Havi & 3 others v Njenga & 10 others (Civil Appeal E044 of 2021)
[2022] KECA 928 (KLR) (19 August 2022) (Judgment)

Neutral citation: [2022] KECA 928 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E044 OF 2021

RN NAMBUYE, HM OKWENGU & KI LAIBUTA, JJA

AUGUST 19, 2022

BETWEEN

NELSON HAVI ..... 1ST APPELLANT

CAROLYNE KAMENDE ..... 2ND APPELLANT

HERINE KABITA ..... 3RD APPELLANT

ESTHER ANG'AWA ..... 4TH APPELLANT

AND

ADRIAN KAMOTHO NJENGA ..... 1ST RESPONDENT

LAW SOCIETY OF KENYA ..... 2ND RESPONDENT

ALUSO INGATI ..... 3RD RESPONDENT

CAROLYNE MUTHEU ..... 4TH RESPONDENT

FAITH ODHIAMBO ..... 5TH RESPONDENT

LINDA EMUKULE ..... 6TH RESPONDENT

BERNARD NGETICH ..... 7TH RESPONDENT

BETH MICHOMA ..... 8TH RESPONDENT

NDINDA KINYILI ..... 9TH RESPONDENT

GEORGE OMWANSA ..... 10TH RESPONDENT

MERCY WAMBUA ..... 11TH RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nairobi (Weldon Korir, J.) dated 3rd February, 2021 in Constitutional and Human Rights Division Petition No. E025 of 2021)

JUDGMENT

1. This is a first appeal arising from the ruling of the High Court of Kenya at Nairobi (W. Korir, J.) Constitutional and Human Rights Division Petition No. E025 of 2021 delivered at Mombasa on 3rd February, 2021.

2. The litigation leading to the appeal was commenced by Adrian Kamotho Njenga (the 1st respondent), who filed a petition in the High Court against the Law Society of Kenya (LSK), the 2nd respondent in this appeal. The 1st, 2nd, 3rd and 4th appellants (herein) and the 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th respondents were named as interested parties.

3. The petition was anchored on various Articles in the *Constitution* of Kenya, 2010 and the *Law Society of Kenya Act*, 2014 (the LSK Act). It questioned the legality of the resolutions passed at the Special General Meeting of the Law Society of Kenya held on 18th January, 2021; and the indefinite suspension of the entire council of the Law Society of Kenya and, alleged violation of rights and fundamental freedoms.

4. The 1st respondent described himself as a Kenyan citizen of sound mind, a public-spirited individual and an ardent defender of the Constitution}}; the 2nd respondent as an entity established under section 4 of the LSK Act,) obligated in law to assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya; the 1st, 2nd, 3rd and 4th appellants and the 3rd, 4th, 5th, 6th, 7th, 8th, 7th and 10th respondents as Council members of the LSK, while the 11th respondent was described as the secretary, LSK.

5. The factual background to the petition was that the LSK issued and circulated a notice dated 18th December, 2020 pursuant to section 31(1)(b) of the *LSK Act*, to its membership numbering about eighteen (18) Thousand, convening a Special General Meeting (SGM) to be held on 18th January, 2021 at 11.00am. The meeting was to be conducted physically at its headquarters on Gitanga Road Nairobi for a maximum of 300 members, while the rest were to participate in the SGM virtually via a zoom link provided by the LSK for that purpose. Pursuant to section 16(5) of the *LSK Act*, the LSK needed a quorum of 55% of its total membership for it to conduct its business, which translates to 900 members. It was imperative for the LSK to confirm and or verify that, besides the 300 members physically present at its headquarters, the balance of the number to make up the requisite quorum had logged in through the link provided for them to participate online.

6. The 1st respondent's complaint or grievances against the SGM deliberations as conducted on that day were inter alia that the meeting had no known voting procedure as the presiding officer never caused any single voting to be conducted; that no proof of any single voting was demonstrated; that the online voting platform was never activated; that, no single issue was referred to the online attendees for a vote; and that the 1st appellant had also knowingly and irregularly caused to be included in the agenda matters that did not form the content of the notice of the SGM, all of which were in flagrant breach of sections 33(1), 34, 17(2), 22(1), 33(2) and Regulation 84(1) of the *LSK Act* and *Regulations* made thereunder, as more particularly set out in the petition.

7. The legal foundations of the petition, a summary of constitutional provisions either breached or threatened to be breached, and the nature of the injury suffered or threatened to be suffered were also set out in the petition.

8. The 1st respondent sought declarations: that the 2nd respondent's failure/refusal to accord equal voting rights to persons attending the SGM virtually as those accorded to members attending physically violates section 12 of the LSK Act, Articles 10 and 27 of the *Constitution*; that the admission of a motion seeking a special resolution outside the statutory timelines violates Regulations 76(6) and 84(1) of the LSK (General) Regulations 2020, section 4 of the LSK Act and Articles 10 and 47 of the *Constitution*; and that the resolution to suspend the 1st – 4th appellants and 3rd – 10th respondents violated regulations 76(6) and 76(7) of the LSK (General) Regulations, 2020, section 22 of the LSK Act, and Articles 47 and 50 of *Constitution*.

9. The 1st respondent also sought orders quashing the entire proceedings, resolutions and decisions of the SGM convened, held and conducted via zoom online platform and physically at the LSK offices along Gitanga road, Nairobi on 18th January, 2021, an order directing the LSK and the 1 – 4th appellants and 3rd – 10th respondents to forthwith convene a special general meeting to procedurally and lawfully dispose of the agenda contained in the notice circulated to members on 18th December, 2020, and an attendant order for provision for costs, and any other order or relief that the court may deem just and expedient to grant. The petition was supported by an affidavit sworn by the 1st respondent.

10. Filed contemporaneously with the said petition, was a notice of motion brought under the several Articles of *Constitution* as well as provisions of the LSK Act, 2014 basically seeking orders in the main, that pending the hearing and determination of the petition herein, all the resolutions and decisions of the respondents arrived at in any manner whatsoever during the Special General Meeting held on 18th January, 2021 be and are hereby stayed/suspended, costs incidental to the application provided for, and that the court be at liberty to grant any further orders/relief that may be deemed just and expedient.

11. The motion was supported by the grounds set out on its body, a supporting affidavit of the 1st respondent together with annexures thereto, and a replying affidavit filed on behalf of the 3rd to the 10th respondents. The application was opposed vide a notice of preliminary objection dated 26th January, 2021 filed by the 1st appellant, namely that:

> "The petitioner had not invoked and/or exhausted the alternative dispute resolution mechanisms available to him under Regulations 95 and 96 of the LSK General Regulations, 2020, the petition did not meet the threshold of a constitutional petition as it did not plead and particularize what right or fundamental freedom in the Bill of Rights due to the petitioner had been denied, violated, infringed, or was threatened. Neither had the petitioner pleaded and or particularized any of the provision(s) of the *Constitution* of Kenya allegedly contravened and, lastly, that the petitioners' pleadings did not disclose adequate particulars in support of the alleged cause of action/claim relating to the alleged violations of the *Constitution* of Kenya, 2010 to warrant granting him the reliefs sought."

12. The motion was canvassed before the trial court through the pleadings, submissions and legal authorities relied upon by the rival parties in support of their respective positions. At the conclusion, the learned Judge analyzed the record, reminded himself that due to the nature of the mandate, the rival parties before him had invited him to exercise his discretion in deciding either way, he was not required to delve into an in-depth analysis of the details of the parties' respective cases. The Judge appreciated that Regulations 95 and 96 of the *LSK (General) Regulations, 2020 (LSK Regulations)* indeed require that disputes founded on the LSK Act be resolved through the prescribed alternative dispute resolution mechanisms, and required a party founding his/her grievance on the *LSK Act* to exhaust the said alternative dispute resolution mechanism before resorting to the Court.

13. The learned Judge took into consideration this Court's decisions in Secretary, *County Public Service Board & Another vs. Hulbhai Abdulla* [2017] eKLR; *Geoffrey Muthinja Kebiro & 2 Others vs. Samuel Munga Henry & 1756 Others* [2015] eKLR; *Republic vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR; *Ndiara Enterprises Limited vs. Nairobi City County Government* [2018] eKLR for the propositions that: firstly, where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum, and only invoke the court process upon sufficient demonstration that the dispute as laid was incapable of being effectively dealt with in that other forum; secondly, that the High Court has mandate to exempt a party from complying with the principle of the doctrine of exhaustion limited to circumstances where such an action on the part of the court is meant to serve the noble interests of justice to the parties before the court in instances where there is sufficient demonstration of the existence of exceptional circumstances or, alternatively, where there is demonstration that the alternative remedy will be less convenient, beneficial and or less effective in the circumstances.

14. In light of the above-mentioned authorities, the learned Judge made findings, inter alia, that the 1st respondent, in his supporting affidavit, acknowledged the existence of the alternative dispute resolution mechanisms provided in the LSK Regulations, but had sought exemption because, according to him, it was not the most efficacious remedy in the circumstances, considering that the membership of the council was in dispute. It was therefore not clear from the record as to who had the authority to represent LSK in any arbitration proceedings, hence making it technically impossible for arbitration proceedings to be conducted. There was also an allegation that there was a stalemate in the discharge of official functions of the LSK Council occasioned by the suspension of the entire LSK Council.

15. The learned Judge was also of the opinion that the availability of the alternative dispute resolution mechanism did not per se override the express provision of Article 22(1) of the *Constitution*, which confers upon the 1st respondent an express right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights had been denied or infringed, or was threatened; and lastly, that it was the consensus of the rival parties before him that Regulation 19(1) of the *LSK Regulations* provided explicitly that the quorum for a meeting of the council is five (5) members excluding the secretary which, in the Judge's view, was unattainable at the material time based on the allegation that either the entire or a majority of the LSK Council had been suspended.

16. The Judge ruled that it would therefore be unjust in the circumstances to require the 1st respondent to submit the dispute to arbitration when the Council, according to the Judge, was dysfunctional and incapable of making any decision, including the decision to participate in any arbitral proceedings and, on that basis, concluded that the alternative dispute resolution mechanisms provided by Regulations 96 was impracticable and unattainable.

17. On the threshold for granting a conservatory order, the Judge took into consideration the decisions in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR; *Nubian Rights Forum & 2 Others vs. Attorney General & 6 Others, Child Welfare Society & 8 Others (Interested parties), Centre for Intellectual Property & Information Technology (Proposed Amicus Curia)* [2019] eKLR; and *Nguruman Limited vs. Jan Bonde Neilsen & 2 Others* [2014] eKLR, in which this Court had adopted the definition of a prima facie case as enunciated by this Court in *Mrao Limited vs. First American Bank of Kenya Limited & 2 Others* [2003] KLR 125, that a conservatory order is granted, inter alia, where there is demonstration that: if the order is not granted, the litigation will be rendered nugatory, or it will be in the public interest to grant the order, or it will be necessary for upholding constitutional values and, lastly, where there is demonstration of existence of an arguable prima facie case, meaning

existence of a right which has been infringed by the opposite party so as to call for an explanation and or rebuttal from the opposite party.

18. In view of the foregoing, the Judge drew conclusions which we find prudent to summarize as follows: that a prima facie case had been established on the issue whether the entire council of the LSK was suspended or whether it was only the 3rd – 10th respondents who had been suspended, necessitating evidence to be called to establish the correct position; that the 1st respondent's petition was compliant especially with regard to the complaints that virtual attendees of the SGM were denied the right to vote in violation of the rights protected under Article 27 of the *Constitution*; and that the 1st respondent, being a member of the LSK, had an interest in the proper running of the LSK affairs, and a duty to ensure that the society was run in accordance with both the statutory and constitutional principles. The learned Judge held that the 1st respondent had locus standi to file the petition and the motion as the 1st respondent stood to suffer prejudice should the LSK be permitted to implement what he termed as illegitimate resolutions; and that his petition was not brought with a view of either subverting, suppressing or questioning the will of the SGM, or the authority to pass resolutions, but to question the conclusions reached during the SGM on the ground that the mandate of the SGM was not exercised in accordance with the applicable provision of the LSK Act and the regulations made thereunder.

19. Further, the learned Judge concluded that the litigation was in the public interest, which requires that statutory bodies, such as the LSK operate within the parameters of the law and the *Constitution* governing its operations; that the balance of convenience also tilted in favour of the court granting the conservatory orders sought notwithstanding the Judge's appreciation of the fact that the pendency of the disposal of the petition would undoubtedly delay the implementation of the decisions arrived at during the SGM and may in the process affect operations at the LSK. The learned Judge deemed this a necessary sacrifice to allow the petition to be heard first to ascertain the correct position, and uphold the rule of law by first ascertaining that the impugned vote items were arrived at in accordance with the law before sanctioning their implementation. The Judge, therefore, granted an order staying all the resolutions and decisions of the SGM held on 18th January, 2021 pending the hearing and determination of the petition together with an attendant order that activities arising from the resolutions and or the decisions of the SGM had likewise been suspended.

20. The appellants were aggrieved and are now before this Court on a first appeal raising fourteen (14) grounds of appeal in their memorandum of appeal dated 3rd February, 2021 subsequently condensed into five (5) thematic issues in the appellants written submissions dated 19th March, 2021 namely:

    1. The High Court lacked jurisdiction to entertain the dispute submitted to it in the circumstances.

    2. Alternative dispute resolution mechanism was not impracticable and unattainable in the circumstances.

    3. The 1st respondent lacked locus standi to challenge decisions made at the SGM on 18th January, 2021.

    4. No arguable case was made to warrant the making of the ruling and order of 3rd February, 2021.

    5. Failure of the court to act in the public interest when granting the impugned order.

21. The appeal came for plenary hearing on 12th October, 2021 during which learned counsel Mr. Nelson Havi, Carolyne Kamende, Herine Kabita and Esther Ang'awa appeared for the appellants. Mr. Adrian Kamotho, the 1st respondent, appeared in person. Mr. Denis Magere appeared for the 2nd respondent, Ngania appeared for the 3rd – 10th respondents, while Mr. Fidel Limo appeared for the 11th respondent.

22. The appeal was canvassed virtually through written submissions and legal authorities filed by advocates for the respective parties in support of their rival positions.

23. The appellants, in support of the first thematic ground, complained that the High Court cases of *Nelson Andayi Havi vs. Law Society of Kenya & 3 Others* [2018] eKLR; *Majimbo Georgiadis vs. Law Society of Kenya, Nairobi Branch & 11 Others* [2018] eKLR; and *Mark Ndung'u Ndumia vs. Law Society of Kenya*, Petition No. 94 of 2019 [UR] and this Court's decision in *County Government of Turkana vs. National Land Commission* Civil Appeal No. 138 of 2019 [UR], which they cited, the High Court and this Court declined jurisdiction on account of the applicants want of exhaustion of the internal dispute resolution mechanisms.

24. They argued that, instead of the learned Judge applying the threshold set in the case law provided by the appellants and ruling in their favour, he resorted to enumerating his perceived exemptions to the requirement for exhaustion, on the basis of which he erroneously ousted the appellants' preliminary objection on want of jurisdiction. The trial Judge was also faulted for failing to apply the limit of jurisdiction arising from Regulations 95 and 96 of the *LSK Regulations*, and for finding that the said provisions were ousted because the council was dysfunctional and incapable of making any decision. It was submitted that no exemption had been sought by the petitioner and that, secondly, in *Deynes Muriithi & 3 Others vs. Law Society of Kenya & Another* [2015] eKLR relied upon by the 3rd to 10th respondents as the basis for conferring jurisdiction on the court to entertain the matter had no application to the circumstances before the Judge, having been decided before the enactment of both the LSK Act No. 4 of 2015, the Regulations made thereunder and the *Fair Administrative Action Act* No. 21 of 2015 (FAAA,) both of which prescribe the mandatory requirement to exhaust alternative dispute resolutions mechanisms before seeking redress in a court of law. Lastly, it was not open to the learned Judge to second guess the intention of Parliament and the LSK in the propriety of the prescribed alternative dispute resolution mechanisms as highlighted by the Judge in the impugned ruling.

25. With regard to thematic issue number 2, the appellants faulted the trial court for erroneously ascribing the impracticability and unattainability of the alternative dispute resolution mechanisms based on the alleged diminished quorum of the LSK Council following the suspension of the 3rd to the 10th respondents. In their opinion, a correct construction of the relevant applicable regulations, would lead to only one conclusion that there is no role the Council of LSK would have played in the initiation and determination of the dispute through the in-built alternative dispute resolution mechanisms.

26. On want of *locus standi*, the appellants relied on *Michael Osundwa Sakwa vs. Chief Justice and President of the Supreme Court of Kenya & Another* [2016] eKLR and submitted that the 1st respondent, having failed to state in his affidavit that he attended the SGM either physically or virtually, or that his name appears in the list of those who had attended the SGM either physically or virtually, he had no locus standi to complain.

27. On want of the existence of an arguable case, the appellants submitted that they tabled uncontested evidence before the trial court to demonstrate that: the 1st respondent did not attend the SGM through either of the two modes of attendance and could not, therefore, give a true account nor the correctness and or truthfulness of what transpired at the said SGM; that the conduct of the impugned SGM and all the business thereby transacted were compliant with Regulations 78 to 83 of the *Regulations*; and that it was the 11th respondent who had attempted to discredit both the SGM and the business conducted thereat by refusing to draw out one of the resolutions in which the 11th respondent was conflicted, all of which went to demonstrate that the 1st respondent had no arguable case against them.

28. On the alleged failure to act in the public interest, the appellants rely on a text by Benion on Statutory Interpretation, 6th Edition; *East African Cables Limited vs. Public Procurement Complaints, Review and Appeals Board & Another* [2007] eKLR; Michael Osundwa case [supra] and *Okiya Omtatah vs. Judicial Service Commission* Petition No. E408 of 2020 [UR], and faulted the Judge for failure to properly appreciate and take into consideration the consequences of the impugned ruling and orders on the overall conduct of business at the LSK.

29. On the alleged want of competence of the appeal, the 1st respondent as supported by the LSK relied on the Supreme Court cases of *Francis Karioki Muratetu & Another vs. Republic & 5 Others* [2016] eKLR and *Methodist Church in Kenya vs. Mohamed Fugicha & 3 Others* [2019] eKLR and submitted that the overriding interest and or stake in any matter is that of the primary/principal parties before the court in respect of whom the determination of any matter will have a direct impact, leaving the third parties admitted as interested parties only remotely affected; that the issues to be determined by the court in such matters will always remain the issues presented by the principal parties or as framed by the court from the pleadings and submission of the principal parties; and, lastly, that an interested party may not frame its own fresh issues or introduce new issues for determination by the court.

30. In view of the foregoing, both the 1st respondent and LSK contend that the respondent in the Petition and the interlocutory application for conservatory orders having been the LSK, the appellants cited as interested parties had a constricted role to play in the proceedings. They could not therefore be permitted to configure themselves into the 2nd respondent and assume that role. The appellants urged the Court to dismiss the appeal as incompetent. In their opinion, the appellants had no mandate to either raise the preliminary objections or file this appeal.

31. On the alleged want of Jurisdiction of the trial court to entertain the Petition and the Motion, and want of locus standi of the 1st respondent s, he 1st respondent submitted on the issue of the jurisdiction of the High Court to entertain the Petition and the motion, and his locus standi asserting that in his affidavit in support of the petition and that in support of the motion, he deposed that he attended the SGM. He pointed out that at paragraph 14 of the 1st appellant's replying affidavit, the 1st appellant has exhibited only a single sheet containing only forty-one (41) names of virtual attendees, and that, in the absence of the appellants exhibiting a complete list of attendees of the SGM both virtually and physically, his assertion was not controverted and that, therefore, he was properly before the Court to seek redress.

32. The LSK, on its part, relied on the decision of the predecessor of this Court in *Mukisa Biscuits Manufacturing Co. Limited vs. West End Distributors Limited* [1969] E. A 696 and submitted that the appellants' preliminary objection based on want of the court's jurisdiction was properly rejected by the learned Judge for failure to meet the threshold as it was not based on a pure point of law, but on facts. The LSK cited *Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited* [1989] eKLR for the principle that jurisdiction is everything, without which, a court of law has to down its tools; that Article 22 of the *Constitution* of Kenya confers a right to the petitioner to institute the petition in the manner presented, and that the conclusions reached by the learned Judge to reject the appellants preliminary objection for want of jurisdiction was not only plausible, but also merited based on the facts and the law as laid before the Judge. The LSK maintained that alternative dispute resolution mechanism was not an efficacious remedy in the circumstances portrayed in Petition No. E025 of 2021 given that the entire Council had been suspended pursuant to the motion dated 22nd December, 2020. Secondly, besides being a member of the LSK, and therefore entitled to intervene in its affairs in the manner done in his petition, the 1st respondent's locus standi was also well founded on Article 22(2) of *Constitution* of Kenya, 2010 conferring on him the right to initiate the petition.

33. In their submissions, the 3rd – 10th respondents' took the position that the decisions relied upon by the appellants both in the High Court and on appeal as the basis for asserting want of jurisdiction by the High Court to deal with the matter, are distinguishable as the facts underlying those authorities are distinguishable from the facts that were laid before the trial Judge who, according to them, properly appreciated them and arrived at the correct conclusion thereon.

34. On want of locus standi, the 3rd – 10th respondents invited this Court to reject the appellants' submissions for the appellants' failure to exhibit the entire record of attendees. Secondly, if this argument were to apply, then the 3rd and 4th appellants, as well as the 3rd to 10th respondents who do not also appear anywhere in the documents exhibited by the 1st appellant as evidencing the list of attendees, would be similarly affected, and yet they were present. These respondents argued that if such a move were to be confined to the 1st respondent only, then that would amount to discrimination not permissible in law.

35. The 3rd to 10 respondents invited this Court to embrace the correct position expounded by the Supreme Court in *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others* [2014] eKLR as adopted by this court in *Law Society of Kenya Nairobi branch vs. Malindi Law Society & 6 Others* [2017] eKLR holding, inter alia, that the promulgation of the Constitution of Kenya, 2010 enlarged the scope of locus standi in Kenya as Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the courts contesting any contravention of the Bill of Rights or the Constitution.

36. The 11th respondent, on the other hand, relied on *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others* [2012] eKLR and submitted that the jurisdiction of the High Court to entertain the 1st respondent's petition, and the motion anchored on it was well-founded on Article 165(3) (b) which confers jurisdiction to the High Court to determine questions as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, and whose range of reliefs for redressing the violation are set out in Article 23.

37. The 11th respondent submitted that, since the petition filed by the 1st respondent sought redress for violation of fundamental rights and freedoms, it was properly filed, and that the Superior Court had jurisdiction to entertain both the petition and the application for conservatory orders.

38. On the issue as to locus standi, it is the 11th respondent's submissions that the 1st respondent was, and still is, a paid up member of the LSK under admission No. P105/17073/20. He was also one of the 4,107 members who participated in the SGM held on 18th January, 2021 and among the 3,929 joining the meeting virtually. In the stated capacity, and by dint of section 12 (e) of the LSK Act, the 1st respondent, having been endowed with the right to vie under the Act, and having attended the SGM virtually, he had the legitimate expectation to vote, and that such right having been violated, the 1st respondent had locus standi to file the petition for redress in the High Court.

39. On Conservatory Orders and Arguability of the Casethe 1st respondent relied on the Supreme Court decisions inGatirau Peter Munya vs. Dickson Mwenda Kithinji [supra] and Methodist Church of Kenya vs. Mohamed Fugicha & 3 Others [supra] and submitted that he lodged petition no. E025 of 2021 before the trial court challenging the constitutionality of the resolutions of the 2nd respondent's SGM held on 18th January, 2021. His petition was therefore well founded both in law and on the facts as he had sufficiently demonstrated that, at that point in time, the 1st appellant had embarked on an overdrive working towards the implementation of the resolutions whose legitimacy and validity had come into question. In view of the chaotic environment in which the impugned resolutions were passed, there was no consensus as to what was finally approved by the membership but, more

significantly, the legality of such resolutions was in question. There was also an admission that the 11th respondent failed to draw out conclusions in which she was conflicted.

40. The 1st respondent invited this Court to embrace the principles expounded in the Gatirau Munya case [supra] and the *locus classicus* case of *Giella vs. Cassman Brown* [1973] E. A. 358 which, according to him, were properly appreciated and applied by the trial Judge before arriving at the correct conclusion that he had satisfied the prerequisites for granting the interim relief sought.

41. On the other hand, the LSK relied on *Safmarine Container N.V of Antwerp vs. Kenya Ports Authority* [2012] eKLR as approved in *Modern Holdings East Africa Limited vs. Kenya Ports Authority* [2020] eKLR, that the rule on exhaustion of internal dispute resolution mechanisms has no application to constitutional issues as these are of a public nature. The trial Judge having been confronted with a constitutional petition on the basis of which the notice of motion seeking conservatory orders to preserve the subject of the petition pending hearing of the petition was founded cannot be faulted for declining to cede the constitutional mandate conferred upon the High Court to determine the petition that the High Court was seized of in favour of the statutory provisions.

42. The 3rd – 10th respondents relied on Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [supra] on the threshold for granting a conservatory order, on the authority of which they argued that the trial Judge not only properly appreciated, but also took into consideration and gave reasons for sustaining the 1st respondent's plea for a conservatory order, including public interest dictated by the expanded scope of the Bill of Rights.

43. The 11th respondent also relied on the Supreme Court decision in Gatirau Peter Munya vs. Dickson Mwenda Kithinji [supra], and *Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General* [2011] eKLR, and submitted that all that the 1st respondent was obligated to do at the preliminary stage was to establish a prima facie case with a likelihood of success, and the prejudice to be suffered if the orders were not granted in his favour, which threshold the 11th respondent asserted was satisfied by the 1st respondent based on the material placed before the trial court.

44. On the alleged want of compliance with Regulation 96 of the LSK (General) Regulations, the 1st respondent submitted that in the wake of the uncertainty that surrounded the legality and validity of the LSK's business conducted on 18th January, 2021 there was technically no properly constituted statutory organ within the meaning of section 17 of the LSK Act, to govern the affairs of the LSK leaving no organ of the LSK to initiate the arbitration process.

45. The LSK's position was that the trial court could only properly withhold the right of audience from the petitioner if satisfied, based on proven facts, that there was an alternative avenue properly constituted and capable of rendering justice to the petitioner without undue delay in accordance with Article 159(2) and (4) of the *Constitution* and in compliance with the protection and promotion of the purposes and principles of the *Constitution*. The LSK submitted that this was not the position in the circumstances that led to this appeal. To the contrary, there was sufficient demonstration on the record placed before the trial Judge that, reverting to the alternative dispute resolution mechanisms entrenched in the LSK (General) Regulations in the manner suggested by the appellants, would not only have proved impracticable, but would also have been extraneous and onerous, and could have resulted in the petitioner being driven from the seat of justice empty handed.

46. The LSK argued that, since what the trial Judge was confronted with was an application for conservatory orders, he correctly appreciated that he had no mandate to delve into an in-depth analysis of the facts of the case, as that would have been prejudicial to the merits of the pending petition; that the Judge properly appreciated and took into consideration the Supreme Court decision in Gatirau

Peter Munya [supra], and the objects of the LSK as stipulated in section 4 of the LSK Act; that the learned Judge arrived at the correct conclusion in forestalling the danger of public money being spent on a challenged process; that, when confronted with a plea of the existence of an alternative dispute resolution mechanism, each case has to be considered on its own set of circumstances; that the only prudent remedial action the court could have taken given the nature of the competing claims against the background to the litigation laid out before it, was to issue the conservatory order as it did.

47. The 3rd – 10th respondents submitted that Article 23 of the *Constitution* grants the High Court the jurisdiction to grant appropriate orders; that Section 9(2) – (4) of the FAAA cannot be read in isolation but in tandem with Article 22 of the *Constitution*, which grants a party the right to approach a constitutional court to challenge any violation or threatened violation of rights; and that asking the 1st respondent to seek exemption under section 9(2) – (4) of the FAAA before approaching the court would have been tantamount to limiting the mandate conferred upon a constitutional court by Article 23 of the *Constitution*.

48. The 3rd to 10th respondents invited the Court to affirm the factors that the trial court took into consideration when it overruled the appellants' objection to the court's jurisdiction to entertain both the 1st respondent's petition and the application anchored thereon.

49. It is also their position that a proper construction of Regulations 96(1), 19(1) and 20(1) as read with section 26(3) of the LSK Act is that, upon receipt of a dispute, the secretary has no mandate to process it on his/her own. He/she must refer the dispute to the LSK Council to deliberate on the initiation of the arbitration process, which was not feasible in this instance as the Council was dysfunctional, as conceded by the 1st appellant in his replying affidavit. The 3rd to 10th respondents urged this Court to be guided by the decision in *Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 Others* [2014] eKLR as approved in *Mitu-Bell Welfare Society vs. Kenya Airports Authority & 2 Others; and Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR for the reiteration that Article 23(3) of the *Constitution* empowers the High Court in appropriate cases to fashion appropriate reliefs even if on an interim nature so as to redress either the violation or threatened violation of a fundamental right.

50. In addition, these respondents argued that, at the interlocutory stage, all that the 1st respondent was obligated to do was to demonstrate before the Judge that he had an arguable case, and that the case was not frivolous. The 1st respondent had demonstrated this, and the learned Judge had also properly analyzed, appreciated and arrived at the correct conclusion in that regard.

51. The 11th respondent, on the other hand, relying on Republic vs. Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 Others [supra], conceded that Regulations 95 and 96 of the LSK (General) Regulations, 2020 not only contemplates, but also entrenches an internal alternative dispute resolution mechanism within the LSK Act. She argued that the said legislative intent is not absolute, but dependent on whether it is not only accessible but also feasible. She reiterated as already highlighted above that, at the material time when the intended relief was sought, the internal dispute resolution mechanism was not feasible.

52. On the issue of public interest, the 11th respondent relied on *Republic vs. Independent Electoral and Boundaries Commission Ex parte Khelef Khalifa & Another* [2017] eKLR and *Republic vs. County Government of Mombasa Ex parte Outdoor Advertising Association of Kenya* [2014] eKLR for the holding, inter alia, that a party seeking to rely on the doctrine of public interest has an obligation of demonstrating to the satisfaction of the Court that it will be a burden under the yoke of impossibility if the orders sought were granted, based on the need of balancing the competing interests, namely, the nature of the right allegedly breached and its importance in the constitutional scheme of rights,

and that there can never be public interest in breach of the law as public interest must accord with the *Constitution* and the law; and, lastly, that the rule of law is one of the national values enshrined in Article 10 of *Constitution*.

53. The 11th respondent drew this Court's attention to the observations made on this issue by the trial court at paragraph 28 of the impugned ruling that LSK should not be allowed to implement what is alleged to be illegitimate resolutions as, in doing so, both the petitioners and other members of the LSK would suffer prejudice if they are required to comply with resolutions said to have been passed illegally; at paragraph 30 where it was stated that it was in the public interest that statutory bodies like the LSK operate within the parameters of the law and the *Constitution* and, lastly, paragraph 31 where it was stated that it was important to ascertain that the impugned resolutions were arrived at in compliance with constitutional and legal requirements before sanctioning the same. The 11th respondent submitted that these observations were sufficient demonstration that the trial court indeed not only addressed the issue of public interest element, but also took it into consideration in arriving at the impugned decision, which this Court was invited to affirm.

54. In reply to all the respondents' submissions, the appellants reiterated the position taken in their main submissions in support of the appeal, which we have already highlighted.

55. This is a first appeal arising from the trial court's exercise of its discretionary mandate to grant the impugned conservatory orders. The principles that guide the Court in the discharge of its mandate in an appeal of this nature are as enunciated in numerous decisions by the predecessor of this Court, and also crystallized by this Court in numerous pronouncements. We take it from *Edward Sergeant vs. Chotabha Jhavarbhat Patel* [supra] in which the predecessor of the Court was explicit that an appeal does not normally lie from the exercise of a trial court's discretion, but that where one does arise, an appeal court will interfere only if it be shown that the discretion was exercised injudiciously. The predecessor of this Court went further and delineated clearer boundaries in *Mbogo & Another vs. Shah* [supra] where, at page 96, it was stated as follows:

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

56. That position was crystallized by this Court in *United India Insurance Co. Limited vs. East African Underwriters (Kenya) Limited* [supra] as hereunder:

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account; or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

57. We have considered the record in light of the above mandate and the well-researched lengthy and thorough rival submissions, together with case law relied upon by the respective parties. With the

exception of the preliminary issue raised by the 1st and 2nd respondents which, in our view, touches on the competence of the appeal as laid, the rest of the issues falling for our determination in the disposal of the appeal are the same as those condensed by the appellants in their written submissions.

58. The approach we take in determining the appeal is to adopt both the record and case law as assessed above as the basis for determining the appeal and only rehash, highlight or replicate where necessary, and for good reason to be given.

59. The preliminary objection raised against the appeal is that, the appellants having been cited as interested parties in the litigation giving rise to this appeal with the LSK being cited as the only respondent, the only main parties to the said proceedings were the 1st and 2nd respondents herein. The appellants therefore had no mandate to configure themselves as main parties to champion both the preliminary objections and this appeal. In support of this argument, reliance was placed on the Supreme Court decision in Methodist Church of Kenya vs. Mohamed Fugicha & 3 Others [supra] and Francis Karioko Muruatetu & Another vs. Republic & 5 Others [supra] in which the Supreme Court was explicit that interested parties have no right to frame issues for determination by the court in the proceedings in which they are cited as interested parties as that is a right reserved both for the court and the main parties in the litigation.

60. The above jurisprudential exposition having emanated from the Supreme Court, it is no doubt binding on this Court. The issue that arises for our consideration is whether the legality of the appeal, having been raised through written submissions, the Court has the mandate to interrogate this issue and express itself thereon. Our response is in the negative. Our reasons for holding this view is because the appeal sought to be impugned through the written submissions was originated by a notice of appeal filed and served on the opposite parties pursuant to the prerequisites in rule 75 of this Court's *rules*.

61. The record of appeal was likewise filed and served pursuant to rule 82 of this Court's rules. Rule 84 of this Court's rules provides a clear procedure that may be invoked by any aggrieved party seeking to fault either the notice of appeal on which the record of appeal is anchored or the record of appeal itself. It provides:

> " A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.
>
> Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."

62. There is no other rule besides the above that has been cited before us to clothe us with the mandate to vitiate the record of appeal as laid, in the manner the 1st and 2nd respondents have invited us to do. The above being the correct position in law, we decline to accede to the 1st and 2nd respondents' request for us to strike out the appeal prematurely. Accordingly, we proceed to consider the appeal on its merits. .

63. On the issue of jurisdiction, the Supreme Court in *The Matter of the Interim Independent Electoral Commission*, S.C. Constitutional Application No. 2 of 2011; [2011] eKLR, and in *Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Limited and 2 Others* [2012] eKLR, held that the

assumption of jurisdiction by Courts in Kenya, is a subject regulated by the *Constitution*, statute law, and judicial precedent. The Supreme Court stated:

> " A Court's jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity".

64. In *Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited* (1989) KLR 1, this Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, inter alia:

> " Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

65. It is trite law that where *Constitution* or Statute confers jurisdiction upon a court, tribunal, person, body or any authority, that jurisdiction must be exercised in accordance with *the Constitution* or the Statute conferring it. See *Secretary, County Public Service Board & another vs. Hulbhai Gedi Abdille* [2017] eKLR where this Court expressed itself as follows:

> " Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum "

66. From our assessment of the record, the petition and the motion anchored on the petition, it is common ground that there are inbuilt alternative dispute resolution mechanisms within the provisions of the LSK Act as well as the (General) Regulations 95 and 96 made thereunder, a position affirmed by the appellants as more particularly set out in their pleadings filed in response to the motion application.

67. The point of departure and or contest between the rival parties on this issue was that the circumstances demonstrated by the facts put forth by the 1st respondent, and as now supported by the 2nd, 3rd – 10th and 11th respondent in their submissions, fell within the prerequisites for exemption provided in section 9(4) of the FAAA, a position affirmed by the trial Judge in the impugned ruling. The appellants' objection to that position was that the prerequisites for exemption in section 9(4) of the FAAA do not apply to the circumstances fronted by the 1st respondent as the basis for seeking exemption. Those highlighted by the 1st respondent as supported by the other respondents albeit in a summary form, are that the LSK governance organ was conflicted; that it was not clear as to what transpired in the said SGM as there were no clear resolutions evidencing the same; and that the 8th respondent tasked with the drawing out of the resolutions was conflicted and had either manipulated the resolutions drawn and failed to draw out others, or, alternatively, she had totally failed to discharge her mandate as was required of her. The 1st respondents produced documentary exhibits generated by the 1st appellant as proof of what has been highlighted above.

68. Considering the foregoing jurisprudential expositions, we find no error in the trial Judge's conclusion that the 1st respondent's request for exemption had met the prerequisite stipulated in section 9(4) of the FAAA. We bear in mind that, this being an interlocutory appeal, the main issues in controversy are yet to be determined and, accordingly, we should avoid delving into the merits of the issues in controversy as between the rival parties herein. Nevertheless, issues that were apparently common ground such as the LSK governance organ being conflicted; there being no consensus on the resolutions reached

at the said SGM; the officer mandated to draft the resolutions being either conflicted or totally failed to discharge her mandate as was expected of her, were in our opinion sufficient demonstration that realizing an effective remedy through the LSK in-built alternative dispute resolution mechanisms was remote. There was therefore a likelihood of impediment to expeditious realization of the alternative relief intended to be sought.

69. From the afore-cited case law, what constitutes exceptional circumstances depends on the facts and circumstances of each case, and the nature of the administrative action sought to be impeached. The factors to be taken into account in determining whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers the prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the *Constitution* and the law, and available if it can be pursued without obstruction, whether systemic or arising from unwarranted administrative conduct. An internal remedy is adequate if it is capable of redressing the complaint.

70. In light of our appreciation of the threshold for sustaining exemption from adherence to the doctrine of exhaustion, the applicable test is whether on the undisputed factual basis highlighted in the rival submissions, the trial court as a tribunal manned by a reasonable midwife would have come to a contrary position as asserted by the appellants and rebutted by the respondents. On the totality of the record assessed above on this issue, our answer is in the negative. Our reasons for taking this position, is as argued by the 3rd – 10th respondents that, firstly, the LSK itself admitted in its position that the situation was chaotic. Secondly, the LSK also recognized that the 1st respondent had the right to complain in the manner done, among numerous other reasons mentioned above.

71. We appreciate the now crystallized jurisprudential position on this issue, which we are obligated in law to follow. For instance, in *Speaker of the National Assembly vs. James Njenga Karume* [1992] eKLR, the Court stated explicitly as follows:

> "Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution}} or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

72. In *Geoffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1756 others* [2015] eKLR, the Court observed as follows:

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts."

73. In *Dawda K. Jawara vs. Gambia* ACmHPR 147/95-149/96, the African Commission of People and Human Rights held that:

> "A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality] ... the Governments assertion of non-exhaustion of

local remedies will therefore be looked at in this light ... a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

74. The principle running through the decided cases cited above among numerous others is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an aggrieved party may be permitted to seek redress from a court of law in the first instance. For example, where a party pleads issues that verge on constitutional interpretation, or where an important constitutional value is at stake. It is evident from the record in this appeal that the trial Judge observed, and correctly so in our view, that the 1st respondent had cited infringement of his constitutional rights and that these fell within the High Court's jurisdiction, hence the finding that the 1st respondent case had met the requirement for exception.

75. In light of the totality of the above assessment and reasoning, it is our finding as did the trial Judge that the alternative dispute resolution mechanisms provided under Regulations 95 and 96 of the LSK (General) Regulations, 2020 was not, and is still not, an effective or a fair process that the 1st respondent can be directed to seek remedy for his grievances against the appellants under the peculiar circumstances of this case. The exception in section 9(4) of the FAAA therefore applies. Accordingly, we find no reason to depart from the findings of the trial judge and, accordingly, uphold the same.

76. On the issue as to the 1st respondent's locus standi to present both the petition and the motion anchored thereon , the approach we adopt is that taken by the Court in Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [supra] wherein this Court was explicit, inter alia, that "the standard guide for locus standi must remain the command in Article 258 of *the Constitution*," which in our view must be read in conjunction with Articles 22(1) and 23(1) of *the Constitution* also making prescriptions touching on *locus standi*.

77. Article 23 (1) is explicit that "The High Court has jurisdiction, pursuant to Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights". Article 22(1) provides, inter alia, that "every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened"; while Article 258, on the other hand, provides that:

> "(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
>
> 2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
>
> a. a person acting on behalf of another person who cannot act in their own name;
>
> b. a person acting as a member of, or in the interest of, a group or class of persons;
>
> c. a person acting in the public interest; or
>
> d. an association acting in the interest of one or more of its members."

78. When the above constitutional prescriptions are considered in light of the jurisprudential exposition/ holding in Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [supra], no doubt is left in the mind of this Court that the 1st respondent, being a member of the 2nd respondent,

and having been affected by the resolutions made at the SGM, clearly had the locus standi to file the petition before the High Court and the motion anchored on it to enforce his constitutional rights as more particularly set out in the said petition; and, secondly, to seek a conservatory order to preserve the substratum of the petition pending the hearing of the petition. A Ruling to the contrary would have been highly prejudicial not only to his interest, but also the interests of those others whom he was championing, considering the overwhelming support that he received from the co-respondents.

79. On the conservatory reliefs granted by the trial court and on an arguable case, we adopt the position taken by the court in *Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae)* [2019] eKLR where the court was explicit inter alia that the principles that guide the court in granting conservatory orders are that the applicant ought to demonstrate an arguable prima facie case with a likelihood of success; that in the absence of the conservatory order he/she is likely to suffer prejudice; whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights; whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory; and, lastly, the Court should also consider the public interest. See also the Supreme Court decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR [supra].

80. On the requirement to establish a prima facie case in *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* (2003) KLR 125, it was stated inter alia that a prima facie case is "a case in which on the material presented to the Court a tribunal properly directing itself to the issue will conclude that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the latter".

81. As already stated, a proper appreciation of the evidence on the record left no doubt in the mind of the trial court, and now of this Court on appeal, that the 1st respondent had sufficient basis for side stepping the alternative dispute resolution mechanisms entrenched in the *LSK (General) Regulations* 95 and 96 under the LSK Act and, instead, approached the seat of justice directly as a member of the LSK and, secondly, in the exercise of his constitutional right. There was therefore sufficient demonstration of the existence of a prima facie case.

82. In addition to the foregoing, the 1st respondent stood to suffer prejudice as the 3rd – 10th respondents have demonstrated that, by 20th January, 2021 when the 1st respondent moved to court, the 1st appellant was already working towards the implementation of resolutions whose legitimacy and validity had not yet been ascertained; that there was a serious issue in contention as to whether the SGM was conducted properly with all the participants virtually and physically being given equal opportunity to vote on matters on the agenda; that there was doubt whether the entire LSK Council had been sent packing by one of the resolution, or a majority of them or, alternatively, only the 11th respondent had been set packing. These issues could not in our view be decided at the interlocutory stage by the trial court as the court needed to interrogate the contested facts surrounding those issues at the hearing of the main petition and express itself thereon.

83. On the issue of public interest, Articles 22 (2) and 258 of the *Constitution* allow every person the right to institute court proceedings in 'public interest' where a claim or contravention or infringement of a right or fundamental freedom, or threat thereto, or a contravention or threat to violate the *Constitution* is alleged.

84. *Black's Law Dictionary*, 9th Edition defines 'public interest' as:

> "...the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation". In litigating on matters of "general public importance", an understanding of what amounts to 'public' or 'public interest' is necessary. "Public" is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land."

85. In *Mumo Matemu vs. Trusted Society of Human Rights Alliance and 5 others* [supra], the Supreme Court explained the essence of public interest litigation thus:

> "Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution's aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret the Constitution in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance".

86. In light of the above threshold, we are satisfied that the learned judge properly exercised his discretion in granting the conservatory order as it met the threshold of an order granted in the public interest, namely to preserve the dignity of the LSK as a public body comprised of lawyers expected to conduct its business with decorum and dignity. The conservatory order was necessary for the substratum of the petition to be preserved pending the determination of the petition, and we therefore have no reason to interfere.

87. For all the afore stated reasons, we come to the conclusion that this appeal has no merit. It is accordingly dismissed. In the circumstances of this case and in order to foster reconciliation, we do not find it appropriate to award any costs. The final orders are that the appeal is dismissed and each party shall bear their own costs.

This judgment has been delivered in accordance with **Rule 34 (4)** of the Court of Appeal Rules 2022, **Nambuye J.A.** having retired from service.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR