REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 1178 OF 2007

INVESCO ASSURANCE CO. LTD.....PETITIONER

AND

THE COMMISSIONER OF INSURANCE……1ST RESPONDENT

THE ATTORNEY GENERAL……2ND RESPONDENT

AND

CITED THIRD PARTIES

AND OTHER THIRD PARTIES IN ANCILLARY SUITS

RULING

Applicant's Case

1. By a Notice of Motion dated 3rd October, 2013, the 1st Respondent herein, **The Commissioner of Insurance**, has moved this Court substantially seeking an order that this Court be pleased to review and set aside the orders made herein on 22nd June, 2010 and that this petition be heard on its merits. There is also a prayer for provision for costs.

2. According to the applicant, it received information from its advocates in the month of July, 2010 that a consent order was recorded between the petitioner's advocate one **Gichuki King'ara** and **Ndumu Kimani** representing decree holders in some 25 ancillary suits to the effect that the said decree holders be excluded from the list contained in the affidavit in support of the petition.

3. According to the affidavit in support of the petition which affidavit I must state with due respect was rather casual in its averments, it would seem that when the said consent was recorded, the applicant herein was represented by an advocate, one **Ms Makila**, from the firm of L. M Kambuni & Associates. On the day when the consent was recorded, apparently **Ms Makila** informed the Court that she neither had instructions to support nor oppose the petition.

4. The applicant however contends that those were not the instructions given to the applicant's advocates and that this position is not supported by the past conduct of the applicant in similar matters. It was however contended that the effect of the consent recorded herein was to prejudice persons who were not parties to the petition who were excluded from the terms of the consent. It was however contended that the 1st Respondent had been discharged from the proceedings and was not a party to the said consent and only became aware of the terms thereof when inquiries were made by the Law Society of Kenya, which

Society alleged that he petitioner was relying on the said consent issued on 22nd June, 2010 to avoid payment of lawful decrees of the Court.

5. The applicant contended that the averments of **Ms Makila** to the effect that she had no instructions to either support or oppose the petition were not pursuant to the instructions given by the applicant.

6. The petitioner therefore contended that the purport and intent of the said consent orders were to prejudice persons who were not parties thereto and were fraught with fraudulent intention in order to avoid paying claims and particularly lawful decrees issued by Courts of competent jurisdiction. Further the said consent orders were issued *per in curium* and are contrary to public interest and policy.

7. While appreciating that there is potential for fraudulent insurance claims, the extent of which it is not possible to determine, particularly with respect to claims for personal injuries filed under Cap 405, the applicant averred that it was irregular and unjustifiable for the petitioner to use the orders of 22nd June, 2010 to cushion itself and enjoy the luxury of determining whether, when, how and to whom to pay decretal sums, in complete contravention of the law and public interest.

8. The applicant was of the view that the process of challenging the fraudulent claims particularly where there are lawful decrees of the Court should be as provided under the law.

Interested Parties' Case

9. The interested parties herein supported the application. According to them the decrees which were obtained were properly and lawfully obtained. It was contended that the petitioner's insured were ably represented at the hearing of the suits which gave rise to the decrees and that the said decrees have never been challenged.

10. The interested parties averred that the petitioner failed to serve the hearing notice for 22nd June, 2010 hence they could not be represented during the proceedings of that day hence the said orders are null and void *ab initio*.

11. It was therefore contended that the orders made herein on 22nd June, 2010 were irregularly and unprocedurally obtained hence it would be in the interest of justice that the orders sought herein be granted.

Petitioner's Case

12. According to the Petitioner, service was directed to be effected by way of advertisement which was done on 29th November, 2007. Thereafter about 40 lawyers attended the Court representing the interested parties and all those who wanted to be heard were given an opportunity of being heard. The petitioner averred that at that time the applicant herein supported the petitioner. According to the petitioner, it is not the rule that everybody must be heard but the rule is that all persons be given an opportunity of being heard.

13. There were other issues raised on behalf of the petitioner in which the authenticity of the claims was brought into issue. It was however contended that subsequent to the issuance of the order herein, the petitioner sifted through the claims and those found genuine were settled.

14. It was the petitioner's case that if the orders sought herein are granted the petitioner would be prejudiced and may fold up once more.

15. The petitioner also challenged the competency of the application alleging that whereas what was obtained was a decree, the applicant is seeking to set aside the order. On the other hand the petitioner contended that it did not obtain a permanent order but that its order was to await the investigations by the police which investigations are still ongoing. The petitioner on the other hand urged the Court to give a

window for the settlement of genuine claims.

Determination

16. I have considered the issues raised in this application.

17. Although some of the parties herein dwelt on the merits of the petition, what is sought in the instant application is an order setting aside the consent orders issued on 22nd June, 2010.

18. It is important for the proper understanding of these proceedings to give a brief background on the proceedings that provoked the instant application. On 15th February, 2010, **Mr King'ara** represented the petitioner while **Mr Njuguna** and **Ms Makila** represented the Respondents. The interested parties were not represented though the Court was informed that they had been served by way of an advertisement. As the 2nd respondent intended to respond to the petition the matter was stood over to 23rd March 2010 for hearing of the petition. On the said date, the matter was placed before the Deputy Registrar and in the presence of **Mr Kingara**, **Ms Makila** and **Mr Gichovi** for the petitioner and the respondents respectively, the matter was stood over to 22nd June, 2010.

19. On 22nd June, 2010, **Mr King'ara** appeared for the petitioner while **Mr Kimani** and **Ms Makila** appeared for the Respondents. **Ms Makila** and **Mr Muiruri** informed the Court that the Respondents did not intend to oppose the petition and it is thereafter that a consent was recorded between **Mr King'ara** and **Mr Kimani**. The terms of the said consent were as follows:

> ***"By consent, the petition dated 29/10/2007 be allowed and that the names of all those cited in the notice of appointment of Ndumu Kamau & Company Advocates dated 19/11/2007 be excluded from the list contained in the affidavit of Julius Wokabi sworn on 19/10/2007 in support of the petition. Each party to bear its own costs."***

20. What followed was the formal extraction of the order on 14th November, 2011.

21. From the foregoing it is clear that the interested parties were not parties to the proceedings. Even if this Court was to find that the applicant herein was party to the consent, which it was not because its counsel simply informed the Court that it was not opposing the petition, there is a distinction between a party who does not oppose legal proceedings and one consenting to the orders being granted. Circumstances such as in the instant case arose in **Republic vs. Registrar of Societies ex-Parte Justus Nyangaya & 3 others [2005] eKLR** where a consent was recorded in judicial review in which there was an applicant, respondent and interested party. In setting aside the consent recorded by the Deputy Registrar therein, **Nyamu, J** (as he then was) expressed himself as follows:

> **"The applicants claim that the original applicants are aware of the fact that the applicants had become parties firstly because they were served with the orders enjoining them and secondly through Boro Gathuo they had filed a replying affidavit on 5th November, 2002. In para 3 and the whole of the affidavit there is a clear acknowledgement that the IPs were interested parties and were part of the proceedings. Similarly the Registrar General by an affidavit sworn by Ms Catherine Nyiha, a Senior Assistant Registrar of Societies on 17th December, 2003 did respond to the IPs application and she too had knowledge of the IPs and the fact that they were part of the proceedings. Both affidavits it is contended show that at all times the original applicants and the respondent were aware that the IPs were contesting the proceedings. On 29th October 2003 a consent letter was filed in court. The consent letter was dated 25th October, 2003. Although the consent letter was signed by the original applicants and the respondent it was not signed by the IPs. It was also not shown to the IPs. I have considered the positions taken by all the parties as outlined above including the submissions of counsel together with the written skeleton arguments. The court after a careful scrutiny of the reasons given by the applicants counsel in his lengthy arguments number 1 to 22 as outlined above has been sufficiently persuaded that the reasons given in support of the**

arguments are convincing. On the other hand the brief arguments advanced by the counsel for the original applicants and the respondent in support of the consent order are off the mark in terms of the applicable law and are also factually incorrect. Firstly the changes effected pursuant to the consent order were the ones the applicants were opposed to and were entitled to a hearing and determination. Secondly once proceedings in the nature of Judicial review are filed it is not the parties who give relief but the court."

22. The learned Judge then proceeded to deal with the parties to judicial review proceedings and their respective roles and expressed the opinion that:

"It is significant to consider who are the parties to a Judicial review application. One of the situations is where there is an applicant or applicants and a respondent or respondents. The second situation is where there is an applicant or applicants, a respondent or respondents and an interested party or parties. The facts of this particular case fit the second category. It is common ground that there were interested parties in this case. It was therefore necessary for both the court and all the other parties at all times to recognize their presence until the determination of the matter in question. The position as outlined has the authoritative support of *THE WHITE BOOK VOL 2002 at page 152* as cited by the learned counsel for the applicants Mr Pherozee Nowrojee. The relevant portion 54.1.13 reads:

> **'The parties to a Judicial review claim will be the claimant, the defendant and interested parties. The defendant will usually be the public body whose decision, action or failure to act is under challenge. An 'interested party' is defined in rule 54 1(1) (f) as any person 'who is directly affected by the claim.' Under the former RSC Order 53 r 5(3) application for Judicial review had to be served on persons "directly affected.'**

In the Kenyan context it is Order 53 rules 3 and 4 which requires service on persons directly affected. I therefore find that the Kenyan situation on parties to be similar to the current situation in the United Kingdom notwithstanding the repeal of their O 53 by the new O 54."

23. The learned Judge then proceeded to deal with the matter in the following manner:

"Since it is common ground that the IPs were not parties to the consent letter and order and yet they were affected parties how does this affect the consent letter and order…On this I find that in the circumstances of the case before me since the IPs were parties to the proceedings in law and they were deliberately excluded from the consent letter/order or judgment the very act of excluding them is a fraudulent act taking into account that the exclusion was clearly aimed at conferring benefits to the excluding parties and denying the IPs of the same benefits. Similarly the exclusion of the IPs if not done fraudulently does in the circumstances constitute negligent misrepresentation to say the least and an unforgivable mistake as well… The oversight on the part of the Deputy Registrar was either deliberate, negligent or by mistake and all these lapses entitle the aggrieved party to avoid the consent order. Lord Herschell in the celebrated case on misrepresentation *DERRY v PEEK 1889 14 AC 389 said "if a representor deliberately shuts his eyes to the facts or purposely abstains from their investigation, his belief is not honest and he is just as liable as if he had knowingly stated a falsehood"*

24. In the Court's view:

"Neither the Registrar of societies nor the Deputy Registrar can oust the Court's jurisdiction to determine matters referred to it. When the application for leave was filed on 27th September, 2002 and leave granted it was granted on the strength of the statement filed on the same day and the relief sought… However the consent recorded and in particular orders (a) (b) and (c) are completely outside the ambit of the relief sought. Thus the orders are not in the nature of mandamus directed at the registrar of Societies. The orders are not in the nature of mandamus at all and are therefore outside the scope of Judicial review remedies at

all or as claimed in the proceedings the consent order was purporting to settle. The orders disregarded the IPs who were part of the proceedings and literally took away offices from them without any determination by a Judicial review court. It is not possible in law for a consent order or letter to confer Jurisdiction on the Deputy Registrar where it is not specifically conferred on him. In other words jurisdiction cannot be conferred by consent. It is trite law that jurisdiction to grant Judicial review remedies is vested in the court (Judges), and they cannot delegate the power to grant those remedies to a Deputy Registrar or any other person this being a supervisory jurisdiction specifically conferred on them by statute – ***see HALSBURY'S LAWS OF ENGLAND 3rd Edition vol II page 119 and para 222:***

> **'Parties cannot by agreement or otherwise confer jurisdiction upon or oust the jurisdiction of a court'."**

Surely the effect of the consent judgment or order was to oust the jurisdiction of the court by virtue of an agreement by some of the parties to make the matter worse. Even if all the parties had agreed to oust the court's jurisdiction I find and hold that they could not do so. The said consent judgment/order is null and void for this reason as well."

25. According to the Court:

"a party or parties cannot seek relief that is outside the statement unless leave to amend the statement is sought and granted pursuant to O 53 rule 4(2) and no such amendment or leave was sought in this case. It follows that the consent judgment or order flies in the face of O 53 rule 4(1) of the Civil Procedure Rules which is worded in mandatory terms. The consent is not valid for this reason as well."

26. It was further held that:

"It is clear from the facts outlined above that the original applicants counsel kept away from the court material facts concerning the settlement which had been worked on behind the IPs back on 29th September, 2003… Since the IPs were parties to the proceedings and were deliberately kept out of the consent judgment or order by the other parties, the effect of this must be the same as that of a party to a contract which he is entitled to rescind and once he challenges such a consent judgment/order in court for keeping him away the effect must be to restore the parties position to that prevailing before the consent was entered into – parties in status quo ante. Lord Atkinson in the case of ***ABRAM STEAMSHIP COMPANY v WESTVILLE SHIPPING COMPALY LTD [1923] AC 773 at 781*** **described the effect in the following terms:**

> **"Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it the expression of his election, if justified by the facts, terminates the contract, puts the parties in status quo ante and restores things as between them, to the position in which they stood before the contract was entered into."**

I therefore hold that this court views the position of IPs in electing to apply to set aside the consent judgment in the same light. They have elected not to be bound by it although the consent judgment purports to bind them and consequently this court is obligated to set the consent judgment/order aside in order to restore all the parties to the position they stood before the consent judgment/order was entered into. It does not matter to the court whether the acts leading to the entering of the consent constitute mistake, fraud or misrepresentation, justice demands that the previous position be restored…I also accept as good law that where some of the parties such as in this case fail to make a full disclosure to the court and obtain what for all practical purposes is an ex parte order behind the back of bona fide parties to the proceedings such as the IPs the court has jurisdiction to refuse such an application if asked

for ex-parte or obtained ex parte, in violation of the duty *uberrimae fidei* to make full disclosure to court."

27. This Court in **Republic vs. Public Procurement Administrative Review Board & 2 Others Ex-parte Coast Water Services Board & Another [2016] eKLR** expressed itself as hereunder:

> ***"In my view, in judicial review and any public law litigation, at that, parties cannot, without the endorsement of the Court, compromise the proceedings. Further, once parties have been joined thereto, it is not open for some of them to compromise the proceedings in a way that prejudices the interests of the other parties, however nominal they may seem to be to the parties compromising the suit. In other words, once the Court or the parties themselves recognise that there are persons interested in the proceedings, any compromise thereof as opposed to the withdrawal of the proceedings by the applicant ought not to be permitted unless it is clear that the issues in the judicial review proceedings can be said to be divisible and the compromise only affects the part of the suit which does not affect the interests of the persons not consenting. In this case, I have found that the 2nd interested party stands to benefit if these proceedings are determined in favour of the applicant. In other words the 2nd interested party's interests are intertwined with and not divisible from those of the Procuring Entity hence the latter cannot by a stroke of the pen and in collusion with the other persons take steps whose effect would be to obliterate the 2nd interested party's interests more so where it is contended, as in this case that the effect of the compromise would be to render the Constitutional and statutory provisions guiding public procurement irrelevant."***

28. In that case, this Court declined to endorse the consent in question.

29. I do also associate myself with the minority decision of **Koome, JA** in **Ransa Company Ltd vs. Manca Francesco & 2 Ors [2015] eKLR** to the extent that:

> **"It is common ground that the consent was entered into by Kalama Katana Advocate acting for the ex parte applicant, Manca and Martin Mutungi state counsel representing the respondents. The orders were to the effect that the title in respect of plot No. 671 Watamu be revoked. It is also common ground that the appellant was not only the registered proprietor of the said plot but was also in its possession. That consent order thus affected the appellant and it was entered into without his knowledge and participation. It is a fundamental right for a party with a dispute before court to be heard before orders that affect him or her made… In my view, it was un procedural, irregular and unlawful to exclude the appellant who was named as an interested party in the Judicial Review proceedings as a party to the consent. The appellant had filed a lengthy replying affidavit in opposition of the orders sought by the ex parte applicant. The judge overlooked the fact that no consent can possibly be entered into by a claimant as happened in the instant case which purports to take away the rights of a defendant without his knowledge, concurrence or hearing. The consent order had the effect of revoking the appellants' title and ownership of the property the subject matter of the litigation without giving the parties a hearing or without first obtaining the express authority of the appellant or that of his advocate. See the case of *Kasmit Wesonga Ongoma & Another vs. Wanga [1987] eKLR*, this Court differently constituted said:-**
>
> > **"A consent judgment is a judgment the terms of which settled and agreed to by the parties to the action."**
>
> **In the premises, the consent order did not include the appellant, and in my view the whole process of how it was entered smacks of collusion or fraud which distinguishes this case from that of;- Flora Wasike vs. Desmond Wambeolla [1980] I KAR"**

30. The learned Judge proceeded to find that:

> **"The appellant was not a party to the consent despite the fact that he was a party to the suit.**

The judge also failed to consider the orders of prohibition and mandamus are within the public law realm directed to an inferior tribunal or a public body as the case may be, and in my view they cannot be issued by consent of parties; least of all without the consent of the interested party against whom they are directed. As I understand these orders, an order of prohibition is an order by the High Court directed at an inferior tribunal, public authority forbidding that body from acting in excess of its jurisdiction or contrary to law; whereas an order of mandamus is an order in form of a command directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty. See *Halbury's Law of England 4th Edition Vol. 1 Paragraph 119*. By the very nature of these orders they cannot issue by consent"

31. In the learned Judge's view:

"Although parties are encouraged to resolve matters outside the court, I am afraid in so doing, the principles of law and the procedures that guide the court, such as jurisdiction, fair hearing among others must be brought to bear. If the Deputy Registrar was exercising powers under Order 49 of the Civil Procedure Rules by recording a consent by the parties, he or she had a duty to ensure the interested party who was named in the judicial review matter that was being settled by the consent order was first made aware of the consent order before adopting it as a court order… A judicial review process was hijacked by an illegal process that terminated it, culminating with an illegal consent. Had the learned judge appreciated that, there was no judicial determination of the judicial review application as Maraga J did not determine the issues that were in dispute, perhaps the judge would have come to a different conclusion as I have, that in law, there is no wrong without a remedy and equity follows the law."

32. In this case, as the date on which the hearing was to take place the matter did not proceed, the interested parties who were represented on record ought to have been notified of the next hearing date. There is however no evidence that this was done. In **Adolf Gitonga Wakahihia & 4 Others vs. Mwangi Thiongo 1 KAR 1028; [1986-1989] EA 589**, the Court of Appeal expressed itself as follows:

"The claim here was of a piece of land in the names of six people, five of whom are parties to the suit. When the hearing went on before the arbitration they were not present yet the district Officer proceeded to hear the matter in their absence, giving away a piece of land to the claimant. When judgement was delivered, all the defendants including those who were not present were condemned to pay costs to the plaintiff. Their complaint was laid down before the Judge on an application to review the judgement but the court overlooked this vital allegation that vitiates the judgement. It was up to the Court when it was pointed out in an application for review that Judgement was entered against some defendants without being heard, to hold that the whole arbitration proceedings were a nullity in the interest of justice and judgement should be set aside as to conduct arbitration without all the parties present, and while some had no notice of the hearing is a misconduct of an arbitrator under Order 45, rule 15. On the face of it the legality of the award was questionable because all the parties were not present. The award could also be set aside under rule 15(1)(b) as the arbitrators misconducted themselves by allowing the proceeding to commence and in the end made an award that affected parties who were not before them to give evidence…It is basic law that no one should be condemned, to a Judgement passed against him without being afforded a chance of being heard…The chance is by being summoned but if he is served and chose not to attend, then he should be bound by the Judgement unless he can show cause why he failed to attend…The issue of the denial of the right to a hearing is a point of law, which underlie the proceedings the effect of which is to render the proceedings a nullity".

33. The general rule is that a non-party to legal proceedings is not bound with the decision emanating therefrom. See **Sakina Sote Kaitany and Anor. vs. Mary Wamaitha Civil Appeal No. 108 of 1995.** Similarly, in **Gitau & 2 Others vs. Wandai & 5 Others [1989] KLR 231, Tanui, J** held that:

"The plaintiffs in this suit were not party to the suit in which the consent judgement was entered and consequently they are not bound by a compromise made between the advocate who acted for the second, third, fourth, fifth and sixth defendants on one part and the advocates for the first defendant on the other."

34. It therefore follows mutatis mutandi that a person who is a non-party to consent which adversely affects him personally cannot be bound by the same. Further a decision given in contravention of the rules of natural justice is a nullity. This was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at*...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio*." [Emphasis mine].

35. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

36. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."

37. The instant case must be distinguished from that of **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** in which the Court of Appeal held that:

"whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point

that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

38. In the above case the Court found as a fact that the applicant had been afforded an opportunity of being heard. In this case there is no evidence that the interested parties, particularly those who were already on record were heard before the purported consent was entered into. In the premises the said consent and all orders consequent thereto must be nullified since as was held in **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169** at **1172** it is trite that if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse.

39. It follows that the Notice of Motion dated 3rd October, 2013 is merited.

Order

40. In the result the consent order entered into herein on 22nd June, 2010 together with the consequential orders are hereby set aside. The petitioner is at liberty to set down its petition for hearing on merits.

41. The costs of this application will be in the cause.

42. It is so ordered.

Dated at Nairobi this 11th day of January, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kingara for the Petitioner

Mr Saluni for the Law Society of Kenya

Miss Olao for the applicant

CA Mwangi