



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 310 OF 2018

WANGILA WALIAULA.....PETITIONER

VERSUS

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

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

1. Through the petition dated 10th September, 2018 and supported by his affidavit, Wangila Waliaula, the Petitioner herein was challenging the agenda of a Special General Meeting (SGM) called by the Law Society of Kenya (LSK/Society), the 1st Respondent, that was slated for 15th September, 2018. His averment was that on 24th March, 2018 members of the 1st Respondent at the Annual General Meeting (AGM) deferred deliberating on the Law Society of Kenya (General) Regulations 2018 (the regulations) to a date which was to be fixed within 6 months when an SGM would be called. It was his averment that the regulations were deferred to allow further refinement and adequate time to deliberate on the draft regulations at an SGM dedicated for that purpose and by a notice dated 15th August, 2018, the 1st Respondent notified its membership of an SGM to be held on 15th September, 2018 at Intercontinental Hotel, Nairobi. Instead, the notice included two new motions for deliberation that were not in the agenda of the AGM of 24th March, 2018. It was therefore his contention that the two motions not being on the agenda of the AGM, could not form part of the agenda for the SGM arising therefrom.

2. It was further his averment that after the notice for the SGM was issued, the 1st Respondent received 8 additional motions and two motions dated 22nd August, 2018 and 24th August, 2018 seeking amendments to the Law Society of Kenya (General) Regulations, 2018. Further, that by a letter dated 22nd August, 2018 concerned members of the 1st Respondent including its immediate former President wrote to the 1st Respondent asking that the motions on development of Gitanga Road plot and closure of International Arbitration Centre (IAC) project be withdrawn as they did not form part of the agenda agreed by members at the AGM held on 24th March, 2018.

3. The Petitioner averred that the regulations were meant to operationalize the Law Society of Kenya Act, 2014 (LSK Act, 2014) had gone through public participation and first came up for adoption and consideration in March, 2017. He averred that a few members of the LSK had generated a rift between the young and senior advocates and he was apprehensive that if the court did not intervene, the LSK Act, 2014 would not be operationalized. It was further his contention that the LSK is Kenya's premier bar for advocates and must conduct its business within the confines of the enabling laws and regulations and in a dignified and noble manner commensurate with the dignity and nobility of the profession. Further, that other than items 1 and 2 of the agenda on the notice dated 15th August, 2018 calling for a SGM, all other motions were unlawful and in contravention of the Constitution, the Judicial Service Act, Fair Administrative Action Act, the Employment Act and the LSK Act, 2014.

4. The Petitioner therefore sought the following orders:-

“A. AN ORDER OF PROHIBITION do issue, prohibiting the 1st Respondent from purporting to table for consideration, deliberation, adoption or otherwise dealing with the motions set out hereunder at the Special General Meeting Scheduled for 15th September, 2018:

i. Motion 1: To seek members' approval for the redevelopment and construction of a modern office block at LSK Gitanga Road Plot dated 15th August 2018;

ii. Motion 2: To seek members' approval to mandate the Council through the Development and Investment Committee to bring the International Arbitration Centre Project to a closure and to consider how best to utilize the South C Plot in the

future dated 15th August 2018;

iii. Motion to bar Commissioners representing the Law Society of Kenya at the Judicial Service Commission from appearing and/or addressing judges and judicial officers dated 19th August 2018;

iv. Notice of Motion - to remove the Chief Executive Officer of the Law Society of Kenya on grounds of gross misconduct and incompetence dated 23rd August 2018;

v. General treatment of advocates in their line of work at gazetted police stations in the Republic of Kenya dated 20th August 2018;

vi. Notice of Motion - seeking for information on liabilities accruing to the Society from the International Arbitration Centre (IAC) Project and to establish the persons responsible and allow members to determine appropriate actions(s) dated 2nd August 2018;

vii. Removal of Allen Waiyaki Gichuhi and Roseline Odede as purported President of the Law Society of Kenya and General Membership Representative respectively dated 16th August 2018;

viii. Notice of Motion - to seek for necessary details and/or information and to request that financial management and procurement policies be developed and approved by members to enable members make informed decisions before LSK undertakes any development dated 20th August 2018;

ix. Streamlining Law Society of Kenya Governance in line with “Mwongozo Code” dated 20th August 2018.

B. A DECLARATION do issue that motions in contravention of Section 31(a) of the Law Society of Kenya Act should not be admitted by the Law Society of Kenya at any SGM.

C. A DECLARATION do issue declaring that Section 43(2) of the Law Society of Kenya Act being a savings and transitional provision is unconstitutional and ultra vires Sections 18(1) and 22 of the Law Society of Kenya Act.

D. A DECLARATION do issue that a motion seeking to remove the Chief Executive Officer of the Law Society of Kenya is unlawful and in contravention of Section 26(6) of the Law Society of Kenya Act

E. A DECLARATION do issue declaring that Section 16 of the LSK Act only empowers the general meeting to approve resolutions and important decisions of the Society provided that they have been lawfully brought to the floor in accordance with Sections 30 and 31 of the Law Society of Kenya Act and are not unlawful or unconstitutional in nature.

F. AN ORDER OF MANDAMUS do issue compelling the 2nd Respondent to make necessary amendments to the Law Society of Kenya Act to provide that no motion that is patently unlawful or unconstitutional should be presented at any meeting for deliberation.”

5. In response, the Attorney General, 2nd Respondent filed Grounds of Opposition dated 20th November, 2018. The grounds are to the effect that the petition does not conform to the principles guiding issuance of an order of mandamus as the Petitioner has not demonstrated existence of any defects or inconsistencies in the LSK Act, 2014 that ought to be rectified; that the petition is bad in law, incompetent, without merit and a gross abuse of the court process; that the Petitioner is inviting the court to enter into the arena of LSK hence the issues raised are non-justiciable; and that the petition does not disclose any right that has been infringed or threatened with infringement as to affect the Petitioner.

6. The 1st Respondent did not file any response to the petition.

7. Mr. Akedi appearing for the Petitioner filed written submissions dated 19th November, 2018, and submitted that three issues arose for determination namely whether Section 43(2) of the LSK Act, 2014 is unconstitutional and contrary to other provisions of the same Act; whether the motion seeking the removal of the Chief Executive Officer of LSK was unlawful and contravened Section 26(6) of the LSK Act, 2014; and whether motions that have been unlawfully tabled at a general meeting can be deliberated upon and passed by members of the society.

8. On whether Section 43(2) of the LSK Act, 2014 is unconstitutional, counsel submitted that vide a letter dated 16th August, 2018 addressed to the Chief Executive Officer, one of the members proposed a motion to have Mr. Allen Waiyaki Gichuhi and Roseline Odede removed as the President of LSK and General Membership respectively based on the provisions of Section 43(2) of the Act. Counsel argued that Section 18 of the LSK Act, 2014 provides for the requirements for election as a member of the Council of LSK and the provisions of Section 43(2) do not therefore apply. Further, that Section 43(2) violates the Constitution, as it is discriminatory contrary to the provisions of Article 27 of the Constitution.

9. To buttress this argument, counsel cited the Ugandan case of **Tinyefuza v Attorney General**, without providing the citation, and submitted that the Constitution has to be read as an integrated whole without one provision destroying the other. He was therefore of the view that if the LSK Act, 2014 intended to have the provisions of Section 43(2) apply, nothing would have been easier than to have the provision under Section 18(2) of the same Act. He further submitted that the motion sought the removal of the President of the Law Society

of Kenya but the same was contrary to the provisions of Section 22 of the Act which states that the removal of the president, vice president or a council member shall be by a general meeting through a vote of at least two thirds of all members present and eligible to vote. It was also his submission that the removal motion contravened the provisions of Section 31(1)(a) of the LSK Act, 2014 as they were not requisitioned by at least five percent of the members of each branch. Further, that the reasons for the removal as stated in the motion is the provision in Section 43(2) of the LSK Act, 2014 which is not among the grounds for removal as stated under Section 22. Finally, that the impugned motions did not form part of the agenda for the SGM as the only agenda for the SGM was deliberation of the regulations, the same having been deferred to the SGM from the AGM held on 24th March, 2018.

10. Turning his guns on Section 43(2) of the LSK Act, 2014, counsel for the Petitioner submitted that Section 43(2) is a savings and transitional clause which operates to modify the operation of a new Act or new legislation. His submission is that such a provision is temporary in nature. He cited the case of **Regina v Secretary of State for Social Security, Ex-parte Britnell [1991] 1WLR 198** in support of this argument. He therefore took the view that Section 43(2) being temporary in nature cannot nullify the principal provisions of the Act and urged the court to find the provision unconstitutional and *ultra vires* sections 18(1) and 22 of the LSK Act, 2014.

11. On the second issue, counsel submitted that the motion seeking to remove the Chief Executive Officer was unlawful and contravened Section 26(6) of the LSK Act, 2014 which strictly reserved the power to remove the Chief Executive Officer to the Council of LSK. He further submitted that the motion contravened Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act which provides for the right to fair administrative action. The case of **Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR** was cited to emphasize the importance of compliance with the constitutional and statutory requirement to strictly adhere to the right to a fair hearing.

12. On whether motions that were allegedly unlawfully tabled at the general meeting could be deliberated upon and passed by members, counsel submitted that Section 16 of the LSK Act, 2014 provides that the general meeting shall be the supreme authority of the society, which shall approve all resolutions, and important decisions of the society. However, motions that contravene the Constitution and any other written law are patently unlawful and should not be admitted to meetings. It was his submission that the legal profession is a noble one and the court is empowered to ensure that it protects such dignity as was emphasized in the case of **Kairie Mbugua v Njoki Mbugua** (citation not provided). He therefore urged the court to allow the petition.

13. On his part, Senior Counsel Nzamba Gitonga appearing for the 1st Respondent filed written submission dated 4th March, 2019. Counsel submitted that the Society held an AGM on 24th March, 2018 and one item being the adoption of the regulations was not discussed and it was resolved that an SGM would be held within six months to deliberate on the regulations. According to him, the AGM did not resolve to have any other matter discussed during the said SGM slated for 15th September, 2018. Counsel for the LSK conceded that the SGM did indeed include other items for deliberation and that various members also filed their own motions for deliberation during the said meeting. It was his submission that the Council of LSK upon further reflection and scrutiny of the Act, its rules and regulations came to the conclusion that it had admitted its own motions and those of its members in error and expunged them from the record. The said motions were therefore not deliberated upon at the SGM. He, however, urged the court to pronounce itself on the issues raised by the Petitioner for avoidance of doubt and in order to guide the business of the LSK in future.

14. As to the constitutionality of Section 43(2) of the Act, counsel for the LSK submitted that the said provision violates the text, tenor and intent of the entire Act and is clearly a draftsman's error which passed unnoticed in Parliament and during assent. It was his submission that the *ejusdem generis* rule does not apply here and a liberal interpretation is applicable as articulated in **Royal Media Services v Telkom [2001] eKLR** where the court held that in a situation of this nature "the generous and purposive" mode of construction is preferable. He submitted that Parliament cannot have intended to create two distinctive, contradictory and conflicting criteria for the elections of the president and members of the Council. It was his submission that Section 18 is more elaborate, comprehensive, reasonable and sensible as it reveals the intention of Parliament. To buttress his argument, counsel cited the cases of **CORD & 2 others v Republic of Kenya [2015] eKLR** and **Law Society of Kenya v The Attorney General & another [2016] eKLR** where the courts categorically stated that any statutory provision which violates, contradicts, contravenes or is contrary to the Constitution will be declared unconstitutional and therefore null and void.

15. Counsel for the 1st Respondent went ahead to submit that the Secretary/Chief Executive Officer of the LSK is not an elected official accountable to members but an employee of the Society accountable to the Council which has the statutory power to hire and fire the Secretary. It was therefore *ultra vires* for a special general meeting to be invited to consider the removal of the Secretary. It was his submission that the mandate to oversee the secretary and the secretariat is vested in the president and the council and any complaints about the same should be directed to them. He therefore urged the court to pronounce itself succinctly on the legal status of the secretary and to clear any doubts regarding the mandate of the 1st Respondent, its organs and statutory provisions.

16. The 2nd Respondent did not file any submissions.

17. Although the substratum of this petition has been overtaken by events, parties have nevertheless asked me to make a decision on the issues raised by the Petitioner. The court is therefore asked to interpret sections 18, 22 and 26 of the LSK Act, 2014 and to declare Section 43(2) unconstitutional.

18. The issues in this petition revolve around the interpretation of a statute and the statement of Mativo, J, which I adopt, in **Jonah Tusasirwe & 10 others v Council of Legal Education & 3 others [2017] eKLR** on the principles of statutory interpretation is apt:-

“Statutory interpretation is the process by which courts interpret and apply legislation. The court interprets how legislation should apply in a particular case as no legislation unambiguously and specifically addresses all matters. Legislation may contain uncertainties for a variety of reasons such as:-

a. Words are imperfect symbols to communicate intent. They can be ambiguous and change in meaning over time.

b. Unforeseen situations are inevitable, and new technologies and cultures make application of existing laws difficult.

c. Uncertainties may be added to the statute in the course of enactment, such as the need to compromise or catering for certain groups.

Therefore, a court must try to determine how a statute should be enforced, but I am alive to the fact that in constructing a statute, the court can make sweeping changes in the operation of the law so this judicial power should be exercised carefully. There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. *Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete.* The implication is that when the language is clear, then it is not necessary to belabour examining other rules of statutory interpretation.

In my view, it is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.”

19. Section 18 of the LSK Act, 2014 provides as follows:-

“18. (1) A person is eligible for election as the president or vice-president if the person-

(a) is a member or former member of the Council: or

(b) is qualified to be a Judge of the Supreme Court.

(2) A person is eligible for election as a member of the Council if the person-

(a) is a member of the Society;

(b) has been [in] practise for at least two years, from the date of admission;

(c) has not been found liable for professional misconduct by the Disciplinary Committee established by the Advocates Act, in the three years immediately preceding the election; and

(d) meets the requirements of Chapter Six of the Constitution.”

20. Section 22 of the same Act states:-

“22. (1) The president, the vice-president and a member of the Council may be removed from office by a general meeting by a vote of at least two thirds of all members present and eligible to vote on grounds of-

(a) inability to perform the functions of office arising from mental or physical infirmity;

(b) suspension or expulsion as provided under the Act;

(c) bankruptcy; or

(d) failure to attend four consecutive Council meetings, without reasonable grounds acceptable to the Council.

(2) Before removal under subsection (1), the president, the vice-president and the member of the Council shall be-

(a) informed of the reasons for the intended removal, in writing;

(b) given an opportunity to put in a defence against any allegations, either in person or through an advocate.”

21. On the removal of the secretary/chief executive officer of the Society, Section 26(6) of the LSK Act, 2014 states that:-

“(6) The secretary may be removed from office by the Council with the support of at least two thirds of the members of the Council and on the following grounds—

(a) inability to perform the functions of office arising from mental or physical infirmity;

- (b) gross misconduct;
- (c) bankruptcy;
- (d) incompetence; or
- (e) desertion of duty.”

22. Section 43 of the LSK Act, 2014 provides as follows:-

“43. (1) The Council of the Society under the repealed Act shall continue in office for their unexpired term and elections held subsequent to the expiry of the term of that Council shall be held under this Act.

(2) A person who is not eligible for election by virtue of having served as a member of the Council under the repealed Act shall not be eligible to vie for election as a member of the Council under this Act.

(3) A person who was immediately before the commencement of this Act serving as the Secretary or an employee of the Society under the repealed Act shall continue in office until the expiry of their term.

(3) Any rule or regulation made, order or directive issued, notification given or any administrative act undertaken under the repealed Act, shall be deemed to have been made, issued, given or undertaken under this Act and shall continue in force and have effect as if it had been so made, issued, given or undertaken under this Act.”

23. Section 43 of the LSK Act, 2014 is clearly identified by the Act as providing the savings and transitional provisions. My reading of sections 18(1) and 43(2) of the LSK Act, 2014 is that while the first section provides for eligibility for election as president and vice-president, the latter section locked out those who had served their terms in the Council prior to the repeal of the Law Society Act, Cap. 18.

24. Section 13 of the repealed LSK Act, Chapter 18 provided for the constitution of the LSK Council as follows:-

“13. Constitution of Council

(1) For the proper management of the affairs of the Society there shall be a Council consisting of a chairman, a vice-chairman and ten other members, all of whom shall be members of the Society.

(2) The chairman, the vice-chairman and the ten other members mentioned in subsection (1) shall be elected biennially by the members of the Society by means of a postal ballot conducted in accordance with regulations made under section 27: Provided that at least one of the members so elected shall be a member of the Society who ordinarily practices in Mombasa and at least two of the members shall be members who do not ordinarily practice in Nairobi or Mombasa.

(3) No member of the Society shall be eligible for election as chairman or vice chairman, and no member of the Society shall put himself forward for such election, unless he is at the time of the election, a member of the Council.

(4) The chairman, the vice-chairman and the other members of the Council shall take office immediately after the ordinary general meeting of the Society, and shall hold office as such until the conclusion of the ordinary general meeting held in the second year after their election: Provided that, in the event of death, resignation, removal or disqualification of the chairman, the vice-chairman or any other member of the Council during his term of office, the vacancy so created may be filled by the Society—

(i) in the case of the chairman or vice-chairman, from persons who are members of the Council; or

(ii) in the case of any other member, from among the members of the Society.”

[Emphasis supplied]

25. By dint of Section 13(3) of the repealed LSK Act, Chapter 18, a person could only vie for the position of chairman or vice-chairman of the LSK if the person was a serving Council member. Section 18(1)(a) of the LSK Act, 2014, however, allows both former members and serving members of the Council of the LSK to vie for the position of the president or vice-president of the LSK. In my view, the mischief which Section 43(2) of the LSK Act, 2014 is meant to address, is to ensure that the door is not opened to those who served as members of Council under the previous legal regime to vie for the presidency, vice-presidency or membership of the Council unless they were members of the Council during the transition to the current law. Any member of the Council of the LSK who was elected under the repealed law but was not in office during the transition cannot vie for the presidency or vice-presidency of the LSK under the new law on the strength of any elective position held under the old law.

26. It is only those who were members of the Council during the transition and those who became members of the Council after the new law came into force who can, by virtue of being former members of the Council, seek to be the president or vice-president of the LSK. That being the case, I find no contradiction between Section 43(2) of the LSK Act, 2014 and Section 18 of the same Act.

27. By enacting Section 43(2) of the LSK Act, 2014, Parliament was making it clear that it did not want Section 18(1)(a) to operate retrospectively. There is therefore no conflict between the two provisions. It is only those who were Council members when the new law came into force and those who have been Council members since then who can vie for the presidency or vice-presidency of the LSK by virtue of having served as Council members. I therefore find no merit in the Petitioner's claim that Section 43(2) of the LSK Act, 2014 is ambiguous or contradictory to the other provisions of the Act.

28. **Halsbury's Laws of England (Lexis Nexis 5th ed., 2012), vol. 96** at page 668 define a savings provision as "a provision the intention of which is to narrow the effect of the enactment to which it refers so as to preserve some existing legal rule or right from its operation". At page 694 the same treatise defines a transitional provision as a provision that "regulates the coming into operation of an enactment and (where necessary) modifies its effect during the period of transition". In my view therefore, the function of a transitional provision is to make special provision for the application of legislation to circumstances that existed at the time the legislation came into force. In enacting Section 43(2), Parliament must have been aware that under the previous regime only those who were serving as Council members at the time of an election could offer themselves for election as chairman or vice-chairman. The provision was therefore enacted so as to preserve that position so that those who served as Council members under the old law and were not in office during the transition could not offer themselves for election as president or vice-president under the new law unless they had since been elected as members of the Council after the new law had come into force. Apart from claiming that Section 43(2) contradicts the other provisions of the Act, the Petitioner did not demonstrate why Section 43(2) of the LSK Act, 2014 should be declared unconstitutional. The Petitioner's assertion that Section 43(2) of the LSK Act, 2014 is unconstitutional is therefore found to be without any merit.

29. Section 22 which deals with the removal of the president, vice-president and a member of the Council and Section 26(6) which provides for the removal of a secretary of the Society are self-explanatory and I do not know what other interpretation the Petitioner expects from this court. In simple terms, the president or vice-president or a member of the Council can only be removed pursuant the grounds provided in Section 22(1) of the LSK Act, 2014. What happens where a person was not eligible to vie for the position? Section 22 does not provide the answer. Since that particular issue is not before this court, I will say no more. Before a person is removed from the membership of the Council, and the president and vice-president are members of the Council, Section 22(2) requires that he or she should be given an opportunity to defend himself or herself. How this can be achieved in a general meeting is another question altogether.

30. On the other hand Section 26(6) of the LSK Act, 2014 is very clear that the secretary/chief executive officer of the Society can only be removed by the Council. I do not think there is any other useful thing to add to this plain language of the lawmaker.

31. The Petitioner prays for several reliefs among them a declaration that unlawful or unconstitutional matters should not be tabled in general or special general meetings. Granting such an order will tie the hands of the leadership of the LSK and will undermine debates and proceedings in the general and special general meetings. The Society is an association of lawyers and its membership should be trusted to determine its affairs without being prohibited from considering certain matters. The training and experience of the LSK members should make them know what is unconstitutional and what is constitutional. LSK members are expected to know what motions to pass and which ones to reject.

32. The reasons already stated as to why no orders should issue in favour of the Petitioner applies to the prayer for the issuance of an order of mandamus compelling the Attorney General of the Republic of Kenya to make amendments to the LSK Act, 2014 to provide that no motion that is patently unlawful or unconstitutional should be presented at any meeting for deliberations. Furthermore, no averment was made that the 2nd Respondent had failed in the performance of his duties to warrant the issuance of an order of mandamus. In fact, the Petitioner did not adduce any evidence to show that he had written to the Attorney General asking him to amend the LSK Act, 2014 and he had refused to do so. An order of mandamus can only issue where a public officer or public entity has refused to perform a public duty despite being asked to do so by the applicant. It is therefore clear that in the circumstances, the Petitioner has not met the conditions for the issuance of an order of mandamus.

33. In light of what I have stated in this judgement, it follows that this petition is without merit. The Petitioner has not persuaded the court that any of the reliefs sought should be granted. As such, the petition is dismissed.

34. Considering that the 1st Respondent supported the petition, and taking into account that the 2nd Respondent, apart from filing grounds of opposition, did not actively participate in the proceedings, I direct each party to meet own costs of the petition.

Dated, Signed and Delivered at Nairobi this 3rd day of October, 2019.

W. Korir,

Judge of the High Court