



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 139 OF 2020**

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 24, 27, 47, 165(3)(b), (d)(ii) & (iii) AND 259 OF THE  
CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE JUDICIAL SERVICE ACT, NO. 1 OF 2011**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015**

**IN THE MATTER OF THE NATIONAL COUNCIL ON ADMINISTRATION OF JUSTICE**

**BETWEEN**

**MATATU OWNERS ASSOCIATION .....PETITIONER**

**AND**

**THE NATIONAL COUNCIL ON**

**ADMINISTRATION OF JUSTICE.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**INVESCO ASSURANCE COMPANY LIMITED .....1<sup>ST</sup> INTERESTED PARTY**

**THE CABINET SECRETARY,**

**MINISTRY OF HEALTH.....2<sup>ND</sup> INTERESTED PARTY**

**AND**

**LSK NAIROBI BRANCH .....INTENDED 3<sup>RD</sup> INTERESTED PARTY**

**KINYANJUI NJUGUNA & CO.**

**ADVOCATES.....INTENDED 4<sup>TH</sup> INTERESTED PARTY**

**THE LAW SOCIETY OF KENYA.....INTENDED 5<sup>TH</sup> INTERESTED PARTY**

**RULING**

1. The 3<sup>rd</sup> Interested Party through an application dated 23<sup>rd</sup> June 2020 seek several orders being as follows:-

*a) The Law Society of Kenya, Nairobi Branch, be admitted as an Interested Party in these proceedings and directions be given*

*for purpose of its participation.*

***b) The application be heard in priority to the Petitioner's application dated 21<sup>st</sup> April 2020 and in the alternative the order issued on 20<sup>th</sup> May 2020 be varied to allow the hearing and determination of this application.***

***c) The interim orders issued by the court on 20<sup>th</sup> May 2020 be set aside, varied and/or discharged.***

***d) The costs of this application be borne by the petitioner in any event.***

2. The application is premised on the grounds on the face of the application and supporting affidavit by Rose Wanjala Wavinya sworn on 23<sup>rd</sup> June 2020.

3. Similarly before me is a Notice of Motion by the 4<sup>th</sup> Intended Interested Party M/s Kinyanjui Njuguna & Co. Advocates dated 3<sup>rd</sup> July 2020 seeking the following orders:-

***a) That the firm of Kinyanjui Njuguna & Co. Advocates be admitted to these proceedings as an Interested Party and directions be given for the Petitioner and 1<sup>st</sup> Interested Party to serve their bundle of documents.***

***b) That the ex parte injunction orders in rem given on or about 28<sup>th</sup> May 2020, be set aside, discharged and or vacated unconditionally.***

***c) That this current matter (Milimani HC Constitutional Petition No. 139 of 2020) be consolidated with:-***

***i) Milimani HC Constitutional Petition No. 51 of 2020 (formerly Kisumu HC Constitutional Pet. No. 4 of 2020)***

***ii) Milimani HC Constitutional Petition NO. 394 of 2020 and***

***iii) Milimani HC Civil Case No.558 of 2020 and be placed before one Judge for directions.***

***d) That this matter be struck out in their entirety for want of jurisdiction.***

***e) The costs of the application be borne by Petitioner and 1<sup>st</sup> Interested Party jointly and severally.***

4. The Notice of Motion is premised on the grounds on the face of the application and affidavit in support.

5. Ms Arat, learned Advocate, sought that the National Body of the Law Society of Kenya be enjoined in these proceedings as an Interested Party. She urged she had filed Notice of Appointment of Advocates to appear for the Law Society of Kenya and that she was in the process of filing the application for joinder of LSK as an Interested Party.

6. Mr. Awale, learned Advocate, for the Petitioner did not oppose the joinder of any of the Parties who sought to be enjoined in these proceedings. I therefore order in absence of opposition to joinder of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Proposed Interested Parties, the 3<sup>rd</sup> Proposed Interested Party; the 4<sup>th</sup> Proposed Interested Party and the 5<sup>th</sup> Proposed Interested parties are accordingly joined in these proceedings as follows:-

***a) LSK Nairobi Branch will be the 3<sup>rd</sup> Interested Party***

***b) Kinyanjui Njuguna & Co. Advocates will be the 4<sup>th</sup> Interested party***

***c) The Law Society of Kenya will be 5<sup>th</sup> Interested Party.***

7. Mr. Khisa, learned Advocate, for the 4<sup>th</sup> Interested Party moved the court to set aside, discharge and/or vacate the ex parte orders unconditionally.

8. It is urged the order was obtained, ex parte in rem through forum shopping, deceit, fraud, misrepresentation and non-disclosure of material facts. That the Petitioner and 1<sup>st</sup> Interested Party deliberately joined as Respondents uninterested parties and/or parties who have no stake at all in the instant proceedings, while deliberately excluding and keeping in the dark the Applicant and other parties who are directly and greatly affected by the injunctive orders in rem issued on 20/5/2020. The Ex-parte injunctive order in rem prevent parties who are not parties in this matter from executing lawful decree emanating from unpaid legal fees.

9. When this matter came up for mention for directions the Respondents who had been served with the pleadings did not appear. They have to date not appeared though duly served.

10. The Petitioner in response urges that the Respondents, are proper parties; that they were duly served but failed to file response as directed by court and failed to appear resulting to the ex-parte orders being granted. The Petitioner aver that the orders were not obtained through

deliberate misrepresentation of material facts to the Court. It further asserts that it disclosed to the Court all relevant material facts.

11. A party seeking ex parte orders is under obligation to disclose to the court all relevant material facts in its application; without choosing what to disclose or not to disclose. There is no room or option for silence or taking advantage of the other party who has no opportunity at such stage to reply. A party who chooses to deliberately mislead the court or fails to disclose material facts while seeking an ex parte order is always at a risk of having the ex parte orders set aside or vacated or discharged once it is discovered the orders were obtained through deliberate misrepresentation of facts or non-disclosure of material facts.

12. In the instant petition, it has clearly been demonstrated that the Petitioner failed to disclose, that it is a mere proxy of the 1<sup>st</sup> Interested Party; that the 1<sup>st</sup> Interested Party similarly failed to disclose its relationship with the Petitioner when it appeared before Court. The Counsel appearing for the Petitioner failed to disclose that he was also representing the 1<sup>st</sup> Interested Party in a similar suit and that there were multiple suits pending over the same subject matter in various courts; in which both the Petitioner and the 1<sup>st</sup> Interested Party are parties. Whether the subject matter is the same or not the Petitioner and 1<sup>st</sup> Interested Party had an obligation to disclose the existence of other similar suits to the court.

13. The Petitioner did not disclose to the court that the Respondents; were not interested in this matter, that they were not the only parties likely to be affected by the ex parte orders sought by the Petitioner. The Petitioner and the 1<sup>st</sup> Interested Party deliberately mislead the Court in seeking ex parte orders and failed to disclose various parties and suits relevant to this Petition. They failed to disclose several names of the would be Respondents including the 3<sup>rd</sup> Interested Party with a view to obtain the ex parte orders. The petitioner and 1<sup>st</sup> Interested Party being aware of multiple suits including the suits disclosed by the 3<sup>rd</sup> Interested Party, deliberately failed to disclose such material facts leading to the obtaining the ex parte orders through deliberate misrepresentation.

14. I find that the Petitioner and 1<sup>st</sup> Interested Party are trifling with Courts and abusing the process of Court in seeking and obtaining ex parte injunctive orders in rem which amount to Court's of concurrent jurisdiction issuing conflicting orders.

15. I find that the Petitioner and 1<sup>st</sup> Interested Party obtained the ex parte injunctive orders through deceit and/or non-disclosure of material facts. The Petitioner and 1<sup>st</sup> Respondent deliberately misled the Court and failed to disclose that the Respondents herein were not the real parties that would be affected by injunctive orders and further by failing to disclose of existence of similar matters before various courts. A party who obtains an ex-parte order through non-disclosure of material facts related to a matter before a Court should not be allowed to enjoy the benefits obtained through such an ex-parte order.

16. **Rule 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013;** provides for setting aside, varying or discharging of an order of the Court. It provides that an order issued under Rule 22, may be discharged, varied or set aside by the court either on its own motion or an application by party dissatisfied with the order.

17. Having considered the application and response and circumstances under which the order was obtained. I am satisfied that non-disclosure of material facts by the Petitioner and 1<sup>st</sup> Interested Party at the material time, and further on existence of multiple suits as disclosed in 4<sup>th</sup> Interested Party's application seeking orders of injunction, similar to this one, that it would be in the interest of justice to have the ex-parte orders issued on 20/5/2020 set aside and discharged as by retaining them parties who should have been joined in this matter and have not would be prejudiced.

18. The upshot is that the proposed Interested Parties are joined in these proceedings as follows:-

**a) LSK NAIROBI BRANCH will be the 3<sup>rd</sup> Interested Party.**

**b) KINYANJUI NJUGUNA & CO. ADVOCATES will be the 4<sup>th</sup> Interested Party.**

**c) THE LAW SOCIETY OF KENYA will be the 5<sup>th</sup> Respondent.**

**d) The Ex-parte orders issued on 20<sup>th</sup> May 2020 be and are hereby set aside and discharged or vacated.**

**e) The Interested Parties do file and serve their responses to the application and Petitioner within the next 14 days from the date of this Ruling.**

**f) Costs be in the cause.**

**Dated, Signed and Delivered at Nairobi on this 7<sup>th</sup> day of July, 2020.**

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**J. A. MAKAU**

**JUDGE**