REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. E116 OF 2021

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 ARTICLES 10, 19(2); 20(1), (2), (3) & (4); 21(1); 23(3); 41; 47 (1) AND (2); 50(1); 258(1); AND 259 (1)

AND

IN THE MATTER OF: LAW SOCIETY OF KENYA ACT

AND

IN THE MATTER OF: EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF: LAW SOCIETY OF KENYA

BETWEEN

FLORENCE WAIRIMU MUTURI.....PETITIONER

VERSUS

NELSON ANDAYI HAVI.....1ST RESPONDENT

CAROLINE KAMENDE DAUDI.....2ND RESPONDENT

HERINE KABITA.....3RD RESPONDENT

ESTHER ANG'AWA.....4TH RESPONDENT

DR. MAXWELL MIYAWA.....5TH RESPONDENT

JANE ODIYA.....6TH RESPONDENT

GEORGE KAMAU.....7TH RESPONDENT

EMMANUEL KYOBIKA.....8TH RESPONDENT

JAMLICK MURIITHI.....9TH RESPONDENT

LEVI MUNYERI.....10TH RESPONDENT

BONBEGI GESICHO.....11TH RESPONDENT

CLARISE MMBONE.....12TH RESPONDENT

AND

COUNCIL OF THE LAW SOCIETY OF KENYA.....1ST INTERESTED PARTY

MERCY KALONDU WAMBUA.....2ND INTERESTED PARTY

GEORGE OMWANSA.....3RD INTERESTED PARTY

CAROLYNE MUTHEU.....4TH INTERESTED PARTY

FAITH ODHIAMBO.....5TH INTERESTED PARTY

ALUSO INGATI.....6TH INTERESTED PARTY

NDINDA KINYILI.....7TH INTERESTED PARTY

BERNHARD NGETICH.....8TH INTERESTED PARTY

BETH MICHOMA.....9TH INTERESTED PARTY

RIZIKI EMUKULE.....10TH INTERESTED PARTY

RULING

1. The Petitioner has brought the suit against the Respondents and in her the application before me seeks the following:-

    1. Spent

    2. THAT pending the *inter partes* hearing and determination of the application herein, there be a Conservatory Order staying the Respondents' decision signed by the 1st Respondent summarily dismissing the Petitioner as a Deputy Secretary and Director of the Compliance and Ethics directorate at the Law Society of Kenya.

    3. THAT pending the *inter partes* hearing and determination of the application herein, there be a Conservatory Order staying the 1st Respondent's Decision published in the Daily Nation Newspaper of 13th July 2021 inviting applications for the position of Director of the Compliance and Ethics at the Law Society of Kenya.

    4. THAT pending the *inter partes* hearing and determination of the application herein, the Respondents and especially the 1st & 2nd Respondents be restrained from interfering with her role as the Deputy Secretary, continue harassing, bullying and intimidating her or forcibly remove her from her work station, fail to pay her salary and benefits as a Senior LSK Secretariat staff or replace her entirely replacing the Petitioner from her current position as a Deputy Secretary and Director of the Compliance and Ethics directorate at the Law Society of Kenya or from withholding her salary or withdrawing any privileges, rights or benefits accruing to the Petitioner in that position.

    5. THAT pending the hearing and determination of the Petition herein, there be a Conservatory Order staying the Respondents' decision signed by the 1st Respondent summarily dismissing the Petitioner as a Deputy Secretary and Director of the Compliance and Ethics directorate at the Law Society of Kenya.

    6. THAT pending the hearing and determination of the Petition herein, there be a Conservatory Order staying the 1st Respondent's Decision published in the Daily Nation Newspaper of 13th July 2021 inviting applications for the position of Director of the Compliance and Ethics at the Law Society of Kenya.

    7. THAT pending the hearing and determination of the Petition herein, the Respondents and especially the 1st & 2nd Respondents be restrained from replacing the Petitioner from her current position as a Deputy Secretary and Director of the Compliance and Ethics directorate at the Law Society of Kenya or from withholding her salary or withdrawing any privileges, rights or benefits accruing to the Petitioner in that position.

    8. THAT the costs of this application be borne by the Respondents.

2. The Petitioner's motion was ably argued by Mr. Theuri who submitted that the Petitioner was seeking in particular orders in terms of prayers 5, 6, and 7 of the application. He submitted the grounds upon which the application is made are found on the face of the Motion and there is concurrence in terms of the factual narration as to the facts leading up to this application as set out in paragraphs 34-49 of the Supporting Affidavit dated 19th July 2021 and sworn by the Petitioner herein. He asserts that the concurrence on the factual position vary in very, very slight narrations with the narration that has been given by the Respondent in the affidavit sown by the Vice President Miss Carolyne Kamende at paragraph 27 to paragraph 40 in affidavit of 26th July 2021. The concurrence of facts are to the effect the Petitioner was summarily dismissed on 9th July 2021 and the decision was communicated or rather handed over on the 12th July 2021. He asserts that there is no dispute that there was never a formal hearing and that there is also no dispute that the Respondents have a detailed Human Resource Manual that establishes the procedure for disciplinary of staff and that procedure was not complied with. He asserted that it is also not in dispute the Court granted certain interim orders on 19th July 2021 staying a decision by the Respondents to advertise the position of the Petitioner and that the advert was dated 13th July 2021 and it was closing on the 20th July 2021. He submitted that it is also not in dispute the order was served upon the Respondents. He urged the Court to take the operative dated for close of submissions for the advert as 20th July 2021 which date was a public holiday and so going by the rules of Statutory Interpretations the operating date of closure was 21st July 2021. He asserts that despite confirmation of receipt of this Order, the Respondents in their affidavit at paragraph 40 and 41 aver that they conducted interviews for that position and recruited one of the applicants for the position. He submits that such outright contempt of Court orders is inimical to the standing and stature of the Law Society of Kenya and that it cannot lie in the mouth of the highest representatives or officials of the Law Society of Kenya to claim as they indeed they have in paragraph 56 of Carolyne Kamende's affidavit that damages would be an adequate remedy in the even the Court were to hold the summary dismissal to be unfair. He submitted that the Law Society enjoys prestige from its standing as a bastion defender to the rule of law and administration of justice. He submits that the Law Society cannot lead from the front side in disobedience of Court orders. He asserts that it is the contention of the Respondents that they can summarily dismiss the Petitioner without giving her an opportunity to be heard. He submits this is contrary not only to the Constitution which at Article 3 requires all of us but more so the Law Society to uphold its tenets by upholding Article 41 in terms of fair labour practices and Article 47 in terms of fair administrative actions. He submitted that is at the level of the Constitution, the upper level. At the level of Statute and the Employment Act Section 41(2) statutorily requires the employer to give a notice before summarily dismissing an employee and to hear and consider any representation which the employee may have on grounds of misconduct. He submitted that in this particular instance, the factual premises is not contentions and that it is only the narration that varies, the Petitioner has been allegedly summarily been dismissed for gross misconduct. It is conceded by Miss Kamende in her affidavit at paragraph 35 of the affidavit and paragraph 33 of the affidavit, that the grounds of misconduct were that the Petitioner declined to provide documents that were in the custody of the Chief Executive Officer who is the Petitioner's boss. He asserts that at paragraph 35 of Miss Kamende's affidavit, she concedes to the spectra of conflicting instructions given to the Petitioner. It was his submission that an action of gross misconduct cannot arise in such circumstances contemplated under Section 44(4)(c) and (e) in the instance of this matter. He submitted that the Petitioner was being instructed to conduct duties outside the scope of her duties and that in short the Court will find this in the affidavit of the 1st Interested Party.

3. Counsel for the Petitioner submitted that the issue before the Court is one of an employment dispute but invited the Court to take notice of the allegations that have bene made in the affidavit of the Petitioner and the responses filed by the Interested Parties and Respondents which clearly demonstrate a toxic working environment blurred or non-existent reporting lines, 2 sections, 2 different factions of Council members. He submitted that the chaos that is precipitated by this situation can be understood from the provisions of Section 27(2) of the Law Society of Kenya Act 2014 which provides that Council can issue specific or general directions to the Secretariat through the Secretary. Reference has been made severally in the affidavit to Section 16 of the Act which sets up the Council of the Law Society of Kenya and Sections 26 and 27 which set out provisions with regard to the Secretariat. He submitted that in the scheme of things and in the scheme of the Law Society, the Council is the governing organ while the Secretariat is in charge of day to day operations. He submitted that the Petitioner is operating in an environment where there are 2 existing and rival Councils. He conceded that some of those matters are subject of another Petition and went on to state that those are matters this Court is not to delve into. He submitted that their existence in themselves create uncertainty. He submitted that in the circumstances and given that there is no dispute over the factual position, it is the Petitioner's submission the she has laid out a *prima facie* case with a high likelihood of success and that is the threshold that is set out in various authorities. The most famous one being **Gatirau Peter Munya *v* Dickson Mwenda Kithinji *&* 2 Others [2014] eKLR**, a Supreme Court of Kenya authority. He submitted the other consideration in exercise of discretion is whether the same enhances constitutional values and we submit in light of the various violations of the right to fair administration action and the exalted standing of the Law Society in matters of Rule and Law, the exercise of discretion in favour of the Petitioner will enhance constitutional values and hold Law Society true to its mandate as set out in Section 4 of the Law Society of Kenya Act. He asserted that it had been also demonstrated an attempt by the Law Society to defeat the ends of justice by claiming that the position has been filled. He asserts that in the first set of facts demonstrates the substratum would be rendered nugatory if the Court were not to grant the conservatory orders sought. He argued that the remedy of payment of damages must be weighed against the interest of the Parties and the justice of this matter and that if there were any payments of damages, the same would be made from Members funds. He submitted that would not be an optimum utilization of Member's funds especially taking into account the facts of this matter, the blatant disregard of Court orders and the other intervening and extremely unfortunate leadership wrangles. He submitted that there is no, that there has never been a more ideal case for the grant of Conservatory orders than this matter and that the rather unfortunate circumstances the Petitioner, and not just the Petitioner, but all the other employees of the Law Society find themselves in it behoves this Court to throw a protective shield to the employees as the contest of leadership is settled it is proper that the employees be protected.

4. Mr. Wakwaya for the 1st Interested Party indicated support for the motion and submitted that the concern is with the status of the law and the facts. He asserts the first question Court will need to ask is there a *prima facie* case with probability of success? He answered the question by stating that based on documents and pleadings before the Court, it is the 1st Interested Party's case that there is a *prima facie* case. He submitted that first, the Respondents while opposing the application have made certain admissions that clearly paint a picture of *prima facie* case and the first is in paragraph 52 of the affidavit sworn by the 2nd Respondent. Under the said paragraph 52, the Respondent states they had a right to dismiss the Petitioner without recourse to Human Resource Manual. The admission is to the effect that in terminating the Petitioner the Respondents were not bound by the provisions of the Employment Act or the provisions of the Human Resource Manual. He submitted that position contradicts Section 12 of the Employment Act, Section 10 of the Employment Act and Article 41 of the Constitution and Section 26 of the Employment Act. He submitted that the next admission is also under paragraph 52 and that the Respondents depone they had a right to dismiss without notice or hearing and recall with paragraph 30 and 31 points to a *prima facie* case that an employee can be dismissed on the spot – spot dismissal. This is a proper misconception, a thorough misapprehension of Section 41 of the Employment Act. He submitted that Section 41(2) is to effect that even in summary dismissal there has to be a hearing, hear charges leveled and sufficient time given to employee to respond and be accompanied by a person of their choice. He submitted that paragraphs 30, 31 and 52 of the

Respondents' affidavit purports to suggest these minimum requirements can be waived and employee dismissed on the spot. He asserts that paragraph 30 and 31 of Replying affidavit is an averment under oath that the Petitioner was taken through disciplinary process on the spot without notice. He asserts there is no documentary evidence that the said employee was taken through the minimum process. Nothing would have been hard to attach the Minutes of the purported disciplinary hearing. We say it was not there. He asserts that the Petitioner has come to Court and indicates persons who are not her employer who are not recognized as her employer have purported to destroy her career. He submits that based on foregoing and facts before Court the Petitioner has established *prima facie* case. As regards the question of damages, he asserted that reliance has been placed on several authorities in advancing the argument that damages will be an adequate remedy. The authorities listed have one common thread – they speak of public office. He submitted that he did not know whether the Respondents went to basic structure of the Constitution on the essence of public office and he argued that the payment of the Petitioner does not emanate from the consolidated fund or moneys provided directly from the Parliament. He asserts that the Petitioner is not a public servant and the authorities cited distinguishable and not applicable. He submitted that in the case of **Irene Echakara**, the claimant therein was out of office and in this case the Petitioner is not out of office and has been working for the Council. That case is thus distinguishable. He submitted that it is quite sad if persons who swore an oath to uphold the rule of law can come to Court and say 'We have violated a right. Kindly pay damage. We have gone against a Court order outrightly, kindly pay damages' He submitted that it cannot be that where there is a violation of a right then damages are an adequate remedy. As to balance of convenience as already pointed out the actions once taken by Respondent fly in clear face of Court orders. He submits that balance of convenience cannot aid the person who has bridged Article 10 of the Constitution with impunity and braggadocio. He asserts that any action done in contravention of the law is a nullity and whereas it is not necessary a Court may be called upon to declare such act as such, nothing can be founded on nothing. He submitted that the Respondents cannot purport to rely on interviews conducted on 23rd July 2021 to argue the balance of convenience lies in their favour. He argued that the balance of convenience lies in protecting the right of the aggrieved party where it is violated with the "*Utado what*" mentality.

5. The 2nd Interested Party filed a replying affidavit sworn on 27th July 2021 and placed reliance on the affidavit. The 2nd Interested Party associated with submissions made by the 1st Interested Party. Counsel for the 2nd Interested Party referred to Section 26 and 27 of the Law Society of Kenya Act. He submitted that Section 27(3) provides the person from whom the staff at the Secretariat can get general or specific orders. He asserts that the Petitioner was summarily dismissed for allegedly defying the order of the 1st Respondent. He referred to Section 27(3) and submitted that the Council is the only person who can give a direct order. He submitted that the Court issued orders in ELRC Petition E090 of 2020 in **Mercy Kalondu Wambua *v* Nelson Havi** where a conservatory order issued. He submitted that the very summary dismissal of the Petitioner is contemptuous of the order of this Court. He submitted that the test for grant of threshold is **Giella *v* Cassman Brown** and the Supreme Court decision in the **Gatirau Peter Munya** case. He referred to the **Board of Management Buruburu *v* Director City County** where Onyango J. held the interest merit is at core of grant of the interlocutory relief. Counsel submitted that the Petitioner's Human Resource Policy is what guides the operations of the Society and there are procedures to follow before a decision for summary dismissal is given. He submitted that the process is to be initiated and secondly, there must be a hearing. He asserts that the affidavit of the Respondents at paragraph 36 of Kamende's Affidavit insulates the Petitioner did not revert to Council. He asserts that paragraph 37 which would have explained the procedure of terminal is missing and paragraph 38 indicates the delivery of summary dismissal. He asserts that the person who initiates the disciplinary meetings is the 2nd Interested Party and the Committee is not indicated to have had a meeting and there are no minutes or resolution. He asserts the rights of the Petitioner were violated and the factual position is not disputed by Parties herein. He asserts that the 1st Respondent indicated the Petitioner was sent on administrative compulsory leave. He asserts that while there are 2 Deputies, the Respondents selectively pointed out the Petitioner who is one of the 2 Deputy Secretaries which is indicative of the Respondent's action. He submitted that the act of the Respondents is discriminatory to Petitioner as her rights were violated and procedures were not followed. He submitted that the test in **Gatirau Peter Munya** case should be applied and the upholding of these rights will allow upholding of the rights. He referred to case of **Okiya Omtatah Okoiti *v* Cabinet Secretary Interior [2019] eKLR** where the Court applied the **Gatirau Peter Munya** case. He submitted that the operation of Law Society of Kenya is dependent upon the Secretariat which serves the members of the Law Society of Kenya who are advocates and the public. He submitted that the Court should grant the relief and have the staff protected. He referred case of S**ebastian Wanzala v. Security Services [2014] eKLR.** The Court indicated spot dismissal is one the Court frowns upon and further gross misconduct cannot be determined in a spot determination. He thus prayed conservatory orders be issued as the Petitioner has shown basis for grant of the orders sought to safeguard the employees of the Law Society of Kenya.

6. The 3rd to 10th Interested Parties supported the motion by the Petitioner and urged the grant the orders. Counsel for the 3rd to 10th Respondent relied on the affidavit of Rizik Emukule a Council Member who had filed the same pursuant to authority to swear. Counsel associated herself with submissions of the Petitioner and the Counsels of the Interested Party. She urged the Court to be persuaded to grant the Motion as due process was not followed since the Respondent did not follow the law by per the provisions of Section 41 and 44 of the Employment Act. She submitted that the purported dismissal is unlawful. It was submitted that the 2nd Respondent filed an affidavit and from it is clear that no show cause was issued to Petitioner neither was there a letter inviting the Petitioner for hearing, nowhere is it indicated that a hearing took place. She argued that what they purport to do is give a detailed account of what happened. She submitted that cannot be basis for dismissal of employee who is permanent and pensionable. Employees of Law Society of Kenya can only be terminated in accordance with the law, the Law Society of Kenya Act and the Human Resource Manual. She submitted that per Section 27(1) it is only the Secretary of the Law Society of Kenya who can initiate procedure for dismissal. It was submitted that having shown the process is flawed, the Petitioner has established a *prima facie* case as required by the law. In replying affidavit, the 10th Interested Party has detailed the process and the Interested Parties submitted that the Petitioner has shown she has a case. They humbly requested the Notice of Motion be granted and the Conservatory orders be issued as no prejudice is shown and to the contrary, it is the Petitioner and Interested Party and Members of the Law Society who will suffer if damages are awarded.

7. The Respondents are opposed that Motion dated 19th July 2021 is opposed by the Respondents. The Respondents submitted that the relief sought is pending hearing of the Petition. It was submitted that the declarations sought are to declare as illegal the Council of the Law Society of Kenya as composed of the 1st to 12th Respondent. The challenge upon which the relief is founded is against the decision made by Members of the Law Society on 26th June 2021. It was submitted that it is as a result of that resolution as the Law Society Council is constituted as of the 1st to the 12th Respondent. He submitted that is also as a result of that resolution the 2nd Interested Party was sent on compulsory leave and the 2nd to 10th Interested Parties removed as Members of the Council of the Law Society. He admitted that there is

pending before High Court of Kenya at Nakuru in Petition E017 of 2021 where the resolutions made at meeting of 26th June 2021 have been challenged. It was submitted that in summary, the Petitioner seeks to quash through order of *Certiorari* the letter of 9th July 2021 summarily dismissing her. Similarly, the Petitioner seeks compensation for the violation of her rights from the summary dismissal. It was submitted that the nature of the relief sought pending the hearing and determination of the Petition is threefold – First there is order sought to stay the summary dismissal contained in letter of 9th July 2021. Secondly, an order is sought to stay notice of 13th July 2021 published in the Daily Nation inviting applications in the office previously held by the Petitioner. Third and last is an order that is sought to restrain the 1st and 2nd Respondent from recruiting an officer in the office held by the Petitioner. It was submitted that gleaned from the Petitioner's motion and her affidavit was that the Petitioner is not answerable to the Council of the Law Society, its individual Council Members, the Vice President or the President. He submitted that in the words of the Petitioner in the Motion and affidavit, she is only answerable to the Secretary of the Law Society of Kenya and nobody. The second ground upon which relief is sought is that summary dismissal was unlawful for the reason it was not proceeded with notice or a hearing. The third and last ground upon which relief is sought is that the dismissal of the Petitioner is an exclusive function of the Staff Budget and Finance Committee and for that reason the Council of the Law Society of Kenya cannot summarily dismiss her. He submitted that indiscipline and insubordination shall result in summary dismissal and any offence under Section 17 shall result in summary dismissal.

8. It was asserted that the summary dismissal is a function of the Law Society of Kenya as express from a reading of the contract of service itself and that Section 44 of the Employment Act on summary dismissal also applies in this case. It was submitted that this is the severance subsequent to resolution of 26th June 2021 whereat the 2nd Interested Party was sent on compulsory leave with pay, a decision of Members of Law Society of Kenya and not one by President LSK, the Vice President LSK or any of the Respondents. He submitted that in the letter of suspension of the 2nd Interested Party, she was to over with detailed hand over notes to her immediate deputy and it was argued that the immediate deputy of the 2nd Interested Party was the Petitioner. It was submitted that the next step is that on 9th July 2021 the meeting of the Law Society was held at the Boardroom of the Law Society at Gitanga Road and the Petitioner was called to the Boardroom and asked to do 3 things – to dispatch statements through the official email of the Law Society, secondly, to avail the documentation necessary for the conduct of the Council meeting and thirdly, to take minutes of the Council Meeting. It was submitted that the Petitioner took the position she will not comply with any of the 3 sets and she was categorical she does not take any orders from anybody other than the 2nd Interested Party. He submitted that she gave the document at page 138 – 139 which is indicated to have been signed by the 3rd – 9th Interested Party and that document purports to rubbish the resolutions of June 2021. It was submitted that the Petitioner contended there were 2 sets of instructions - one from the Respondents and another from the Interested Parties and that she was bound to disobey the instructions by Respondents. As to whether the Petitioner was heard, it was urged that in an email sent by the 1st Respondent to the Petitioner and copied to 2nd Respondent, it minutes what had transpired before it was written. Counsel for the Respondents submits that the Petitioner deceitfully denies receipt of this email. He asserted that assuming she was intimidated, she confirms Section 44 was read to her and she was told she would be summarily dismissed if she did not comply. It was submitted that the dismissal was mooted by Minutes of Council at pages 142 to 145 and as the time of the hearing of the motion, the office formerly occupied by the Petitioner has been competitively filed and a retention made vide letter of 23rd July 2021.

9. In regard to the principles of grant of injunction, the celebrated case of **Giella *v* Cassman Brown Limited** was cited as the starting point. He submitted that the Applicant must demonstrate a *prima facie* case with a probability of success. First it must be a case anchored on a right given in law or equity. Second the suitor, the Claimant, must demonstrate between his or her case and the response there is more in his or her case and less in the response. After meeting that threshold, the suitor must prove the injury threatened cannot be compensated with an award of money – if the Court is in doubt of the first two issues it may determine on a balance of convenience. The Respondents cited the case of **Nguruman Limited *v* Nielsen [2014] eKLR** which illuminates the sequential nature of the 3 principles. He submitted that one must prove the first requirement first, then one must prove the second requirement and if failing that the Council should consider the balance of convenience. He submitted that there is no leap frogging. It is sequential with these clear principles.

10. It was submitted that starting with the first issue, the Petitioner proceeds from the premise she cannot take orders from the Council, the President or the Vice President and that she will only take orders from the Secretary. It was submitted further that the Court must therefore ask if there is a *prima facie* case that she is only subordinate to the Secretary – to enable the court evaluate the *prima facie* nature of the claim. He submitted that the Secretary is herself subordinate and in fact, the letter of appointment is signed by the President of course on recommendation of the Council and the letter of termination will be signed by the President of course by sanction of the Council. It was asserted that the 2nd Interested Party has been sent on compulsory leave. The Petitioner therefore is subordinate to the Council and that is so whether the Petitioner believes the Council is the proper Council. The suspension or leave of the 2nd Interested Party or validity of the Council are for another Court. Counsel posed the question as to what is summary dismissal? He answered that it is instantaneous dismissal. It is for an act by the employee that is so egregious that termination of the employee cannot be postponed. It is just that, summary. He submitted that notwithstanding the summary nature of the dismissal, she was engaged for 1 hour, she retrieved her contract of service and if she was intimidated, let us assume she was, pleas were made to her and to cap it all she was emailed. It was asserted that she said she needed to consult and she left her place of work and put off her phone. The right to be heard it is given and it has to be taken. He submitted that there are members of the Law Society who do not want it to work and the Court should not countenance this insubordination. It was submitted that the third point on laying a *prima facie* case is her reliance of the Staff Budget and Finance Committee. It was conceded that it is indeed true it exists and the Committee is chaired by Vice President as a matter of custom and practice. He submitted that a committee is a non-legal congregation of people who perform the function of a principal entity and in this case the principal is the Law Society of Kenya. He submitted that it is trite law what can be done by the delegate can be done by the principal. Counsel referred to **Gower & Davies: Principles of Modern Company Law** on the default powers and stated that what arises from this text is that which may be done by the delegate or be done by the principal. He cited the case of **Byron *v* Cotton [1914] 1 CH 895**.

11. It was submitted that the Petitioner asserts that she ought to have been taken through the disciplinary process in the Staff and Finance Committee in an action initiated by the 2nd Interested Party. It was submitted that we have seen the 2nd Interested Party is on leave and that provision does not preclude the Council from acting as the principal. He submitted that there was no difference in the Human Resource Manual, Clause of the contract and Section 44 of the Employment Act on dismissal and summary dismissal. It was submitted that even the Human Resource Manual sets the dichotomy between summary dismissal and dismissal. It was submitted that the act of summary dismissal

is not an act of Committee or Commission. It is a function of the Law Society of Kenya and the Staff Committee only recommends and the Council can accept or refuse the recommendation. He submitted that it had been demonstrated there is no *prima facie* on any of the grounds the claim is made.

12. As to the 2nd principle, it was submitted that the Petitioner is leap frogging she has not even pleaded money will not compensate her and that conveniently she has not sued her employer and has only sued the President, the Vice President. It was submitted that the problem at Secretariat is that they think the elected officials are subordinate to them. He submitted that the Secretariat operates as implementers of policy and this has been done since 1943. He referred to the case of **Ameja Zele Moi *v* County of Baringo** whose *ratio decidendi* is that nobody has a proprietary right to office. He also cited the case of **Attorney General *v* Andrew Kiplimo** which held that there is no property in public office whereas it is not been alleged monies will not compensate the injury, this is an injury if it is proved can be compensated by money. On the issue of reinstatement submissions were that the case of **Rift Valley Railways v. Kenya Railways** is an answer as it is not for Court to substitute its own grounds for those of the employee. He submitted that the employer – the Council of Law Society of Kenya found the Petitioner to have been insubordinate. If it is found at the end that the employer was wrong, then the Court can give remedy. The case of **Bryan Khaemba *v* Chief Justice** was cited where the Court of Appeal declined reinstatement. He argued that the order granted by Onyango J. was that there would be stay of the receipt of applications for the position. He asserts that the advertisement was signed on 12th July 2021 and it was put in the papers on 13th July 2021 and they went to Court on 19th July a clear 6 days after. He submitted that the notice indicated the close of application would be 20th July 2021 and therefore they sought to stay a notice that had taken effect. He submitted that the Law Society of Kenya plays a fundamental role per Section 4 of the Law Society of Kenya Act and that role cannot be undertaken by Council if the Secretariat is hell-bent to frustrate the work of elected leaders. He submitted that the Court process should not be abused by employees who do not want to work and thus prayed the Motion be dismissed with costs.

13. The Petitioner's Counsel in a brief reprise submitted that there is a mischaracterization of the Petitioner's case before the Court. He stated that the Petitioner is not saying she is not answerable to President, the Vice President or the Council and that she only alleges proper corporate governance and respect to the chain of command. He submitted that she should take her instructions from Secretary. He submitted that what the Petitioner is alleging is that in exercise of her duties the Council is bound and guided by the Staff Human Resource Manual. He asserted that this is to ensure harmony and consistence in furtherance of fair labour practice as required by Section 10 and more specifically Section 12 of the Employment Act. He submitted that Section 12 is very categorical in the proviso that an employer must set out the statement on disciplinary rules and those statements are contained in the Human Resource Manual. He submitted that in this instance, the Council cannot in manner of speaking approbate and reprobate on the issue. He submitted that the President had conveniently failed to tell the Court that there are 2 Deputy Secretaries and the letter referred to does not designate the Petitioner to be the one to exercise the powers of the Secretary. He submitted that the Powers of Secretary are donated by Statute in Section 26 and 27 and therefore it follows they can only be exercised by a person so designated. He submitted that the Court has also been informed that the Petitioner was given a hearing which contradicts the averments made in the Vice Presidents affidavit paragraph 35. He submitted that there is also a contradiction in the submissions made by Counsel for Respondents. It is stated she was given a hearing and he submits she is not entitled to a hearing in case of summary dismissal. It was submitted that even in cases of summary dismissal notice must be given and the Petitioner must be heard. He referred to Section 26 and 27 of Law Society of Kenya Act and submitted that the responsibility for day to day management of affairs of the Society is under the Secretariat of the Law Society. He proceeded to distinguish the cases relied upon and submitted with regard to decision of **Attorney General & Another *v* Andrew Kiplimo Sang** and **Ameja Zele Moi *v* County of Baringo,** those cases are not applicable when interrogating the disciplinary issue of employee being permeant and pensionable terms. He cited the case of **KRA *v* Daniel Waithaka Gitahi** where the disciplinary feature demonstrates that the Appellants had been given a hearing and the Court was satisfied that the proper procedure was followed. He submitted that the proper procedure was the not followed in this case. He submitted that the case of **Itoto Echakara** related to the issue of effluxion of contract which is not the situation in this case. Finally, in regard to the decision of **Chief Justice *v* Bryan Khaemba** the Court of Appeal declined to order reinstatement on the basis and that the Applicant there was to exercise judicial functions if the Court were to find eventually the Respondent Mr. Khaemba had been dismissed properly then the proceedings, he would have conducted on the interim would have been called into question. Counsel submitted that this decision actually supports the submissions before the Court and if the decision of suspension of Council were upheld then this decision would be rendered nugatory and thus this favors the Petitioner to be granted an order to conserve her position pending decision to determine the proper Council.

14. The Petitioner seeks injunctive relief and the principles of grant or denial of such relief is the celebrated case of **Giella *v* Cassman Brown** (*supra*). The three-part test is as follows:-

a) An Applicant must show a *prima facie* case with a probability of success;

b) An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages;

c) If the Court is in doubt of the two above principles, it will decide an application on the balance of convenience.

15. In the case of **Nguruman Limited *v* Jan Bonde Neilsen & 2 Others** (*supra*), the Court of Appeal (Ouko JA (as he then was), Kiage and M'Inoti JJA) in analysing the 3 tier test in **Giella *v* Cassman Brown** held:-

> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.
>
> ……
>
> If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other

words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.

16. The Petitioner asserts that her removal as the Deputy Secretary of the Law Society was without a hearing and in contravention of her rights to fair administrative action. She has elaborately set out the circumstances of the incidents leading to her removal.

17. I will borrow and paraphrase the *dicta* of the Learned Judges of Appeal in analyzing the Petitioner's motion. The Petitioner was required to establish a *prima facie* case though that alone is not sufficient basis to grant an interlocutory injunction. The court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If a *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted. I am satisfied that a *prima facie* case has been established and I come to this conclusion because without going into the merits of the impugned action, the Petitioner has indicated that she was not heard while the Replying Affidavit of the 2nd Respondent seems to suggest that there may have been a misstep in the process. That therefore leaves the issue of irreparable injury. The injury suffered by the Petitioner from her pleadings ranges from infringement of her right and termination. In respect of the infringement of her rights and even her termination, there is provision for payment of damages under the rubric of Constitutional remedies for violation of rights while the Employment Act under Section 49 provides remedy which in my considered view would be sufficient for the alleged infringement of the Petitioner's rights. The Court is therefore not convinced that damages would not be an adequate remedy. As to the balance of convenience, there is indication that a recruitment took place for a replacement of the Petitioner. The merits or otherwise of such a move notwithstanding means that the balance of convenience heavily tilts against the grant of the relief the Petitioner seeks. In the final analysis, I find that the motion by the Petitioner has not surmounted the 3-tier test in **Giella *v* Cassman Brown** and reiterated in the **Nguruman** case. The inevitable conclusion is that there is no basis for the grant of the motion and I accordingly dismiss the Petitioner's motion albeit with no order as to costs. As today is the last day of this term, the Petition shall be mentioned in the new term on 21st September 2021 to take directions on its disposal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2021.

NZIOKI WA MAKAU

JUDGE