



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 172 OF 2018**

**IN THE MATTER OF AN APPLICATION BY FOR LEAVE FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, THE CIVIL PROCEDURE ACT, CAP 21 OF THE LAWS OF KENYA AND FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2015**

**BETWEEN**

**MAJIMBO GEORGIADIS .....APPLICANT**

**VERSUS**

**LAW SOCIETY OF KENYA , NAIROBI BRANCH.....1<sup>ST</sup> RESPONDENT**

**KANJAMA CHARLES NJIRU.....2<sup>ND</sup> RESPONDENT**

**PAULA NYAGUTHIE NJUGUNA.....3<sup>RD</sup> RESPONDENT**

**INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA...1<sup>ST</sup> INTERESTED PARTY**

**CHIGITI JOHN MUGWIMI.....2<sup>ND</sup> INTERESTED PARTY**

**OWUOR FELIX ODHIAMBO.....3<sup>RD</sup> INTERESTED PARTY**

**KITAA DORCAS SHIKUKU.....4<sup>TH</sup> INTERESTED PARTY**

**KWESIGA ARNOLD.....5<sup>TH</sup> INTERESTED PARTY**

**FITZWANGA NAKILI.....6<sup>TH</sup> INTERESTED PARTY**

**CATHERINE NJERI NGUNJIRI.....7<sup>TH</sup> INTERESTED PARTY**

**GAD GATHU.....8<sup>TH</sup> INTERESTED PARTY**

**WANGILA ALEX WALILAULA.....9<sup>TH</sup> INTERESTED PARTY**

**RULING**

**The Application**

The application before the Court is a Chamber Summons dated 25<sup>th</sup> April 2018 filed in Court on 26<sup>th</sup> April 2018. It came up for ex-parte hearing on 27<sup>th</sup> April 2018, and on that date, the judges in the Judicial Review Division were not sitting due to other official duties. The duty Judge thereupon directed that it be served on the Respondents and Interested Parties and be mentioned today, the 2<sup>nd</sup> May 2018, before a Judge in the Judicial Review Division for directions. Upon mention, this Court directed that the application be heard *interpartes* today by way of oral submissions at 12.30 pm, and after the hearing proceeded to reserve this ruling.

The Applicant is an Advocate of the Law Society of Kenya and states that he is a paid up member of the Law Society of Kenya. The 1<sup>st</sup> Respondent is a branch and constituent organ of the Law Society of Kenya and is so established under Law Society of Kenya Act, the 2<sup>nd</sup> Respondent is an Advocate of the High Court of Kenya and Chair of the 1<sup>st</sup> Respondent, while the 3<sup>rd</sup> Respondent is an Advocate of the High Court of Kenya and a council member of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Interested Party on the other hand is a professional body established under Cap 531 of the laws of Kenya to regulate Certified Public Accountants in Kenya, while the 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties are Advocate of the High Court of Kenya practicing in Nairobi County.

The Applicant is seeking the following orders in the Chamber Summons dated 25<sup>th</sup> April 2018:

- 1. This Application be and is hereby certified urgent.**
- 2. The Applicant be and is hereby granted leave to apply for an Order of Certiorari to remove into the High Court and quash the decision of the Respondents made on 19<sup>th</sup> January, 2018 declaring the 3<sup>rd</sup> Respondent and the 7<sup>th</sup> to 9<sup>th</sup> Interested Parties elected unopposed, for the offices of Vice Chair and Council Members respectively.**
- 3. The Applicant be and is hereby granted leave to apply for an Order of Certiorari to remove into the High Court and quash the decision of the Respondents made on 19<sup>th</sup> April, 2018 appointing the 2<sup>nd</sup> to 6<sup>th</sup> Interested Parties as Members of the 1<sup>st</sup> Respondent's Independent Elections Committee.**
- 4. The Applicant be and is hereby granted leave to apply for an Order of Certiorari to remove into the High Court and quash the decision of the Respondents made on 19<sup>th</sup> April, 2018 appointing the 1<sup>st</sup> Interested Party to conduct elections of officials of the 1<sup>st</sup> Respondent on 3<sup>rd</sup> and 4<sup>th</sup> May, 2018 using the ICPAK digital platform.**
- 5. The Applicant be and is hereby granted leave to apply for an Order of Prohibition to prohibit the Respondents from proceeding with the elections of officials of the 1<sup>st</sup> Respondent in a manner and by a body not approved by the general meeting of the 1<sup>st</sup> Respondent.**
- 6. An Order be and is hereby made that the leave granted do operate as stay of the decision of the Respondents made on 19<sup>th</sup> January, 2018 declaring the 3<sup>rd</sup> Respondent and the 7<sup>th</sup> to 9<sup>th</sup> Interested Parties elected unopposed, for the offices of Vice Chair and Council Members respectively, stay of the decision of the Respondents made on 19<sup>th</sup> April, 2018 appointing the 2<sup>nd</sup> to 6<sup>th</sup> Interested Parties as Members of the 1<sup>st</sup> Respondent's Independent Elections Committee and stay of the decision of the Respondents made on officials of the 1<sup>st</sup> Respondent on 3<sup>rd</sup> and 4<sup>th</sup> May, 2018 using the ICPAK digital platform.**
- 7. The costs of this Application be provided for.**

The main grounds for the application in summary are that the term of the 2<sup>nd</sup>, 3<sup>rd</sup> Respondents and the 3<sup>rd</sup> Interested Party, as well as of the entire Council of the 1<sup>st</sup> Respondent lapsed on 24<sup>th</sup> March, 2018 when new Council Members of the Law Society of Kenya (LSK) were sworn into office. Further, that elections of Chair of the 1<sup>st</sup> Respondent and of its Council Members are scheduled for 3<sup>rd</sup> May, 2018 after having been posted from 22<sup>nd</sup> March, 2018 for want of adequate preparation.

However, that In the meantime, on 19<sup>th</sup> January, 2018 the Respondents declared the 3<sup>rd</sup> Respondent and the 7<sup>th</sup> to 9<sup>th</sup> Interested Parties elected unopposed, for the offices of Vice Chair and Council Members respectively, and on 19<sup>th</sup> April, 2018 they appointed the 2<sup>nd</sup> to 6<sup>th</sup> Interested Parties as Members of the 1<sup>st</sup> Respondent's Independent Elections Committee.

It is the Applicant's case that the Respondents were not authorized by the Law Society of Kenya Act No. 21 of 2014 or members of the 1<sup>st</sup> Respondent to appoint the 2<sup>nd</sup> to 6<sup>th</sup> Interested Parties as Members of the 1<sup>st</sup> Respondent's Independent Elections Committee, and that they acted in excess of jurisdiction or power conferred upon them, acted unreasonably, irrationally, violated the legitimate expectation of members of the 1<sup>st</sup> Respondent and abused their power.

In addition, that the Respondents were not authorized by the Law Society of Kenya Act No. 21 of 2014 or members of the 1<sup>st</sup> Respondent to appoint the 1<sup>st</sup> Interested Party to conduct elections of officials of the 1<sup>st</sup> Respondent on 3<sup>rd</sup> and 4<sup>th</sup> May, 2018 using the 1<sup>st</sup> Interested Party's digital platform, and acted in excess of jurisdiction or power conferred upon them, with an ulterior motive or purpose calculated to prejudice the rights of members and other candidates, and failed to take into account relevant considerations.

The Applicant contended that the 1<sup>st</sup> Respondent is a constituent organ of LSK and the body responsible for the conduct of its elections must be one proposed by the 1<sup>st</sup> Respondent's Council Members and approved by the 1<sup>st</sup> Respondent's members in a general meeting. However, that no such proposal was made by the 1<sup>st</sup> Respondent's Council or approved by the 1<sup>st</sup> Respondent's members.

Lastly, it is also the Applicant's case that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are candidates in the election, whilst the 2<sup>nd</sup> Respondent is a member of the 1<sup>st</sup> Interested Party. Thus, that there cannot be any impartiality in the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents decision to recruit the 1<sup>st</sup> Interested Party to conduct elections.

These facts were reiterated during submissions and reliance was on the Law Society of Kenya (General) Regulations of 1962 as the applicable regulations for elections held by the 1<sup>st</sup> Respondent, as the regulations required for this purpose by section 41(j) of the Law

Society of Kenya Act had not been made. Dr. John Khaminwa S.C., Mr. Nabutola Wanjala and Mr. Sylvester Mbithi for the Applicants urged that the procedure of secret ballot in the Law Society of Kenya (General) Regulations of 1962 has not been followed.

Various emails and notices sent by the 1<sup>st</sup> Respondents to its members as well as correspondence between the members and the 1<sup>st</sup> Respondent were also cited as evidence of the irregular procedure of election by way of a digital platform that is being employed by the 1<sup>st</sup> Respondent; of the complaints and objections to the said process; and of the alleged conflict of interest on the part of the Respondents and Interested Parties who are candidates, members of the 1<sup>st</sup> Respondent's Independent Elections Committee or who have already been declared elected unopposed.

The 1<sup>st</sup> Respondent filed a Statement of Grounds of Opposition dated 2<sup>nd</sup> May 2018 and a replying affidavit sworn on the same date by its Chairman, Charles Kanjama. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent also filed Grounds of Opposition dated 2<sup>nd</sup> May 2018. The gist of the Respondents' and Interested Parties' arguments and submissions as urged by Mr. Paul Muite SC and Mr. Cohen Amanya for the 1<sup>st</sup> Respondents and 1<sup>st</sup> to 6<sup>th</sup> 9<sup>th</sup> Interested Parties; Mr. Kanjama for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, and Mr. Wangila for the 9<sup>th</sup> Interested Party are as follows.

First, that this matter was listed today as a mention and relying on various judicial decisions, it was submitted that it could not proceed to hearing today without consent of all parties. Furthermore, that they objected to the hearing when the matter was first mentioned.

Second, that the Applicant is not a candidate in the elections of the 1<sup>st</sup> Respondent's council scheduled for 3<sup>rd</sup> and 4<sup>th</sup> May 2018, and therefore has no vested rights that will be prejudiced, and hence, no locus to bring the application. Related to this argument was the contention that the elections concern about 7000 members of the 1<sup>st</sup> Respondent who are not parties in this application and who will be prejudiced if the elections are stayed. Reliance was in this regard placed on the decisions in **Ntusero Naimau Tiye vs Jubilee Alliance Party & 3 Others (2015) e KLR** and **Nelson Andayi Havi vs Law Society of Kenya & 3 Others,(2018) e KLR**

Third, that the Applicant has not exhausted the alternative remedies provided by the Law Society of Kenya (Arbitration) Regulations of 1997 in line with section 9 (2) and (3) of the Fair Administrative Act. Fourth, that there are contested facts as to the process used in the elections, that make the application not amenable to judicial review. The Respondents relied on the chronology of events stated in the Replying Affidavit filed by the 1<sup>st</sup> Respondent, and cited the decision by the Court of Appeal sitting at Malindi in **Kenya Revenue Authority & 2 Others vs Darasa Investments Civil Appeal No. 24 of 2018**. They also challenged the admissibility of some of the electronic documents relied upon by the Applicant.

Lastly, that the Applicant is also guilty of inordinate delay in bringing the application as the process of elections for the 1<sup>st</sup> Respondent's council commenced in December 2017.

### **The Determination**

I will first address the preliminary issue raised as to whether the Chamber Summons application is properly before this Court. While the application was cause listed and did first come for mention earlier today, the Court during the mention and after hearing the parties, did give directions that it be heard *inter partes* later in the day. It is indeed the general rule of practice that a matter should not be heard when listed for a mention, but nevertheless, there are exceptions to this rule when the circumstances merit departure.

In the present application the elections by the 1<sup>st</sup> Respondent are scheduled to commence tomorrow, and it is in the interests of all the parties affected to know the position as regards the said elections in good time. More importantly however, this Court has inherent powers granted to it under the Constitution in Article 159 and sections 1A, 1B and 3A of the Civil Procedure Act to give such directions and orders as are necessary and expedient in the interests of justice, and this is one such case. This Court cannot in the present circumstances abdicate its responsibility and duty to decide on the application in a timely, just and efficient manner.

The substantive issues that require to be determined is whether an arguable case has been shown for leave to be granted to the Applicant to commence judicial review proceedings, and if so whether the leave should operate as a stay. The applicable law in this respect is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. On whether leave once granted should operate as a stay, *Order 53 Rule 1(4)* of the Civil Procedure Rules further provides as follows:

**“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”**

The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

**“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for**

granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

Matavo J. expounded on the Applicant's burden of proof in this respect in Aden Noor Ali. vs the Independent Electoral Boundaries Commission and Another as follows:

**At the leave stage an applicant must show that:- (i) he/she has 'sufficient interest' in the matter otherwise known as *locus standi*; (ii) the applicant must demonstrate that he/she is affected in some way by the decision being challenged; (iii) An applicant must also show that he/she has an arguable case and that the case has a reasonable chance of success; (iv) the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law; (v) the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function. All these tests are important and must be demonstrated.**

The decision whether or not to grant a stay pursuant to leave is also an exercise of judicial discretion and that discretion must be exercised judiciously. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of the proceedings have been laid down in various decisions. Firstly, in George Philip M Wekulo vs. The Law Society of Kenya & Another **Kakamega HC Misc. No. 29 of 2005** it was held that if the decision sought to be quashed has been fully implemented leave ought not to operate as a stay, as there is nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted.

Secondly, it was held in Jared Benson Kangwana vs. Attorney General, Nairobi **HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. Similarly, Maraga J. (as he then was) was of the following view in this regard in Taib A. Taib vs. The Minister for Local Government & Others **Mombasa HC Misc. No. 158 of 2006**:

**"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."**

In the present application, the Applicant contends that he has sufficient interest in the elections by the 1<sup>st</sup> Respondent scheduled for 3<sup>rd</sup> and 4<sup>th</sup> May 2018 as a voter. However, he has not shown any evidence of his registration as such, and how his rights to vote have been or are likely to be infringed upon by the Respondents and Interested Parties. The Applicant is also not a candidate in the said elections. It is thus not possible for this Court to find that he is prejudicially affected by the impugned decisions made by the Respondents and Interested Parties. The Court has also taken into account the fact that there are other members of the 1<sup>st</sup> Respondent who are not parties to this application, and who may be prejudicially affected by the orders he seeks.

The main ground presented by the Applicant for leave is that the procedure applied by the 1<sup>st</sup> Respondent in conducting the said elections is not based on any known law. The 1<sup>st</sup> Respondents and Interested Parties however argue otherwise. They also argue that the issues presented by the Applicant are not appropriate for determination in judicial proceedings.

This Court in this respect is of the view that there are alternative remedies that exist to address any illegality of the elections scheduled to be held by the 1<sup>st</sup> Respondent or the processes leading to the said elections, and judicial review proceedings are not the appropriate proceedings. This is mainly for the reason that there are disputed facts raised by the parties as to the nominations and elections processes, that have to be subjected to a process of examination to establish their veracity or otherwise, before reaching a decision as to whether the applicable procedure was applied. In other words, in addition to determining what the applicable law is and whether it was applied, the Court will first have to make a decision as to which of the facts as alleged by the parties are the correct facts.

In particular, the Applicant and Respondents have differing accounts as to the date the decisions that are being challenged were made and communicated, whether the decisions made by the Respondents as regards nomination and voting method were agreed upon by the members and/or candidates, and the various steps taken by the Respondents in holding the elections. The issues raised therefore are mixed issues of law and contested facts, and are not amenable to judicial review proceedings.

This Court is mindful of the purpose of judicial review proceedings, which is to address defects in decision making processes by public bodies, and not to deal with the merits of the case. It therefore follows that where an Applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties, the Court would not have jurisdiction in a judicial review proceeding to determine such a matter. In my view, this is one such matter.

In addition, the appropriate procedure of elections that ought to have been applied by the 1<sup>st</sup> Respondent is an internal issue limited to its membership, that ought to have been first subjected to the 1<sup>st</sup> Respondent's internal dispute resolution methods, and one such a method has been disclosed by the Respondents which is the procedure provided for in the Law Society of Kenya (Arbitration) Regulations of 1997. I

also agree with the holding of Mativo J. in **Nelson Andayi Havi vs Law Society of Kenya & 3 Others (supra)** in this respect. No exceptional circumstance has been shown by the Applicant to depart from the provisions of section 9(2) and(3) of the Fair Administrative Act which requires exhaustion of such alternative remedies, and on the contrary he has expressly relied that the internal procedures of the LSK for this case.

Lastly, as stated earlier, the persons affected by the 1<sup>st</sup> Respondent decisions will still have the opportunity to challenge the decision in the appropriate fora if the elections proceed to be held.

In the premises, I find that the Applicant's Notice of Chamber Summons dated 25<sup>th</sup> April 2018 is not merited, and it is accordingly dismissed with costs to the Respondents and Interested Parties.

Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MAY 2018**

**P. NYAMWEYA**

**JUDGE**