



**Mutisya v Theuri & another (Petition E070 of 2022)
[2023] KEELRC 3302 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3302 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E070 OF 2022

MA ONYANGO, J

DECEMBER 7, 2023

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 1,2,3,27,28,41,43,47,50,165

AND 259 OF THE CONSTITUTION OF KENYA,2010

AND

IN THE MATTER OF ECONOMIC DEPRIVATION, HARASSMENT,

PREJUDICE, VICTIMIZATION AND DISCRIMINATION OF THE PETITIONER

AND

IN THE MATTER OF SECTION 44,45 AND 47 OF THE EMPLOYMENT ACT 2007

AND

IN THE MATTER OF THE ILLEGAL, UNFAIR, UNJUST, UNREASONABLE

AND UNCONSTITUTIONAL ACTIONS OF THE RESPONDENTS

AND

IN THE MATTER OF THE VIOLATION OF RIGHTS AND

FUNDAMENTAL FREEDOMS OF THE PETITIONER

BETWEEN

JOSEPHAT MUTUNGA MUTISYA PETITIONER

AND

ERIC THEURI 1ST RESPONDENT

LAW SOCIETY OF KENYA 2ND RESPONDENT



JUDGMENT

1. The Petitioner is an Advocate of the High Court of Kenya, and in the petition before the court describes himself as the Chief Executive Officer and Secretary to the Council of the Law Society of Kenya. The 1st Respondent is an advocate of the High Court of Kenya and the President of the Law Society of Kenya. He is by virtue thereof a member of the Council of the Law Society of Kenya. The 2nd Respondent, the Law Society of Kenya, is a body corporate established under Section 3 of the [Law Society of Kenya Act](#).
2. By his petition dated 6th May 2022 and filed in court on 9th May 2022 the Petitioner alleges that the Respondents have violated his rights guaranteed under Articles 41, 47(1) & (2) and Article 50(1) of the [Constitution](#) as read with sections 44 and 45 of the [Employment Act](#) and various provisions of the [Fair Administrative Actions Act](#)
3. The Petitioner seeks the following reliefs against the Respondents:
 - a. A declaration that the Petitioner's letter of appointment and contract of employment dated 23rd July 2021 are legal, valid and enforceable.
 - b. A declaration that the Petitioner's fundamental rights and freedoms under the [Constitution](#) of Kenya have been abused, infringed and violated by the Respondents
 - c. A declaration that the 1st Respondent as agent of the 2nd Respondent acted *ultra vires*, unlawfully, illegally, unjustly, unconstitutionally and the termination of the Petitioner's employment was unlawful, illegal, wrongful, unfair, discriminatory and unconstitutional.
 - d. An order of *Certiorari* do issue to quash the entire decision as per the letter of 20th April 2022 of the Respondents summarily dismissing the Petitioner from employment.
 - e. An Order of *Certiorari* do issue to quash the entire decision of the Respondents either by themselves, servants or agents dismissing, barring, refusing and declining to allow the Petitioner to report to work at the 2nd Respondent s offices as Secretary/ Chief Executive Officer.
 - f. An order of *Certiorari* does issue to quash the notice appearing in the Daily Nation Newspaper of 13th April 2022 inviting applications for the position of the Secretary/Chief Executive Officer, Law Society of Kenya and all consequential processes thereto
 - g. An Order that the Respondents either by themselves, servants, employees or agents do allow the Petitioner to report to work at the 2nd Respondent's offices as the Secretary /Chief Executive Officer, Law Society of Kenya.
 - h. Aggravated damages
 - i. General damages
 - j. Costs of this Petition
 - k. Any other relief that this Honourable Court may deem just to grant
4. The Petition is supported by the affidavit of Josephat Mutunga Mutisya, the Petitioner herein.



5. The 1st and 2nd Respondents opposed the Petition vide the Replying affidavit of Florence W Muturi sworn on 23rd May 2022. They filed a further affidavit and 2nd Further affidavit both sworn by Eric Theuri, the 1st Respondent sworn on 12th and 25th July 2022 respectively.

The Petitioner's Case

6. It is the Petitioner's case that on 29th June 2021, the 2nd Respondent placed an advertisement on the Daily Nation newspaper inviting applications for the position of the Secretary/Chief Executive Officer, Law Society of Kenya.
7. He tendered his application for the said position on 14th July 2021 and was shortlisted and invited for interviews scheduled for 23rd July 2021. He attended the interviews on the said 23rd July 2021 which were conducted virtually by the Council of the Law Society of Kenya.
8. The Petitioner contends that he was later called by the President and informed that he was successful at the interview and that he had been appointed as the next Secretary/Chief Executive Officer of the Law Society of Kenya and that he was to assume office on 1st March 2022.
9. The Petitioner states that his appointment letter dated 23rd July 2021 was received and accepted by him on 26th July 2021 and that a contract of employment was executed between the parties on the same day which contract of employment was for a term of employment of three (3) years and was renewable.
10. The Petitioner further states that his contract of employment was communicated to all members of the Law Society of Kenya via email and social media and the appointment has never been challenged before any court of law.
11. It is stated that the Petitioner on diverse dates from 1st March 2022, made efforts to assume his job and even wrote a demand letter dated 8th April 2022 but was denied access to the secretariat by the Respondents agents, employees and servants on allegation that he was appointed by a caretaker council unknown in law.
12. The Petitioner states that the Respondents' went ahead and placed an advertisement in the Daily Nation newspaper of 13th April 2022 inviting applications for the position of the Secretary/Chief Executive Officer, Law Society of Kenya in total and blatant disregard of due process and in violation of the Petitioner's rights to fair and just treatment.
13. According to the Petitioner, his recruitment and subsequent appointment as the Secretary/Chief Executive Officer of the Law society of Kenya was done above board, competitively and transparently.
14. He maintains that in all fairness and in accordance standard procedures and renown norms, it was not in the place of the Petitioner as a job seeker to enquire, interrogate, investigate or otherwise question the capacity, the authority, legality or otherwise of the interviewing persons who included the President of the Law Society of Kenya, the Vice President of the Law Society of Kenya and other council members.
15. The Petitioner states that the 2nd Respondent is clothed with statutory character of perpetual succession and is by law of contract bound by the actions of its lawful agents, servants, employees, former officials and representatives and thus estopped from denying the validity of the contract of employment and terminating the same unlawfully.
16. It is the Petitioner's contention that the Respondents are denying him his rightful job maliciously, unfairly and unlawfully without any sufficient legal reasons being proffered.



17. He states that the actions of the 1st Respondent are a violation of the Petitioner's rights and in breach of the concept of due process, fairness and rules of natural justice as entrusted in Articles 45, 50 and Chapter 10 of the Constitution.

The 1st and 2nd Respondents' case

18. The 1st and 2nd Respondents in their replying affidavit sworn by Florence W. Muturi, the Secretary and Chief Executive Officer of the 2nd Respondent on 23rd May 2022 aver that the petition is an attempt by the Petitioner to ratify an illegality namely to effect the decision of the "Caretaker Council" to appoint the Petitioner as its Secretary/Chief Executive Officer which illegality was already called out and quashed by the High Court (Mrima J) in Odundo & 3 others v Havi & others: Emukule & 22 others (Interested parties) (Constitutional Petition 22 & E260 of 2021& E379 of 2020 (Consolidated)) (2021).
19. It is deposed that the Petitioner's alleged appointment was illegal, irregular, unreasonable and non-binding for reasons that: the advertisement, shortlisting, interview and recruitment process that gave rise to the Petitioner's alleged employment was conducted by the "Caretaker Council"; that the "Caretaker Council" was and still is, an organ unknown under the Law Society of Kenya Act and as such had no power to appoint the Petitioner as Secretary/Chief Executive Officer of the Law Society of Kenya; that all the resolutions and decisions made by the "Caretaker Council" were declared null and void by High Court in Odundo & 3 others v Havi & others; Emukule & 22 others (Interested parties) (Constitutional Petition 22 & E260 of 2021& E379 of 2020 (Consolidated)) (2021); that at the time of the Petitioner's purported appointment, there was no vacancy in the office of the Secretary/Chief Executive Officer of the Law Society of Kenya as the office became vacant on 28th February 2022; that on 30th July 2021, the LSK Council wrote a letter to the Petitioner informing him of the illegitimacy of his purported appointment and lastly, that the proper Law Society of Kenya Council that was elected and sworn in during the Law Society of Kenya Annual General Meeting of 2020 communicated to the members vide emails dated 3rd and 30th August 2021 warning the membership about reports circulating on the purported appointment of new employees for various positions including Secretary/Chief Executive Officer of Law Society of Kenya.
20. The Respondents aver that the Petitioner, as a member of the Law Society of Kenya is deemed to have knowledge of the internal rules, processes and procedures of the Law Society of Kenya and was therefore aware of the illegalities surrounding his purported appointment as Secretary/Chief Executive Officer of the Law Society of Kenya and the contentious exercise that attempted to go against the Law Society of Kenya Council that was then in office.
21. The Respondents maintain that it would be unreasonable for the Petitioner to legitimately expect that his alleged contract of employment would be honoured by the LSK Council.
22. The Respondents in their response to the Petition contended that the Petitioner had not demonstrated that he had a prima facie case with a likelihood of success.
23. According to the Respondents, elections were conducted on 10th March 2022 and a new LSK council was elected and sworn into office during the Annual General Meeting held on 25th March 2022, which Council is vested with authority to conduct recruitment of the Secretary/Chief Executive Officer of the LSK as per section 26 of the Law Society of Kenya Act.
24. It is the Respondents case that the instant Petition is an abuse of the process of this court and is for dismissal with costs to the 1st and 2nd Respondents.



25. As directed by the court on 14th July 2022, the Petition was disposed of by way of written submission. The Petitioner's submissions are dated 19th August 2022 while the Respondent's submissions are dated 15th September 2022. These submissions were highlighted on 20th September 2022.
26. According to the Petitioner, the Respondents' allegation that there was no vacancy in the office of the Secretary of Law Society of Kenya is not true as the advertisement dated 29th June 2021 referred to a position that was not for immediate placement but was to take place upon the expiry of the tenure of the office holder. The Petitioner submitted that his letter of appointment dated 23rd July 2023 issued by the former president of LSK indicated that the Petitioner was to assume office on 1st March 2022.
27. With regard to the allegation by the Respondents that the Petitioner's employment contract is invalid as it was issued to him by the caretaker council, the Petitioner maintains that the decision rendering the former council as null and void by Mrima J as cited by the Respondents is not binding on this court. The Petitioner submitted that his employment contract was not brought before the Judge and that if the Respondents wanted the court to make a pronouncement on his employment contract, they ought to have preferred a suit to this court.
28. It is the Petitioner's submission that the decision of Mrima J. to the effect that the decision made by the caretaker council was illegal does not affect the Petitioner's employment as he dealt with the Law Society of Kenya council.
29. On the averment by the Respondents that there was no vacancy for the position of secretary as at the time the Petitioner was appointed, the Petitioner states that he did not seek to assume office in 2021 but on 1st March 2022.
30. The Petitioner thus submits that the grounds advanced by the Respondents to impeach his contract of employment are illegal.
31. On the allegation that the Petitioner's recruitment flouted Section 26 of the *Law Society of Kenya Act* and Rule 45 of the Regulations, he maintained that in the interview panel chaired by the president, vice president and other members of the Law Society of Kenya council and that it was in his place to question the capacity of the panellists present in the interview. He maintained that the Respondent's refusal to allow him to take office is unconstitutional and a violation of his rights.
32. In a rejoinder by Mr. Kanjama SC for the Respondents, it was submitted that as at the time the impugned advertisement for a vacancy of secretary was made, there were fights between members of the council and this resulted in the council being divided into two.
33. Counsel submitted that Regulation 45(2) of the *LSK General Regulations* sets out the procedure for filling of a vacancy in the office of the secretary. He submitted that whenever there is a vacancy, the council will make an advertisement to the membership which process was not followed by the caretaker council. It was the Respondents submission that there is no requirement in law that the appointment of Chief Executive Officer be done 6 months in advance.
34. It was submitted that the caretaker council was declared unlawful and all its activities including the appointment of the Petitioner invalid. That the Petitioner knew that the process he was partaking in was invalid and that there was no notice to the general membership of the Law Society of Kenya. That his averment that he was an innocent third party cannot come to his aid.
35. The Respondents submitted that since the purported appointment of the Petitioner was a nullity, he could not have a legitimate expectation on a nullity.
36. The court was urged to dismiss the petition.



Determination

37. Having considered the Petition, the rival affidavits, the submissions on record and the authorities cited by the parties, the issues that fall for my determination are:
- i. Whether the 1st Respondent has properly been sued in this Petition;
 - ii. Whether the Petitioner's contract of employment is valid and if so, whether he was unfairly summary dismissal;
 - iii. What orders should issue.
38. The issue whether the 1st Respondent has been properly sued in the Petition herein was raised by the Respondents who averred that the 1st Respondent was erroneously joined to the suit as he does not meet the threshold to be a party to this suit since there is no legal relief that is claimed by the Petitioner against him.
39. It is the 1st Respondent's position that the proceedings herein relate to the decision of the Law society of Kenya "Caretaker Council" which council the 1st Respondent has never been a member of.
40. It is submitted that as a member of the Law Society of Kenya, the 1st Respondent is absolved of liability by dint of section 29 of the [Law Society of Kenya Act](#) which provides:
- (1) No matter or thing done by a member of the Council or by any officer, member of staff, or agent of the Council shall, if the matter or thing is done bona fide for executing the functions, powers or duties of the Council or the objects of the Society under this Act or for any neglect or default in the performance or exercise in good faith of any such duty or power render the member, officer, employee or agent or any person acting on their directions personally liable to any action, claim or demand whatsoever.
41. Order 1, rule 3 of the [Civil Procedure Rules](#) provides for who may be joined as a defendant to a suit as follows:
- Who may be joined as defendants.
3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.
 4. Court may give judgment for or against one or more of joint parties.
 4. Judgment may be given without amendment—
 - (a) for such one or more of the plaintiffs as may be found to be entitled to relief for such relief as he or they may be entitled to;
 - (b) against such one or more of the defendants as may be found to be liable according to their respective liabilities.
- [Order 1, rule 5.] Defendant need not be interested in all relief claimed.



5. It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

42. In the Case of *Civicon Limited v kivuwatt Limited and 2 others* [2015] eKLR the court while expounding on this rule stated as follows:

“The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do, is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

43. In *Kingori v Chege & 3 others* [2002] 2 KLR 243, Nambuye J set the guiding principles on the question of joinder as follows:

“Necessary parties who ought to have been joined are parties who are necessary to the Constitution of the suit without whom no decree at all can be passed. Therefore in case of a defendant two conditions must be met: (1) There must be a right to some relief against him in respect of the matter involved in the suit. (2) His presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the questions involved in the proceedings. A proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation which interest will be recognisable in the Court of law being an interest, which the Court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party. But a person may be added as a defendant though no relief may be claimed against him provided his presence is proper for a complete and final decision of the question involved in the suit and such a person is called a proper party as distinguished from a necessary party... Order 1 rule 10 allows the Court to add a defendant on its own motion or upon application by either party either orally or formally by summons in chambers under Order 1 rule 22. Here the party has not moved on its own but has been moved by the intending party on its own formally. The use of the words “either party” denotes that the formal move has to be made by a party already participating in the proceedings and it would mean that an intending party cannot come on his own and choose which position he wants.”

44. The prayers in the petition are not directed at the 1st Respondent except prayer 3 which seeks a declaration against him as agent of the 2nd Respondent. Since the 2nd Respondent is a corporate body that can be sued in its own name and in view of section 29 of the LSK Act, I find that the 1st Respondent is not a necessary party to this suit and was wrongly sued. I therefore remove his name from these proceedings.



45. On the 2nd issue whether the Petitioner’s contract is valid, the Petitioner insisted that he was legally appointed as the Secretary/Chief Executive Officer of the 2nd Respondent vide the appointment letter dated 23rd July 2021 which appointment was to take effect on 1st March 2023.
46. According to the Respondents, as at the time the Petitioner was appointed there was no vacancy in the office of the Secretary/Chief Executive Officer of Law Society of Kenya as the office was to become vacant on 28th September 2022.
47. The Respondents argue that the recruitment process carried out by the ‘caretaker council’ was in contravention of section 26(5) of the *Law Society of Kenya Act* as read together with Regulation 45(2) of the *LSK Regulations*. Section 26(5) provides:
- (5) A person appointed secretary shall hold office for a period of three years and shall be eligible for reappointment for a further term of three years.
- Regulation 45(2) of the *LSK Regulations* provides,
- (2) Where the office of secretary becomes vacant, the Council shall cause the vacancy to be notified to members through appropriate advertisement inviting qualified members to apply to fill the vacancy.
48. The wording of the section is clear, that a vacancy is declared when the office becomes vacant. At the time the caretaker council advertised for the position, it was not vacant and therefore the caretaker council filled a position that was unavailable.
49. In the case of *Gitbu Mungai & another v Law Society of Kenya & another* [2015] eKLR it was held that where a body has been established by statute (such as the Law Society of Kenya) then that body must act in accordance with the powers conferred upon it and cannot allocate itself powers even when it feels those powers are necessary to enable it perform its functions. The court observed:
- “In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In *Republic v Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 others* [2004] 2 KLR 530, it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others, and based on *East African Railways Corp. v Anthony Sefu Dar-es-Salaam* HCCA No 19 of 1971 [1973] EA, Courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it.
- Consequently, where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. Further, courts will not be rubber stamps of the decisions of administrative bodies. However, if Parliament gives great powers to statutory bodies, the courts must allow them to exercise it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law.”
50. In the instant case, the caretaker council was in breach of the very clear provisions of the law. A contract founded on an illegality is a void contract. The Petitioner ought to have been aware that there was no



vacancy in the office to which he was being appointed. In *Benjamin Macfoy v United Africa Co. Ltd* [1961] 3 All ER, 1169

“If an act is void then it is in law a nullity. It is not only bad but incurable bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”

51. In *Wambui v Mwanqi & 3 others* [Civil Appeal 465 of 2019] KECA 144 (KLR) (19 November 2021) (Judgment), the Court of Appeal upheld the trial Court's finding that the entitlement to title to the suit property was correctly found to have been premised on a nullity and as such was devoid of any legitimacy or legality and could not therefore be sanctioned by the court. The Court stated as follows:

“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing the obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court; and lastly, that it is trite law that where an act is a nullity it is void and every proceeding founded on it is also in law a nullity. (para. 42 (v))”.

Every subsequent act premised on a nullity cannot accrue legitimacy or legality (para. 46 (i))

Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void abinitio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3rd Respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence” (para 70)”

52. In *Joseph Kamau Kiguoya v Rose Wambui Muthike* (2016) eKLR the Environment and Land Court found that the transaction between the parties was void *ab initio* for failure to obtain the requisite consent. The Court ultimately found that it cannot order the Executive Officer of the Court to sign any transfer documents on behalf of the Defendant since to do so would amount to enforcing an illegal contract. In reaching that finding, the Court was guided as follows:

53. *Black's Law Dictionary* 9th Edition defines the term void as: "of no legal effect; null". And with regard to a contract, the same Dictionary states as follows: "A contract is void *ab initio* if it seriously offends law or public policy"... In *Mistry Amar Singh v Kulubya* 1963 E.A 408, the court cited the following passage from *Scott v Brown, Doering, MC NAB & Co. (3)*, (1892) 2 QB 724:

“*Ex turpi causa non oritur actio*. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principal which is not confined to indicate offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality: It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves illegality, the Court ought not to assist him”



54. In *Trans Mara Sugar Co Ltd & another v Ben Kangwaya Ayiemba & another* [2020] eKLR the High Court at Migori (Mrima, J.) held as follows on the issue of illegal contracts being unenforceable by the Courts:

According to Chitty on Contracts Thirty-Second Edition Vol. 1, General Principles Sweet & Maxwell Thomson Reuters publishers at pages 1335-1339 as a general rule a contract will be considered illegal at its formation when it is outrightly based on an illegal act. Contracts falling under this category cannot be enforced. Where a contract is illegal at formation neither party will acquire rights under that contract regardless of whether there was any intention to break the law, The contract will be void ab initio and it will be treated as if it was never entered into. In Kisii Civil Appeal 72 of 2008 *Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgesellschaft ('Deq') & others* [2011] eKLR the Court of Appeal considered instances where an illegal contract at formation may still be enforced. Referring to the decision in *Nathala Raghavii Lakhani v H.J. Vaitha & another* [1965] EA 452 the Court observed as follows:

"A plaintiff is not entitled to relief in a court of equity on the ground of illegality of his own conduct. In order to obtain relief, he must prove, not only that the transaction was illegal, but something more: he must prove either pressure or undue influence. If all he proves is an illegal agreement, he is not entitled to relief." (para. 52-53)

55. In *Root Capital Incorporated v Tekangu Farmers Co-operative Society Ltd & another* [2016] eKLR the High Court discussed the issue of certain contracts not complying with statutory provisions being unenforceable, The Court quoted with approval the Court of Appeal case of *Patel v Singh (No.2)* (1987) KLR 585 wherein the Court dismissed the appeal and held that the contract entered into by the appellant and the Respondent was illegal and contrary to the provisions of section 3(1) of the *Exchange Control Act* and was therefore illegal *ab initio* and it was unenforceable, The Court of Appeal cited with approval Devlin LJ in *Archbalds (Freightage Ltd v S Spanglett Ltd)* (1961) IQB 374 where he said at page 388 that:-

"The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy

56. The foregoing notwithstanding, the High Court (Mrima J) in *Odundo & 3 others v Havi & others; Emukule & 22 others (Interested parties)* (Constitutional Petition 22 & E260 of 2021 & E379 of 2020 (Consolidated)) (2021) declared the caretaker council and all its activities a nullity. The court held:

- (d) A declaration be and hereby issue that the Special General Meeting of the Law Society of Kenya convened and held on the 26th June, 2021 was in contravention of the orders of the court in Milimani High Court Judicial



Review No E1146 of 2020 *R v Nelson Andayi Havi & others ex parte Gad Aguko*. The meeting contravened articles 2(1), 3, 10(2)(a) and 159(2)(c) of the Constitution and rule 3(6)(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. All the resolutions made at the said meeting are invalid, null and void. They are hereby quashed.

- (e) A declaration be and hereby issue that the Caretaker Council constituted vide Resolution No 11 of the Special General Meeting of the Law Society of Kenya convened and held on the 26th June, 2021 is an unknown organ or entity of the Law Society of Kenya hence of no legal effect, null and void. It is hereby quashed.

57. The Petitioner submitted that the Judgment of Mrima J above did not touch on his contract and that the court did not have jurisdiction to determine the validity of his contract. He submitted that the Courts have declared the President of the 2nd Respondent to be the spokesman of the Respondent in all matters relating to the 2nd Respondent. That he has not been accused of participating in any illegal activities. That if the president was acting against internal rules and regulations that does not bind him, he is protected by the indoor management rule as LSK is a corporate entity and subscribes to internal standards and rules of management as a corporate entity.
58. The Petitioner submitted that the judgment was defective and its decision is not binding on this court. That the same is only persuasive.
59. I disagree. The judgment in Odundo & 3 others v Havi & others; Emukule & 22 others (Interested parties) (Constitutional Petition 22 & E260 of 2021 & E379 of 2020 (Consolidated)) (2021) was as pointed out by Mr. Kanjama, a judgment in rem. It declared a position that was binding on all and sundry. The decision was delivered on 20th December, 2021, before the crystallization of the Petitioner's contract which was to come into force on 1st March 2022. If the Petitioner was aggrieved by the judgment which declared all activities carried out by the entity which employed him null and void ab initio, he had the right to petition the court and even to appeal against the said judgment. He did not do so, instead, opting to file the instant petition on 9th May 2022.
60. Further, the wrangles within the law society council at the time the position of Chief Executive Officer/ Secretary of Law Society was advertised was a matter of notoriety which the court takes judicial notice of. The Petitioner, as an advocate and one who applied for the position, cannot feign ignorance of the fact that the council was split and that the advertisement was done by one faction of the council.
61. It is my finding that the Petitioner's contract is unenforceable for two reasons, the first is that it was entered into against the clear provisions of section 26(5) of the Law Society of K Act as read together with Regulation 45(2) of the LSK Regulations as the position had not been declared vacant. The second is that the body that entered into the contract with the Petitioner was declared unlawful and its actions void *ab initio* in the Judgment of Mrima J. in Odundo v Havi case.
62. I therefore find no merit in the petition with the result that the same is dismissed. There shall be no orders for cost.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 7TH DAY OF DECEMBER, 2023.

M. ONYANGO

JUDGE

