



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT NAIROBI

PETITION NO. E090 OF 2020

BETWEEN

MERCY KALONDU WAMBUA PETITIONER

VERSUS

NELSON ANDAYI HAVI RESPONDENT

AND

COUNCIL OF THE LAW SOCIETY OF KENYA INTERESTED PARTY

RULING

1. This Petition is related to Petition No. EO87 of 2020, pending before this Court. The Parties in the other Petition are Murigi Kamande [Petitioner], Nelson Andayi Havi and The Law Society of Kenya [Respondents] and Mercy Kalondu Wambua [Interested Party].
2. In a Ruling delivered on 17th December 2020, the Court ordered that the Law Society of Kenya [LSK] shall present to the Court, a resolution of the General Meeting, indicating which Law Firm, Law Firms or Lawyer, shall represent the LSK in the 2 Petitions. Proceedings in both Petitions were stayed pending the filing in Court, of the resolution of LSK General Meeting.
3. Through an Application dated 21st February 2021, LSK President, the Respondent herein, seeks an order setting aside the order staying proceedings, made on 17th December 2020. The Application was heard virtually on 9th April 2021.
4. Mr. Havi explains that the LSK held its General Meeting on 18th January 2021. Resolution was made as required by the Court, appointing certain Lawyers to represent the LSK. The Petitioner however, has refused to draw the resolution, which she is mandated to draw, under the LSK Regulations. The High Court stayed implementation of all the resolutions of 18th January 2021, on 3rd March 2021. In the period between 18th January 2021 and 3rd March 2021, the Petitioner did not draw any resolution.
5. There is a dichotomy between the 2 Petitions, Mr. Havi submits. The Petitioner herein is challenging termination of her contract of employment. The contract was to lapse on 19th March 2022. She obtained a conservatory order, and is in office, by virtue of that order.
6. The other cases filed at the High Court are challenging the manner in which the LSK resolutions were made. The Petitioner cannot be allowed to ride on the proceedings elsewhere, to stall her Petition on termination of her contract.
7. The order staying proceedings cannot be sustained on the basis that resolution of the LSK General Meeting has not been filed. The default has been occasioned by the Petitioner's failure to draw the resolution. Mr. Havi submits that the E&LRC is not precluded from hearing and determining the Petition, on account of Judicial Review pending at the High Court.
8. The Court is urged to give effect to the principle of timely disposal of disputes. The Petitioner should not be allowed to benefit from her own wrong. Mr. Havi submits that this Court must give a decision that aids progression of the dispute.
9. Ms. Kamende, also for the Respondent, associates herself fully with the Submissions made by the Respondent, Mr. Havi. She adds that the conservatory orders obtained by the Petitioner herein, were not against the LSK, but against Mr. Havi. The Petitioner was requested to draw the resolutions on 19th January 2021.

10. Mr. Otieno for Council of the LSK submits that the Application is fatally defective. It is made under the Civil Procedure Act. Proceedings of the E&LRC are regulated by the E&LRC [Procedure] Rules, 2016. The applicable Rule would be Rule 33 on review jurisdiction. Review is not permissible under the Rule, because the 2nd Respondent lodged a Notice of Appeal against the Ruling of 17th December 2020.

11. Mr. Limo for the Petitioner herein, submits that the General Meeting of 18th January 2021 was partly virtual and physical. Members who were not physically present were prevented from giving their views and from voting. They were asked to raise their hands, in a meaningless exercise. Members were disenfranchised. The outcome was an embarrassment of litigation. The Petitioner declined to draw the resolutions, because Mr. Havi amended the minutes of the General Meeting to suit his own position. The Petitioner denies that she is riding on litigation initiated elsewhere. Resolutions of the General Meeting must be approved by the LSK Council. The activities of 18th January 2021 led a situation where there was no Council to approve any resolution.

12. Mr. Ochiel for the Interested Party in Petition 087 of 2020, submits that the Application is barred by the doctrine of *sub judice*. There are at least 4 cases pending in Courts, relating to the resolutions of the General Meeting of 18th January 2021. Granting the orders sought by Mr. Havi, would embarrass the pending Claims. Mr. Havi is the Respondent in most of the cases. He mismanaged the General Meeting. The question of who represents the LSK, has not been resolved.

13. Mr. Obura for the Petitioner in Petition 087 of 2020, similarly argues that there is no resolution of the General Meeting, to support the appointment of any Lawyer, to represent the LSK. The appointment of Ms. Grace Bundi is subject of litigation initiated at the High Court. All resolutions were suspended.

14. Ms. Kamende answers that it is not fatal that the Respondent invokes the Civil Procedure Act, in bringing his Application. Article 159 of the Constitution grants the Court wide powers in dealing with matters before it. The Respondent has not filed any Appeal against the Ruling of 17th December 2020. Notice was filed by Murgor & Murgor, one of the Law Firms, which claimed to represent the LSK. Notice of Appeal in any event, does not amount to an Appeal. Mr. Limo concedes that the Petitioner has declined to draw the resolutions. The resolutions were made pursuant to the orders of this Court. The Court which stayed implementation of the resolutions is a Court of concurrent jurisdiction. Mr. Havi adds that there is no Appeal against the Ruling of 17th December 2020. The Record of Appeal ought to have been filled within 60 days under the Court of Appeal Rules. Under Rule 83, the Notice of Appeal is deemed to have been withdrawn.

The Court Finds: -

15. The Court has not been presented with any resolution of the LSK General Meeting, supporting the appointment of any Lawyer, or Law Firm, to represent the LSK in these Petitions.

16. The position as it was, on 17th December 2020, remains the same.

17. It may even have become compounded by the General Meeting of 18th January 2021, which, rather than generate consensus, apparently was highly controversial, generating further litigation and orders from other Courts.

18. Implementation of resolutions coming out of that meeting, has been stayed by the High Court. Even if the Petitioner herein is to draw the resolutions, they would not be useful in determining who is to act for the LSK in these Petitions. The Ruling of the High Court suspended and stayed all the resolutions and decisions of the General Meeting of 18th January 2021, emphasizing that the implementation of all resolutions shall cease forthwith.

19. From the Ruling of the High Court, it appears there was a resolution from the General Meeting, suspending Council Members. Without a Council who was to approve the resolutions of 18th January 2021?

20. The main problem that the Respondent faces, in the view of the Court, is not in the Petitioner declining to draw the resolutions; the problem is that there is an order of the High Court staying implementation. That order must be dealt with first, and lifted, if resolutions are to be drawn, and acted upon in any Court.

21. The Court does not think there is good ground established by the Respondent, to exercise its review jurisdiction and lift the order staying proceedings. The position as expressed by the Court in the Ruling of 17th December 2020, regarding the representation of the LSK, has not been resolved.

22. Whereas there is concurrence of jurisdictions and the E&LRC must conduct its proceedings independently, as submitted for the Respondent, Courts exercise judicial cooperation and comity, in the administration of justice, deferring to orders issued in concurrent jurisdictions. The Court cannot disregard the orders staying implementation of the resolutions, notwithstanding that it was this Court, that requested for the particular resolution on representation of the LSK.

23. The Court also agrees with Mr. Otieno that there was a Notice of Appeal filed against the Ruling of 17th December 2020. It is not for this Court to make a presumption that there is no Appeal, or that the Notice of Appeal is deemed to have been withdrawn. The Respondent ought to move the Court formally for an order indicating Notice of Appeal is no longer valid. It would not be proper to deem the Notice of Appeal to have been withdrawn, based solely on the Submissions of the Respondent. One of the Parties aggrieved by the Ruling has initiated an Appeal, which does not allow this Court to revisit its Ruling. The Court does not think the Application is fatally defective on the ground that the Respondent invokes the Civil Procedure Act. There is possible remedy for this, to be found in Article 159 of the Constitution as submitted by Ms. Kamende. There is however nothing to allow this Court to assume review jurisdiction, where one of the affected Parties has initiated Appeal against the Ruling sought to be reviewed. This position is not affected by the fact that it was not the Respondent, but

another Party, who lodged the Appeal.

24. The dispute has been escalated, drawing in other Lawyers, with fresh but related litigation cropping up in different Courts. The Court agrees that the overriding objective is timely resolution of disputes. But escalating of the dispute does not aid in timely resolution.

25. The Respondent has not persuaded the Court to review and set aside its Ruling of 17th December 2020. It is not practicable to proceed with different Lawyers with conflicting instructions, appearing for the LSK.

26. Let the LSK resolve this, and the Court shall thereafter, expedite the hearing of the Petitions.

IT IS ORDERED: -

a. The Application dated 21st February 2021, filed by the Respondent, is declined.

b. No order on the costs.

DATED. SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 17TH DAY OF JUNE 2021

JAMES RIKA

JUDGE