dated 9th January, 2019 which was affirmed on 23rd September, 2019 remains unconstitutional.

32.On the third issue the Petitioner submits that as a matter of common sense, 'Chama cha Mawakili Limited' is not the same as 'Law Society of Kenya'. Further, that similarity does not lie on the fact of translation, but on the name that is in fact registered. However, even if similarity lies in the translation, the Petitioner draws the court's attention to the affidavit of Rufus Karani and the decision in **Mohamed Ali Baadi & others v Attorney General & 11 others [2018] eKLR** in support of its assertion that even upon translation the names are not similar.

33.The Petitioner asserts that the Interested Party's contention that the similarity is likely to cause confusion to the public is based on hearsay evidence of newspaper-cuttings and unauthenticated and inadmissible screenshots which were produced in court contrary to the rules on production of electronic evidence.

34.The Petitioner additionally asserts that the provisions of Section 58 of the Companies Act only apply to companies with similar names and the scope of the statute cannot be extended to "societies". The Petitioner supports this assertion by relying on the decisions in the cases of **Attorney General v Law Society of Kenya & another [2017] eKLR; Commissioner of Income Tax v Pan African Paper Mills (E.A) Limited [2018] eKLR;** and **David Ouma Ochieng v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR.**

35.On the final issue, the Petitioner submits that the limitation of the Petitioner's right to associate under the name 'Chama cha Mawakili Ltd' is neither justified nor reasonable in the circumstances of this case. The Petitioner relies on Article 22 of the International Covenant on Civil and Political Rights (ICCPR) to demonstrate the international foundation of this right.

36.The Petitioner asserts that although the freedom of association under Article 36 is not absolute, it can only be limited in terms of Article 24(1) of the Constitution if the limitation is reasonable and justifiable in an open and democratic society as was enunciated in the cases of **Eunice Nganga & another v Law Society of Kenya & another [2019] eKLR; Randu Nzai Ruwa & 2 others v Internal Security Minister & another [2012] eKLR**; and **Vladimir Romanovsky v Belarus Communication No. 2011/2010.** It is submitted that Article 24(3) places a burden on the respondents and the Interested Party to demonstrate that the limitation of the right to freedom of association is by law, pursues a legitimate aim, and is the least restrictive measure.

37. On the matter of costs, the Petitioner relies on the South African case of **Biowatch Trust v Registrar Genetic Resources [2009] ZACC 14** in which the Court set out the general rule for an award of costs in constitutional litigation between a private party and the State. This court is urged to take into account the conduct of the 2nd Respondent when deciding on an appropriate order on costs.

38.The respondents filed joint submissions dated 6th December, 2019 and identify the issues for determination as: whether the petition is arguable; whether the registration and continued existence of the Petitioner on the register of companies complies with the provisions of the Companies Act; whether the Interested Party had locus to lodge the complaint vide the letter dated 8th January, 2019; whether the decision by the 2nd Respondent is *ultra vires* Section 58(1)(a)&(b) of the Companies Act and is characterized by irrationality and irrelevant considerations; whether the decision of the 2nd Respondent violates the Petitioner's rights under Article 36(3)(b) of the Constitution; whether the decision violates the Petitioner's legitimate expectation not to be de-registered; whether Section 58(5) of the Companies Act is unconstitutional; whether the impugned decision violates Articles 10 & 47(1) of the Constitution and the Fair Administrative Action Act; and, whether the Petitioner has discharged the burden of proof.

39. It is the respondents' case that at the time the petition was filed the 2nd Respondent was yet to make the final determination on the objection by the Interested Party, as the 2nd Respondent's decision was actually delivered on 23rd September, 2019. It is contended that the Petitioner has not challenged the decision made on 23rd September, 2019 and this court does not therefore have jurisdiction to issue any orders in respect of that decision.

40. The respondents claim that the Petitioner's objection to the directive was taken into consideration and was found to lack merit.

41. According to the respondents, applying the provisions of Section 49 of the Companies Act and the criteria in regulation 11(f) of the Regulations, the translation of the name Chama cha Mawakili Limited to English offends the law as it is similar to the Law Society of Kenya which is established under a written law. The decision in the case of **Republic v Registrar of Companies Ex-parte Megascope Healthcare (K) Limited & another [2017] eKLR** is identified as stating the law on the similarity of the names of two companies.

42.The respondents assert that Rule 12(a) of the Regulations recognise that similarities may lie in synonyms. It is argued that 'Chama Cha Mawakili' is a Swahili variant and a synonym of 'Law Society of Kenya' and therefore it must be deemed that the use of the name is prohibited by the law.

43.It is further urged that the similar objectives and functions of the two bodies namely the representation, protection and assistance of members of the legal profession in matters relating to the conditions of practice and welfare, is likely to cause confusion and is therefore against the public interest as indicated in Rule 11(h) of the Regulations. This argument is supported by the statement in the case of **Eunice Nganga & another v Law Society of Kenya & another [2019] eKLR** that it is in the public interest to have a single law society being a premier bar association for all advocates.

44.It is further submitted that Chama Cha Mawakili has not and did not present any proof that it had sought the Interested Party's views or consent before seeking registration. The respondents contend that the Petitioner's failure to seek the consent of the Interested Party makes its registration untenable within the meaning of sections 50 and 51 of the Companies Act as read with Rule 13 of the Regulations.

45.Additionally, it is submitted that by virtue of the Petitioner's objectives and membership it should be regulated under the Advocates Act and the Law Society of Kenya Act. This, it is submitted, is because all advocates in Kenya belong to the Law Society of Kenya and are regulated under the Advocates Act and therefore the existence of a parallel body that is not regulated under the Advocates Act is likely to cause confusion to the public.

46. The respondents assert that the 2nd Respondent has the statutory power to direct a company to change its name. They support this proposition by referring to the decision in the case of **Republic v Registrar of Companies & another Ex parte Atlantic Group (K) Limited**.

47. On the question as to who can raise a complaint on the similarity of names of registered companies, the respondents rely on the holding in the case of **Republic v Registrar of Companies, ex parte Transglobal Freight Logistics Limited and Global Freight Logistics Limited (Misc Application 711 of 2005)** that the 2nd Respondent can be notified by an interested party of the similarities in names. Other cases cited in support of this assertion are **Datacomm Interface, Inc. v Computerworld, Inc., 396 Mass. at 769; Republic v Registrar of Companies & another Ex parte Atlantic Group (K) Limited (2016);** and **Staples Coal Co. v City Fuel Co. (Mass. 1944) 55 N.E (2d) 934.**

48. On the issue of the constitutionality of the 2nd Respondent's decision, it is contended that the duty of the 2nd Respondent to determine what constitutes similarity of names is derived from the application of the entire provisions of Part I, Divisions 1 & 3 of the Companies Act, and in particular sections 49, 50, 51, 57, 58 and 60, and therefore the directive by the 2nd Respondent was in line with the provisions of rules 11(f) and (h), and 12 of the Regulations which give effect to sections 49 and 57 of the Companies Act.

49.On the alleged violation of the Petitioner's right to freedom of association, the respondents contend that no constitutional rights of the Petitioner have been threatened or violated as the 2nd Respondent has not prevented it from existing as a registered company or association within the confines of the Companies Act since the Petitioner has merely been directed to change its name so to comply with the law.

50.The respondents submit that Article 36 of the Constitution is one of the provisions in the Bill of Rights that is not absolute. They contend that the Article must be read in conjunction with Article 24(1) and the provisions of sections 49 and 57 of the Companies Act so that the limitation, if any, must be reasonable and justifiable in an open and democratic society. It is their view therefore that the decision by the 2 nd Respondent is reasonable and within the confines of sections 49 and 57 of the Companies Act and Article 36(3)(a) of the Constitution.

51.On the claim by the Petitioner that it had a legitimate expectation not to be deregistered, it is submitted that a legitimate expectation cannot lie in favour of a party who wishes to contravene the provisions of the law. This argument is supported by the decision of the Supreme Court in **Communications Authority of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** and the decision of the Court of Appeal in **Richard Erskine Leakey & 2 others v Ambassador Samson Kipkoech Chemai [2019] eKLR.** It is thus asserted that the Petitioner cannot have a legitimate expectation that allows it to exist in a name that offends the provisions of the Companies Act.

52. In response to the Petitioner's submission that Section 58 of the Companies Act is unconstitutional, the respondents argue that the provision enjoys a presumption of constitutionality and must therefore be observed. This argument is supported by the decisions in the cases of **Ndyanabo v Attorney General [2001] EA 495; Mark Ngaywa v Minister of State for Internal Security and Provincial Administration & another, Petition No. 4 of 2011; Hambardda Dawakhana v Union of India Air (1960) AIR 554;** and **Susan Wambui Kaguru & others v Attorney General & another [2012] eKLR.**

53. It is further urged by the respondents that in determining whether an Act of Parliament or a provision thereof is unconstitutional, the court must consider the objects and purpose of the legislation and the effect of implementing the statute or provision as was espoused in **Murang'a Bar Operators & another v Minister of State for Provincial Administration and Internal Security & others [2011] eKLR; Samuel G. Momanyi v Attorney General & another, High Court Petition No. 341 of 2011; Olum & another v Attorney General [2002] 2 EA 508; R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; Re Kadhis' Court: The Very Right Rev Dr. Jesse Kamau & others v The Hon. Attorney General & another Nairobi HCMCA No. 890 of 2004;** and **U.S v Butler, 297 U.S. 1 [1936].**

54. Additionally, it is stated that the impugned provision harmonises with the provisions of the Constitution and the Petitioner has failed to specifically point out how the provision is unconstitutional. Further, that granting the orders sought would defeat the very purpose of Section 58 of the Companies Act and will occasion disproportionate harm than good to the respondents and the public in general.

55.On the issue of the claimed violation of the right to fair administrative action, it is argued that the 2nd Respondent did not violate the Petitioner's right as guaranteed under Article 47 by writing the letter dated 9th January, 2019. According to the respondents, the letter was a mere notification in accordance with Section 58(1) & (3) of the Companies Act and the 2nd Respondent would have undertaken other processes before deregistering the Petitioner under Section 58(5) & (6). Further, that the notification serves the purpose of notifying an affected party and gives it an opportunity to raise an objection, if any. The respondents rely on the decisions in **Egal Mohamed Osman v Inspector General of Police & 3 others [2015] eKLR; R v Aga Khan Education Services ex parte Ali Sele & 20 others [2010] eKLR; Russel v Duke of Norfork (1949) All ER 118** for the proposition that the right to a fair hearing is not violated where there is an opening for the hearing of the person affected by an administrative decision.

56. It is also argued that the Petitioner had through the letter dated 14th January, 2019 objected to the 2nd Respondent's directive and the 2nd Respondent in consideration of the objection and in compliance with the requirement of a fair hearing by Article 47 of the Constitution and the Fair Administrative Action Act invited the Petitioner and the Interested for consultative meetings on 25th January, 2019 and 4th February, 2019. Further, that the Petitioner and the Interested Party filed and submitted to the 2nd Respondent affidavits canvassing the various positions adopted by them which was taken into consideration in making the decision. The respondents submit that the Petitioner was accorded an opportunity to be heard through the meetings and the correspondences.

57.On the final issue as to whether the Petitioner had discharged the burden of proof, the respondents contend that the Petitioner bears both the legal and evidential burden of proof. In support of this statement of the law, the respondents relied on the decisions in the cases of **Raila Odinga v IEBC & 3 others, Supreme Court of Kenya Presidential Election Petition No. 5 of 2013;** and **Kiambu County Tenants Welfare Association v The Attorney-General & another [2017] eKLR**. It is the respondents' case that the Petitioner has failed to

discharge both the legal and evidential burden of proving the allegations levelled against them.

58.The Interested Party filed submissions dated 27th November, 2019 in which it proposes that the issues for the determination of this court are: whether Section 58(5) of the Companies Act is unconstitutional or in contravention of Article 36 (3)(b); whether the court can quash the decision cancelling the registration of the Petitioner and the effect of the decision dated 23rd September, 2019; and, whether the court ought to grant the reliefs sought.

59.On the first issue the Interested Party states that the Petitioner has only challenged a sub-section of a statutory provision. It is the Interested Party's submission that in order to determine whether the impugned provision is indeed unconstitutional, the court has to look at the entire Section and read it together with the whole Act. It is further urged that the Petitioner cannot challenge Sub-section 5 of Section 8 of the Companies Act without challenging the other sub-sections from which the 2nd Respondent derives his power.

60. The Interested Party therefore posits that Section 58(5) cannot be deemed unconstitutional. The Interested Party supports this submission by reference to the case of **Leisure Lodges Ltd. v Yashvina Shretta, Civil Appeal No. 10 of 1997,** which was cited with approval in **Republic v National Environment Tribunal & 2 others Ex-Parte Abdulahafidh Sheikh Ahmed Zubeidi [2013] eKLR.** Also cited in support of the Interested Party's argument is the case of **Jack Mukhongo Munialo & 12 others v Attorney General & 2 others [2017] eKLR.**

61. The Interested Party urges the court to take heed of Article 259 of the Constitution on interpretation of the Constitution, and also Article 159(2)(e) on the exercise of judicial authority. On the applicable principles of constitutional interpretation, the Interested Party relies the holdings in the cases of **The Law Society of Kenya v Kenya Revenue Authority [2017] eKLR; John Harun Mwau & 3 others v Attorney General & 2 others [2012] eKLR;** and **Nation Media Group Limited v Attorney General [2007] 1 E.A. 261.**

62.The Interested Party further asserts that there is a general presumption of the constitutionality of every Act of Parliament, and the burden of proving unconstitutionality lies on the person who alleges so. The decision in the case of **Council of County Governors v Attorney General & another [2017] eKLR** is relied on as elucidating the principle. It is submitted that not only has the Petitioner failed to show how Section 58(5) of the Companies Act contravenes Article 36(3)(b) of the Constitution but that it has also failed to raise with any degree of clarity, specificity and particularity any constitutional rights infringed and violated.

63. On the second issue, the Interested Party states that the decision being challenged is contained in the letter dated 9th January, 2019. It is the Interested Party's case that the said decision has been overtaken by events by virtue of the decision dated 23rd September, 2019, and the latter decision has never been challenged and therefore stands. The case of **Republic v Registrar of Companies & another Ex parte Golden Africa Kenya Limited [2019] eKLR** is relied on in support of this argument.

64. It is the Interested Party's contention that where a party alleges a violation of a right, it must show how the provision contravenes the law. This is supported by the decision of the Constitutional Court of Seychelles in **Elizabeth v President Court of Appeal [2010] SLR 38** where the threshold to be met for a matter to be deemed a constitutional petition was set down.

65.It is further asserted that parties are bound by their pleadings and the court should not grant the orders sought by the Petitioner as this would amount to a denial of justice. The Interested Party supports its case by relying on the decision of the Court of Appeal of Malawi in **Malawi Railways Limited v P.T.K. Nyasulu, MSCA Civil Appeal No. 13 of 1992,** as well as the decisions in **Nairobi City Council v Thabiti Enterprises Limited [1997] eKLR,** and **Charles Sande v Kenya Co-operative Creameries Limited, Civil Appeal No. 154 of 1992.**

66. Once again it is asserted that the Petitioner has failed to specify how the decision by the 2nd Respondent was irrational and unlawful. It is the Interested Party's submission that the parties subjected themselves to the jurisdiction of the 2nd Respondent and are bound by the decision and the court cannot therefore quash the decision of 23rd September, 2019. Reliance is placed on the holding of the Court in **Republic v Registrar of Societies & 5 others Ex-parte: Stephen O. Owino & 5 others (Suing in their capacity as officials of NHC Lang'ata Court Resident's Association) [2018] eKLR.**

67.The Interested Party urges that the registration and or continued use of the name 'Chama Cha Mawakili' is likely to cause confusion to the public and it is the job of the 2nd Respondent to ensure that such confusion does not happen by deregistering the Petitioner. The Interested Party submits that the two names mean the same thing and are identical as 'Chama Cha Mawakili' is the Swahili version of 'Law Society of Kenya' and the former has been used widely by the public, reporters and news anchors when referring to the latter. Reliance is placed on the case of **Eunice Nganga & another v Law Society of Kenya & another [2019] eKLR** to firm up this point.

68. The cases of **Republic v Registrar of Companies, Ex-Parte Transglobal Freight Logistics Limited, (Misc. Application No. 711 of 2005);** and **Republic v Attorney General & another Ex-Parte Kensington International Ltd & another [2015] eKLR** are relied on to expound on the role of the 2nd Respondent in dealing with anomalies and complaints regarding registration of companies.

69. On the third and final issue, the Interested Party submits that the 2nd Respondent has made a decision based on all facts presented to him, and this decision should not be quashed as the decision has never been challenged. It is urged that if the court quashes a decision that was not challenged then such an action would be illegal. Reliance is placed on the decisions in **Republic v Registrar of Companies & another Ex parte Atlantic Group (K) Limited (supra),** and **Benjamin Leonard Macfoy v United Africa Co. Ltd (1961) 3 All E.R. 1169** in support of the proposition.

70.The court is urged to follow the principles for granting conservatory orders as laid down by Onguto, J in **Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR.** The Interested Party submits that the issues surrounding the decision have been determined and that it was an error to register the Petitioner, and therefore they cannot claim any right.

71.The Interested Party reiterates its contention that the 2nd Respondent rescinded his initial decision and gave all the parties an opportunity to make representations before a fresh decision was made. The case of **Republic v Registrar of Companies & another Ex-Parte Golden Africa Kenya Limited [2019] eKLR** is relied on as giving guidance as to when an order of certiorari should be granted.

72.The Interested Party dismisses as dishonest and untrue the Petitioner's claim that it was not accorded a fair hearing or that it was not served with a written copy of the Interested Party's reservations and objections. The court is urged to follow and apply to the Petitioner the holding in **Republic v Attorney General & another Ex Parte Kensington International Ltd & another [2015] eKLR** on the authority of the 2nd Respondent and the consequences of not complying with his decision. Still stressing the statutory power of the 2nd Respondent to deregister the name of a company, the Interested Party points the court to the decisions in **Republic v Registrar of Companies Ex parte Megascope Healthcare (K) Limited & another [2017] eKLR,** and **Republic v Registrar of Companies & another Ex parte Atlantic Group (K) Limited [2017] eKLR.**

73. On the Petitioner's prayer for an injunction, the Interested Party submit that the Petitioner is seeking an order that has been overtaken by events. Reliance is placed on the decision in **New Ocean Transport Limited & another v Anwar Mohamed Bayusuf Limited [2014] eKLR** where the Court determined the extent and application of an injunctive order.

74. It is further submitted that allowing the petition will go against the public good as the impugned decision was made in good faith and to protect the members of the public. The court is urged to strike a balance between the decision that has been made and the consequences of quashing an order that has not been challenged. The Interested Party beseeches the court to adopt the interpretation and holding in the case of **James Opiyo Wandayi v Kenya National Assembly & 2 others [2016] eKLR** in determining what amount to public interest.

75.The Interested Party closes its submissions by stating that an order of prohibition cannot be granted where there is no decision that has been challenged, or where a hearing has been granted under Article 47 of the Constitution. The Interested Party posits that the Petitioner should do what ought to be done as per the decision of 23rd September, 2019 and change its name within 14 days.

76. I have carefully considered the pleadings and submissions of the parties herein and I identify three issues for determination of the court. In my view all the issues identified by the parties fall under these three issues, which are:-

a) Whether Section 58(5) of the Companies Act violates Article 36(3)(b) of the Constitution and should be declared unconstitutional;

b) Whether the directive of the 2nd Respondent dated 9th January, 2019 violated Article 47 of the Constitution and the Fair Administrative Action Act; and

c) Whether the names "Chama Cha Mawakili Limited" and "Law Society of Kenya" are indeed similar as held by the 2nd Respondent.

77. I note that the first two issues are on the constitutionality of the law invoked by the 2nd Respondent in making the impugned decision and the constitutionality of the process leading to that directive. I will address these issues first and if I find in favour of the Petitioner, then it will no longer be appropriate for me to consider the third issue.

78.The Petitioner argues that Section 58(5) of the Companies Act is unconstitutional as it does not afford an affected company an opportunity to be heard or require the 2nd Respondent to give a hearing to an affected company before the decision to ask a company to change its name is made. The respondents and Interested Party contend that Section 58 of the Companies Act enjoys a presumption of constitutionality and the Petitioner has failed to specifically point out how the provision is unconstitutional with the required degree of clarity, specificity and particularity.

79. The essence of Article 2(4) of the Constitution is that any law which is inconsistent with the Constitution is invalid.

80. In this matter, the court is urged to find that the impugned provision violates Article 36(3) of the Constitution. The cited constitutional provision states:-

"Any legislation that requires registration of an association of any kind shall provide that?

a. registration may not be withheld or withdrawn unreasonably; and

b. there shall be a right to have a fair hearing before a registration is cancelled."

81. Section 58(1) of the Companies Act states that where the 2nd Respondent determines that a company has a similar name to an existing name, he can direct the company to change its name. The impugned Sub-section 5 provides for enforcement of that mandate as follows:-

"If the company does not comply with the direction issued under subsection (1) within fourteen days, the Registrar shall publish a notice in the Gazette to strike the name of the company off the Register."

82. There is need to interrogate Section 58 of the Companies Act in its entirety in order to determine whether it provides room to the 2nd Respondent to hear a targeted company before making a decision to deregister the company. The Section states:-

"Power to direct change of name in case of similarity to existing name

(1) The Registrar may direct a company to change its name if it has been registered by a name that is the same as or, in the opinion of the Registrar, too similar to—

(a) a name appearing at the time of the registration in the Registrar's index of company names; or

(b) a name that should have appeared in that index at that time.

(2) A direction under subsection (1) may be given only within twelve months after the date on which the company concerned was registered or within such extended period as the Registrar may specify in writing in a particular case.

(3) In giving a direction under subsection (1), the Registrar shall specify the period within which the company is required to comply with the direction.

(4) The regulations may further provide—

(a) that no direction is to be given under this section in respect of a name—

(i) in specified circumstances; or

(ii) if specified consent is given; and

(b) that a subsequent change of circumstances or withdrawal of consent does not give rise to grounds for a direction under this section.

(5) If the company does not comply with the direction issued under subsection (1) within fourteen days, the Registrar shall publish a notice in the *Gazette* to strike the name of the company off the Register.

(6) As soon as practicable after striking the name of the company off the Register, the Registrar shall publish in the *Gazette* a notice indicating that the name of the company has been struck off the register.

(7) Upon publication of the notice under subsection (6), the company shall be deemed to have been dissolved.

(8) Despite subsection (7)—

(a) the liability, if any, of every officer and member of the company shall continue and may be enforced as if the company had not been dissolved; and

(b) nothing in this section shall affect the power of the Court to liquidate a company the name of which has been struck off the Register."

83.In my view, the provision provides two steps to be taken by the 2nd Respondent before a company is deregistered. The first step which is found in Sub-section 1 is the issuance of a notice to a company directing it to change its name because of similarity to the name of another company in the index of company names. A reading of Sub-section 3 shows that the 2nd Respondent is given discretion as to the notice period. I suspect the law-maker intentionally left the notice period open knowing that the 2nd Respondent's notice would be in the manner of a notice to show cause. This is the stage at which a company opposed to the directive to change its name will be afforded an opportunity to be heard.

84.The second stage is provided by the impugned Sub-section 5. At this stage, the targeted company will either have refused to comply with the directive or will have been heard by the 2nd Respondent and its case dismissed. It is the final step towards deregistration. It is clear that the 2nd Respondent short-circuited the process and jumped directly to the second stage without issuing a notice to show cause to the Petitioner.

85.In my view, the failure here is not that of the law but that of the implementer of the law being the 2nd Respondent. The right to a hearing is one of the key ingredients of the right to fair administrative action. Where the person tasked with implementing the law fails to comply with the constitutional requirements, it cannot be said that the law is unconstitutional. Every State or public officer is required to infuse the principles of the Constitution in the day to day execution of duty.

86.In the circumstances of this case, I do not agree with the Petitioner that Section 58(5) of the Companies Act, 2015 is unconstitutional. Indeed declaring the said provision unconstitutional will result in an absurd outcome where the 2nd Respondent can direct a company to change its name under Section 58(1) but has no power to implement the directive since that power is donated by Section 58(5). I therefore reject the Petitioner's arguments on alleged unconstitutionality of Section 58(5) of the Companies Act, 2015.

87.The next argument by the Petitioner is that it was not given a hearing before being served with the notice dated 9th January, 2019 and therefore the decision made by the 2nd Respondent is unconstitutional for infringing on its right to fair administrative action as protected

under Article 47 of the Constitution.

88.The respondents and the Interested Party oppose this assertion by arguing that the 2nd Respondent did not violate the Petitioner's rights as guaranteed under Article 47 when he wrote the letter dated 9th January, 2019. They contend that the letter was a mere notification in accordance with Section 58(1) and (3) of the Companies Act and the 2nd Respondent would have undertaken other processes before gazetting the decision to deregister the Petitioner under Section 58(5) and (6) of the Companies Act.

89. According to the respondents, the operation of Section 58 starts with a directive which is a mere notification in accordance with Section 58(1) & (3) of the Companies Act and which undergoes other stages before the engagement of Section 58(5) & (6) of the companies Act. They submit that the gazette notice accords the parties the opportunity to be notified and to show cause why deregistration should not be implemented.

90. Section 4(3)(b) of the Fair Administrative Action Act provides that:-

> **"Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision an opportunity to be heard and to make representations in that regard."**

91. In the case of **Kenya Human Rights Commission & another v Non-Governmental Organisations Co-Ordination Board & another [2018] eKLR** it was held that: -

> **"41. This Court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void."**

92.Furthermore, according to the decision in **Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya [2019] eKLR**:-

> **"72. The common law rules of natural justice consist of two pillars: impartiality (the rule against bias, or *nemo judex in causa sua* – "no one should be a judge in his own cause") and fair hearing (the right to be heard, or *audi alteram partem* – "hear the other side"). The rule against bias divides bias into three categories: actual bias, imputed bias and apparent bias. More recent case law from the UK tends to refer to a duty of public authorities to act fairly rather than to natural justice. One aspect of such a duty is the obligation on authorities in some cases to give effect to procedural legitimate expectations. These are underpinned by the notion that a party that is or will be affected by a decision can expect that he or she will be consulted by the decision-maker before the decision is taken."**

93.The Court further held that:

> **"77. Procedural fairness contemplated by Article 47 and the Fair Administrative Action Act demands a right to be heard before a decision affecting one's right is made. Whether or not a person was given a fair hearing of his case will depend on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case."**

94. The right to be heard being a constitutional requirement does not give the decision-maker the discretion to decide whether or not to hear the person to be affected by the decision. The respondents argue that a final action was yet to be taken by way of publication in the gazette notice. The respondents placed reliance on the decision of this court in **Egal Mohamed Osman v Inspector General of Police & 3 others [2015] eKLR** in support of this argument. I will state without much ado that the facts in the cited case were different since I found that although a Gazette Notice had been issued, the same amounted to a show cause notice as the petitioner therein was going to be heard before further action could be taken.

95.Unlike in **Egal Mohamed Osman** (supra), a decision under Section 58(5) of the Companies Act is final. The provision does not provide any other opportunity for a deregistered company to be heard by the 2nd Respondent. The decision is final and the claim by the respondents that the Petitioner would still have had an opportunity to explain itself is not supported by the law. It is clear from the evidence on record that the 2nd Respondent knew that his decision was final. This is demonstrated by the fact that he had to withdraw the decision of 9th January, 2019 before hearing the Petitioner.

96. In the case at hand, the 2nd Respondent arrived at the decision that the name of the Petitioner was similar to that of the Interested Party without affording the Petitioner an opportunity to explain itself. Once a decision is made without compliance with the provisions of the Fair Administrative Action Act, it runs afoul the constitutional right to fair administrative action. This is what the 2nd Respondent did in this case.

97.The Interested Party further submits that the Petitioner was heard as evidenced by the meetings held between the parties and the correspondences specifically exchanged between the Petitioner and the 2nd Respondent. The Petitioner rejects this argument and asserts that the meetings held after the petition had been filed in an attempt to settle the dispute cannot be equated to the fair hearing which should have been afforded to it before the decision of 9th January, 2019.

98. It seems that the 2nd Respondent attempted to rectify this error in law by holding meetings between parties on 25th January, 2019 and 4th February, 2019 in order to find an amicable solution in light of the objections raised by the Interested Party. It is not disputed that both the

Petitioner and the Interested Party were given an opportunity to make their representations in support of their positions and a final decision was made in favour of the Interested Party's objection. The question is whether these meetings can be considered to have met the threshold of a fair hearing as required by the Constitution and Fair Administrative Action Act.

99.In the case of **Republic v Registrar of Companies Ex Parte Transglobal Freight Logistics Limited [2008] eKLR** the Court appeared to suggest that the right to a hearing would be safeguarded through the court process. The court stated thus:-

> **"The fact of registration through "inadvertence or otherwise" carries with it good faith, but also many sins of commission and omission. How does the Registrar discover that a Company has been registered inadvertently or otherwise" He/she does so by own research on the index of companies, or on notice by an interested Party. Where therefore a question of such inadvertent registration arises and becomes a court dispute, it is incumbent upon the Registrar to have that dispute resolved through the court that is the only way of ensuring that all the parties are heard."**

100. As already stated, the respondents' argument that the final decision had not been made and the petition was filed prematurely lacks merit. The decision by the 2nd Respondent that it was erroneous to register the Petitioner because of similarity of names with the Interested Party was of itself an administrative action that automatically attracted the application of Article 47 of the Constitution and the Fair Administrative Action Act, 2015. The Petitioner therefore had every right to bring this matter to court.

101. In my view, the fact that the 2nd Respondent held collaborative meetings in order to find an amicable solution in the matter does not sway me because, firstly, the meetings were held after the matter was brought to the court's attention. Secondly, the decision complained of was the one made on 9th January, 2019 without a hearing, and not that of 23rd September, 2019. I am persuaded by the decision in **Republic v Registrar of Companies Ex Parte Transglobal Freight Logistics Limited (supra)** where it was stated that:-

> **"I therefore hold the view as expressed by Lord Diplock in the CCSU vs Minister for the Civil Service (supra), that the matter being already in court, the decision-maker could not isolate one party. It was the Applicant's legitimate expectation that he would not only be informed of any moves to take away the matter from the court, but that he would also be heard in controverting the proposed decision."**

102.Since the matter has been brought to court, and it was brought before any other action was taken, it is only fair that the Petitioner is afforded the proper hearing it was not afforded in the first instance. Indeed agreeing with the respondents and the Interested Party that the post-decision hearing qualified as fair administrative action will complicate the matter. I have already found that the 2nd Respondent's decision of 9th January, 2019 violated the Constitution and the Fair Administrative Action Act. I do not think the attempt by the 2nd Respondent to rectify his mistake can sanitise the illegality. There is also the risk that the Petitioner's right of appeal, if any, against the merit of the decision of the 2nd Respondent will be lost as the decision that the respondents seek to validate was made way back in January 2019.

103.I therefore find that the Petitioner's right to fair administrative action under Article 47 of the Constitution of Kenya, 2010 and the Fair Administrative Action Act, 2015 was infringed by the 2nd Respondent when he determined through the letter dated 9th January, 2019 that the Petitioner's name was similar to that of the Interested Party without affording the Petitioner an opportunity to make its representations.

104. Having found that the 2nd Respondent violated the Petitioner's right to fair administrative action, the appropriate remedy is to quash the 2nd Respondent's decision dated 9th January, 2019. Any action taken by the 2nd Respondent in respect of the matter after 9th January, 2019 amounts to nothing. In particular the 2nd Respondent's decision of 23rd September, 2019 does not count as its foundation is the illegitimate decision of 9th January, 2019. The 2nd Respondent must, if he so desires, commence the process of deregistering the Petitioner *de novo.*

105. In light of my finding that the Petitioner's right to fair administrative action was violated, it follows that I should reserve my comments on the arguments concerning the merits of the decision of the 2nd Respondent. In my view, any finding on the third issue identified in this judgement will prejudice the parties and embarrass the 2nd Respondent who will be bound by any finding of this court regarding the correctness or otherwise of his decision to direct the Petitioner to change its name.

106. In the circumstances of this case, I find that the petition dated 21st January, 2019 partially succeeds and orders are issued as follows:-

a) A declaration be and is hereby issued that the 2nd Respondent's decision dated 9th January, 2019 violated the Petitioner's right to fair administrative action guaranteed by Article 47 of the Constitution and the Fair Administrative Action Act, 2015; and

b) The costs of the petition shall be awarded to the Petitioner as against the respondents herein.

Dated, signed and delivered at Nairobi this 3rd day of April, 2020.

W, Korir,

Judge of the High Court