REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram Ibrahim, Wanjala, SCJJ)

PETITION NO. 12 OF 2013

-BETWEEN-

TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE.....PETITIONER

-AND-

MUMO MATEMO.....1ST RESPONDENT

THE ATTORNEY-GENERAL.....2ND RESPONDENT

MINISTER FOR JUSTICE & CONSTITUTIONAL AFFAIRS.....3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

THE KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS.....5TH RESPONDENT

KENYA HUMAN RIGHTS COMMISSION.....6TH RESPONDENT

RULING

A. BACKGROUND

[1] The Petition before the Court is an appeal by Trusted Society of Human Rights Alliance against the judgement and decree of the Court of Appeal (Kihara Kariuki, Ouko, Kiage, Gatembu Kairu and Murgor JJA) dated 26th July, 2013 which reversed the High Court decision that had annulled the appointment of the 1st Respondent, Mumo Matemo, as the chairperson of the Ethics and Anti-corruption Commission.

[2] Upon the institution of this Petition the Law Society of Kenya (LSK) filed an Application dated 15th October, 2013 seeking to be enjoined in the matter as an interested party. The matter came up for mention before the Deputy Registrar on the 23rd January, 2014, and the possibility of admitting LSK to the proceedings by consent was considered. However, no consent was forthcoming, as the Petitioner indicated that it would oppose the application. Parties were advised to file and serve their responses to the LSK's application, and the matter was scheduled for hearing on the 28th January, 2014 before a two-judge Bench of this Court.

B. SUBMISSIONS

[3] At the hearing of the application for the joinder of LSK, its counsel on record, Mr. Mwenesi sought to rely on the grounds in the application and the supporting affidavit of Mr. Apollo Mboya, the Chief Executive Officer and Secretary of the Society. The application is premised mainly on the objectives of the Society as provided for by Section 4 of the Law Society Act (Cap 18, Laws of Kenya).

[4] Mr. Mboya depones that it will be in the greater interests of justice and the rule of law, and in the interests of all concerned, that litigation on the matter should cease. He further points out flaws in the Petition and Record of Appeal, as then filed in Court, and states that it was defective, as it lacked the Court of Appeal's judgement and proceedings, as attachments. It was his averment that this omission was prejudicial to the effective determination of the matter; hence there was no substantive appeal at law. He deponed that the Council of the Society wants to promote the highest standards of advocacy and pleading by its members, and the omissions in question are not mere technical errors that can be cured by the provisions of Article 159 of the Constitution. He proceeds thus:

> ***"THAT the Law Society of Kenya seeks to be enjoined as an Interested Party. The Society is pursuing its objects to***

represent, protect and assist its members appointed to constitutional and statutory positions to further their careers and perform in those positions. The pursuit is incidental and conducive to the attainment of the object of assisting the members to better apply the law and perform in the new environment of the constitutional or statutory position".

[5] Mr. Mwenesi in his oral submissions, sought to respond to the objections raised by the Petitioner, and the 5th and 6th respondents in the Petition. He reiterated that the fact that Mr. Matemo's status on the LSK's website was 'inactive' does not mean he is not a member, only that he has not taken out a certificate for private practice. Further, he submitted that the contention that LSK let other bodies in the matter intervene was not justified, as LSK had previously participated in forums championing the fight against Corruption where it has even sat as the Chair of the various boards established to fight corruption. That the other bodies were not going to champion the LSK's course, as even the now regularized record of appeal was so done after the intervention of the Society by its application, in which it pointed out the apparent flaws.

[6] The application was supported by the 1st respondent through their counsel, Mr. Sisule who submitted that the matter relates to Chapter 6 of the Constitution and its applicability to an advocate acting as advocate within corporate bodies. Mr. Mwenesi further urged that Mr. Matemo is an advocate of the High Court, which status is granted by the Court, and not by the Law Society. Secondly, counsel referred the court to the ***Raila case***, Petition No. 5 of 2013**,** and argued that the Court can admit an intervener and direct him as to the area of submission. It was counsel's position that LSK be so admitted, and then the Court can direct it on how it conducts its business in the proceedings.

[7] The 2nd and 3rd respondents also supported the application by LSK. Through their counsel, Mr. L.N. Muiruri they questioned the 5th and 6th

respondents' objection to the LSK's application given that they too had been admitted into these proceedings in the superior Court on similar ground, that of advocating an interest. This argument was also supported by the 4th respondent through their counsel, Mr. Okello.

[8] The Petitioner, through counsel, Mr. Imanyara opposed the LSK application. Counsel submitted that the society was not coming to Court to advance neutrality, but was biased, as evidenced from the affidavit of Mr. Mboya (paragraph 26) who deponed: **"We agree with the grounds of objection of the 1st Respondent".**

[9] Counsel wondered why LSK had not sought to be enjoined in the proceedings from the onset, in the superior court and the Court of Appeal. Counsel also sought to support and rely on the grounds of objection by Mr. Nderitu, counsel for the 5th and 6th respondents.

[10] Mr. Nderitu, in his submissions filed on 27th January, 2014 opposed the application on the following grounds:

- that Mumo Matemo was no longer a member of the Society;
- that the resolution of the society to represent Mr. Matemu is *ultra vires;*
- that the representation is based on an untenable interpretation of the LSK Act;
- that the Society's intervention is discriminatory;
- that the intervention has no legal basis under the Supreme Court Rules and/or the Supreme Court Act;
- that the Society's intervention would subvert the principle of equality of arms;
- that there has been gross and unexplained delay in applying to join in the proceedings;
- it is an abuse of the court process; and

- that no prejudice would be caused by the Supreme Court declining to allow the Society to intervene.

C. ANALYSIS

(a) *Relevant Questions*

[11] In determining whether or not LSK should be admitted into these proceedings as an Interested Party/ Intervener, the following questions call for determination:

(i) Who is an Intervener and what role does he/she play?
(ii) In what circumstances is an Intervener enjoined in proceedings?
(iii) What is the difference between an Intervener and *Amicus curiae*?
(iv) What is the mandate of the LSK under the Society's Act? Can it take sides in proceedings on the basis of this mandate?
(v) Lastly, does LSK have a role to play in respect of the quality of pleadings as filed in Court?

(b) Who is an Intervener?

[12] Rule 25 of the Supreme Court Rules, 2012 is headed *Interventions*, and provides thus:

> **"(1) A person *may at any time in any proceedings before the Court* apply for leave to be enjoined as an interested party.**
>
> **(2) An application under this rule shall include-**
>
> **(a) a description of the interested party;**
>
> **(b) *any prejudice that the interested party would suffer if the intervention was denied;* and**

> **(c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and *the reasons for believing that the submissions will be useful to the Court and different from those of the other parties"(*emphasis provided).**

[13] While the Rules have a definition of who an *Amicus* is, there is no definition attributed to "Intervener" or "Interested Party". However, from Rule 25 above, one is allowed to apply to be enjoined any time in the course of the proceedings.

[14] **Black's Law Dictionary, 9th Edition**, defines "intervener" (at page 897) thus:

> **"One who voluntarily enters a pending lawsuit *because of a personal stake* in it" (emphasis provided);**

and defines "Interested Party" (at p.1232) thus:

> **"A party who *has a recognizable stake* (and therefore standing) in a matter".**

[15] On the other hand, an *amicus* is defined in ***Black's Law Dictionary*** thus:

> **"*A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter"***

[16] In the **Presidential Election Petition No.5 of 2013 (*The Raila Case)***, the role of *amicus* was clarified. The LSK was at that time denied admission on the ground that it had taken a partisan position. This means that an

amicus ought not to be partisan. This is a 'neutral' party admitted into the proceedings so as to aid the Court in reaching an 'informed' decision, either way.

[17] Suffice it to say that while an interested party has a 'stake/interest' directly in the case, an *amicus's* interest is its 'fidelity' to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.

[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. On the other hand, an *amicus* is only interested in the Court making a decision of professional integrity. An *amicus* has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a 'friend' of the Court, his cause is to ensure that a legal and legitimate decision is achieved.

[19] Considering LSK'S declared interest in this instance, it was more tenable it should have sought admission as intervener, and not *amicus*. What now follows is a consideration of this option and, in particular, whether it is prudent to admit LSK in this matter as an interested party.

(c) *The LSK's mandate*

[20] The core objectives of the LSK are provided for in the LSK Act (Cap. 18, Laws of Kenya), Section 4. They include:

> ***"(c) to assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya; . . . .***

> ***"(e) to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law..."***

It is on this basis, and in the cause of the stated mandate, that LSK is occasionally admitted as an interested party and/or, more often, as *amicus,* in matters before Courts.

[21] It is clear from the provisions of Section 4 of the LSK Act, that one of LSK's key mandates is to champion the *interests of the Kenyan public*. The question remaining is: will LSK be championing the interests of the general public if it were to join these proceedings, where it has declared its interests to be in support of the 1st respondent's cause? Is it tenable for LSK to pursue the interests of an individual person, whether a member or not, at the expense of the public-interest mandate of Section 4 of the Act?

[22] It is our considered opinion that the answer is 'no'. LSK cannot invoke Section 4 where it seeks to champion the interests of an individual. The wide mandate bestowed on LSK to protect and assist the public in Kenya, cannot be read in such a manner as to allow it to perpetuate an individual's interest.

[23] Lastly, LSK in its application to be enjoined, and in its submissions in Court through learned counsel, Mr. Mwenesi, claimed that the Record of Appeal before the Court was improper. Whether that was the case or not is not an issue for determination here. The outstanding question is: to what extent LSK should intervene in proceedings before a Court of law. LSK in its application avers in (paragraph 12) thus:

> **"THAT I should point out that the Council of the Law Society of Kenya wishes to promote the highest standards of advocacy and pleading by its members..."**

On this ground, LSK contends, it was able to point out the flaws in the Record of Appeal, thus occasioning the Petitioner putting in a Supplementary Record of appeal. LSK by its wide mandate under Section 4 of the Act, is indeed charged with ensuring its members attain the highest standards of advocacy. How does LSK do this? Should it achieve this goal by intervening in proceedings before Courts of law, and securing the striking-out of 'defective' pleadings? Our answer is in the negative.

[24] A suit in Court is a 'solemn' process, "owned" solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of ***defective pleadings***.

[25] LSK is the umbrella body for all advocates in Kenya. Is it tenable for it to enter into proceedings taking a partisan position, and then seek to strike out the pleadings of an advocate? We do not think so. The Society's mandate to ensure high standards of advocacy, under Section 4 of the Act, was not meant to allow it to 'police' members' pleadings as already filed in Court. LSK'S objective can be achieved, and is indeed achieved, through ***continuous training of its members on good practices and procedures.*** This is what the Society does when it engages in Continuous Legal education (CLE) programs. It is during such forums that members can and should be trained on the preparation of pleadings.

[26] Once the matter is filed and the Court is seized of it, the LSK has no *locus standi* to intervene with regard to the quality of pleadings. The Court has its own safety-nets for filtering matters before it, through the rules of procedure as developed over time. These include the Civil Procedure Rules, 2010 for the Sub-ordinate Courts and the High Court, the Appellate Jurisdiction Act (Cap.9, Laws

of Kenya), and Rules for the Court of Appeal, and the Supreme Court Rules, 2012 for this Court.

[27] Suffice it to say that, seeking to move the Court to strike out a defective pleading cannot be a ground upon which LSK can seek, and be granted leave to be enjoined as an interested party to proceedings.

D. CONCLUSION

[28] We find and hold that the LSK has manifested its partisan support for the 1st respondent, and on this account it was improper for it to be enjoined as an interested party and much less, as *amicus*. Given LSK's objectives under Section 4 of the Law society Act, the Society holds a special responsibility for championing the wider public interest, rather than individual interests clothed as public interest. The Society cannot use its mandate for such a cause, as that would be ***ultra vires*** its statutory mandate.

[29] LSK should always strive to remain neutral, letting its members carry out their advocacy work independently. The Courts have their established safeguard-mechanisms to address any frivolous pleadings or suits.

[30] The upshot is that the LSK's application to be enjoined as an interested party in this matter is hereby dismissed. In exercise of the Court's discretion, there shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF FEBRUARY 2014

…… ……

MOHAMMED IBRAHIM, SCJ. SMOKIN WANJALA, SCJ.

I certify that this is
a true copy of the original

DEPUTY REGISTRAR

SUPREME COURT OF KENYA