REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

IN THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 507 OF 2014

DEYNES MURIITHI.....1ST PETITIONER

ALEXANDER MUCHEMI.....2ND PETITIONER

ANNA CHERONO KONUCHE.....3RD PETITIONER

PAUL KARIBA KIBIKU.....4TH PETITIONER

(Suing on their own behalf and on behalf of 1047 Other Petitioners)

VERSUS

THE LAW SOCIETY OF KENYA.....1ST RESPONDENT

REGISTRAR OF THE HIGH COURT.....2ND RESPONDENT

CONSOLIDATED WITH

MOMBASA HIGH COURT PETITION NO. 64 OF 2014

KIMANI WAWERU AND 28 OTHERS.....PETITIONERS

(Suing on their own behalf and on behalf of 1018 Others)

VERSUS

THE LAW SOCIETY OF KENYA AND 12 OTHERS.....RESPONDENT

RULING

Introduction

1. The petitioners, who are all Advocates of the High Court of Kenya and members of the Law Society of Kenya (LSK), filed two separate petitions in Nairobi and Mombasa. An order for the consolidation of the petitions was made on 24th November 2014. In accordance with the order made at the consolidation of the petitions, the petitioners in Petition No. 507 of 2014 would be the 1st - 4th petitioners while the petitioners in Mombasa High Court Petition No. 64

of 2014 would be the 5th -32nd petitioners. This ruling pertains to the two applications for conservatory orders filed by the petitioners in their respective petitions.

2. In the said applications, the petitioners seek, inter alia, orders restraining the 1st respondent, the LSK and its Council, from implementing a decision, said to have been reached at a Special General Meeting of the LSK held on 27th September 2014, allegedly pegging the issuance of practicing certificates for 2015 on the payment of sums of Kshs 39,000 and 50,000 levied on Advocates, depending on an individual Advocate's years of practice, towards the construction of a project by the 1st respondent referred to as the LSK International Arbitration Centre.

3. In their petition dated 15th October 2014, the 1st- 4th petitioners seek the following orders:

> ***a. A Declaration that issuance of a Practicing Certificate under Sec. 21 of the Advocates Act, Cap 16 Laws of Kenya is not subject to any other benefit or obligation that may either be resolved or proposed by the 1st Respondent and which benefit or obligation is not contemplated by the Advocates Act, Cap 16, Laws of Kenya, The Law Society of Kenya Act, Cap 26 Laws of Kenya, regulations thereunder or any other applicable law.***
>
> ***b. A prohibitory Order restraining the Respondents from in any way making the payment of Kshs. 39,000.00 – Kshs. 50,000.00 either wholly or any part thereof a pre-condition for the issuance of a Practicing Certificate.***
>
> ***c. An Order of Certiorari to bring to this Court and quash the decision made by the 1st Respondent making it a condition precedent for the Petitioner and any Advocate to pay Kshs. 39,000.00 or any other monies not contemplated under the Advocates Act, Cap 16 Laws of Kenya, The Law Society of Kenya Act, Cap 26 Laws of Kenya and the Rules thereunder prior to issuance of a Practicing Certificate.***
>
> ***d. Costs of this Petition.***

4. LSK is a body corporate established under the provisions of the Law Society Act, Cap 18 Laws of Kenya. All Advocates to whom a practicing certificate is issued are members of the Law Society of Kenya pursuant to the provisions of section 5 of the **Law Society of Kenya Act Cap 18 Laws of Kenya** and section 23 of the **Advocates Act**, Cap 16 Laws of Kenya.

5. The 2nd respondent in Petition No. 507 of 2014 is the Registrar of the High Court of Kenya. The office of the Registrar has the mandate, under section 21 of the Advocates Act, to issue annual practicing certificates to Advocates. The 5th -32nd petitioners who are the petitioners in Mombasa High Court Petition No 64 of 2014 sued both the LSK as well as the LSK Council Members.

The Applications

6. In their application dated 10th November 2014 and supported by an affidavit sworn by the 1st petitioner, Mr. Deynes Muriithi, the petitioners in **Petition No. 507 of 2014** seek various orders, prayer 3 and 4 of which subsist for determination and are in the following terms:

1. ….

2. ….

3. Pending the hearing and determination of this Petition, a conservatory order be issued restraining the 1st and 2nd Respondents from in any way implementing or executing the decision requiring the payment of Kshs. 39,000.00 or Kshs. 50,000.00 or any part thereof being money towards construction of the International Arbitration Centre as a pre-condition to the issuance of the 2015 Practicing Certificate.

4. Costs of this application be in the cause.

7. In the grounds forming the basis of the application which are set out on the face of the application, the applicants state that they filed the petition on 16th October 2014 and it came up for directions on 28th October 2014 when the court gave directions on the filing of submissions and directed the parties to pursue an out of court settlement. They contend, however, that despite expressing a willingness in court to pursue such settlement, the 1st respondent, in a bid to steal a match on the petitioners and render the petition nugatory, proceeded to issue a demand for the payment of fees for the 2015 practicing certificate which included payment of the **Kshs. 39,000.00** or **Kshs. 50,000.00** as a precondition for issuance of the certificate.

8. The petitioners further contend that they were not heard or consulted on the pegging of this payment to issuance of the practicing certificate, and that if the 1st respondent's decision is implemented, their constitutional right to a fair hearing, fair administration of justice and economic rights will be infringed upon.

9. The petitioners in **Mombasa High Court Petition No 64 of 2014**, similarly aggrieved by the decision of the 1st respondent, filed an application under certificate of urgency dated 3rd October 2014 supported by affidavits sworn by Mr. Kimani Waweru and Ms. Faith Waigwa on the same date. In their application, they seek the following substantive orders:

a. ….

b. That this Honourable Court be pleased to issue Conservatory Order for stay to all the resolutions made by the respondents in the special general meeting held at Hilton Hotel on 27th September 2014 pending hearing and determination of this Application and Petition.

c. That this Honourable Court be pleased to issue Conservatory Order of stay to stop or stay the implementation of the proposed Law Society of Kenya Arbitration Center pending hearing and determination of this Application.

d. That the Honourable Court be pleased to issue Conservatory Order of temporary injunction to restrain the respondent by itself, its agents and servants from enforcing the resolutions of the special general meeting held on 27th September 2014 at Hilton Hotel and in particular from obtaining any loan and or financing by way of a loan and or overdraft from any financial

institution pursuant to the aforesaid resolution pending hearing and determination of this Application, and the Petition.

e. That the Honourable Court be pleased to issue a Conservatory Order of temporary injunction to restrain the respondent by itself, its agents and servants from compelling the petitioners to pay any monies towards the Law Society of Kenya International Arbitration Center and in any way pending the issuance of practicing certificates to the petitioners to the payment of that illegal charge pending hearing and determination of the Petition herein.

10. They also seek, at prayer (f) of the application, information relating to the minutes of the meetings of various organs of the Council and the Society at which the project in dispute was approved, and various other financial information on the project. They also pray for the costs of the application.

11. Their application is based on the grounds, among others, that the application raises fundamental issues on the constitutionally and legality of the convening and passing of resolutions in the respondent's Special General Meeting held on 27th September 2014; relates to matters of grave national interest and importance and the livelihood of the applicants in their legitimate practice as advocates of the High Court of Kenya. They argue that the impugned resolutions of the Special General Meeting of 27th September 2014 are subjective in terms and seek to use force to make the petitioners contribute to a project without full material disclosure and accountability; and that the respondent's Council has refused to give them information about the project and have pleaded confidentiality.

12. The petitioners further claim that the purposes of the proposed Law Society of Kenya International Arbitration Centre are in conflict with the provisions and purpose of the Nairobi International Arbitration Centre Act No 26 of 2013, which sets up an arbitration center in Nairobi and any other place in Kenya.

13. It is also the petitioners' contention that they and the respondents face the risk of substantial loss of their assets and property, and a compromise to their right to livelihood as the main guarantors of the proposed Kshs 800 million loans.

The Applicants' Submissions

14. Mr. Anzala for the 1st - 4th petitioners submitted that their application was precipitated by the fact that the 1st respondent had failed to engage in consultation and negotiations and had instead, with a view to stealing a match on the petitioners, demanded fees for the 2015 Practicing Certificate including payment of the **Kshs. 39,000.00** or **Kshs. 50,000.00,** depending on the years of practice, as a precondition for issuance of the certificates.

15. The petitioners contend that no resolution has ever been passed by LSK members pegging payment of the amounts aforesaid or any part thereof to issuance of a practicing certificate; that the LSK is mandated under **Regulation 27 of the Law Society (General) Regulations** to make regulations, subject to **the Law Society of Kenya Act,** and subject to approval by a special resolution of the members, prescribing inter alia, the annual subscription to be paid by members; that pursuant to the provisions of **Section 23** of the **Advocates Act,**

Cap 16 Laws of Kenya, the Petitioners are not required to pay any fee other than what is contemplated under statute and the regulations in order to obtain a practicing certificate. It is also their case that the LSK Council has no authority to issue pre-conditions other than payment of the fees envisaged in the **Advocates Act** for the issuance of a practicing certificate and so any such decision made without approval through a special resolution is ultra-vires.

16. The petitioners contend therefore that in view of the actions by the 1st respondent, the petitioners' apprehensions set out in the petition and the verifying affidavit of the 1st petitioner have come to pass; and that there is real likelihood that the petitioners may not practice law in the year 2015 in the event that the 1st respondent declines to give clearance to the 2nd respondent to issue the petitioners with practicing certificates on the grounds that they have not paid the levy for the arbitration centre.

17. It is the petitioners' submission that the court has the jurisdiction to review the decision by the 1st respondent and grant a conservatory order pending the hearing and determination of the petition; that no public interest has been demonstrated by the 1st respondent that would justify its action, and that in any event, public interest does not grant the 1st respondent the authority to either act unlawfully or infringe upon their constitutional rights. It is their submission further that the 1st respondent has not exhibited any minutes either at any Special General Meeting or Annual General Meeting where a motion was discussed making payment of the **Kshs 39,000.00** or **50,000.00** a pre-condition to the issuance of a Practicing Certificate.

18. The 5th - 32nd petitioners' case was presented by Mr. Kimani Muhoro. He relied on the affidavit sworn by Mr. Kimani Waweru and Ms. Waigwa on 13th October 2014. These petitioners contend that it is the intention of the 1st respondent to make the members' acquisition of the annual Practicing Certificate conditional upon the payment of between **Kshs 39,000** to **Kshs 50,000** decreed at the unlawful Special General Meeting of 27th September 2014. They contend further that this would be in violation of the provisions of **Section 22** of the **Advocates Act** and infringes on their right to practice as advocates as provided under Part III Section 9 of the Advocates Act and further, that it undermines the right to access to justice by the general public.

19. The petitioners complain that their attempt to get the information that they seek from the 1st respondent's Council has been met with arrogance, muzzling and silencing of members who demand openness and accountability from the 1st respondent; that the 1st respondent's Council, in gross abuse of the mandate given to them by, amongst others, the petitioners, have turned to intimidation and blackmail against any members with an independent and divergent opinion on the project; and that the 1st respondent, as a public body founded by statute, should be reformist, open, transparent, democratic and accountable which is not the case on the issue of the project.

20. The petitioners allege that LSK has violated **Article 10** of the **Constitution** by failing to ensure the membership had real participation in making decisions on the project, and has violated their rights by failing to provide information, and also curtailing dissenting members' right to free speech and assembly and association at the purported Special General Meeting and thereafter. It is also their contention that their rights to fair administrative action under

Article 47 and fair hearing under **Article 50** of the **Constitution** has been infringed by the 1st respondent's failure to provide information that would facilitate informed participation at the purported Special General Meeting.

21. They submit that the respondents will suffer no loss or prejudice if the orders sought are granted, and that the overriding objective and the interests of justice tilt towards granting the orders pending the determination of the petition.

The 1st Respondent's Submissions

22. The 1st respondent filed a Statement of Grounds of Opposition dated 18th November 2014 and a Replying Affidavit dated 21st November 2014 sworn on the same date by the LSK Secretary, Mr. Apollo Mboya. Its case was presented by its Learned Counsel, Mr. Ahmednasir Abdullahi.

23. In its grounds of opposition, the 1st respondent contends that the application and the petition do not raise with any degree of clarity, specificity and particularity any constitutional rights infringed and violated by the 1st respondent; that the petitioners have not shown how, who, when and in what manner their constitutional rights under **Articles 23, 43, 35** and **50** of the **Constitution** were infringed; and therefore the applicants have no cause of action at all against it.

24. The 1st respondent further contends that **Article 23** of the **Constitution** is a jurisdictional and empowering one that is not disputed by the 1st respondent; that **Article 43** relates to economic and social rights which are available vertically as against the State and have no relevance to the matter at hand; and that the applicants have failed to show the relevance of Article 50 to their claim.

25. It is the 1st respondent's case that the Special General Meeting was convened as provided by law; and that it is its business and within its powers to issue Practicing Certificates in accordance with the provisions of **Section 21** of the **Advocates Act.**

26. According to the 1st respondent, the overwhelming majority of its members support its action and activities and therefore the rights of the said majority is an important consideration that the court should take into account as the issuance of the orders sought will infringe on the rights of this overwhelming majority who are in agreement with the actions of the 1st respondent. It was its submission that the application violates the equality provisions of Article 27 of the Constitution as it attempts to confer a privilege on a few selected individuals at the expense of the majority.

27. The 1st respondent contended that the petitioners have deliberately misrepresented the facts to the court and that no decision has been made by the LSK Council on the mode of enforcing the decision made by members at the Special General Meeting held on 27th September 2014. Mr. Mboya averred on its behalf that at the Council meeting held on 3rd November 2014, the LSK Council sought to partially implement the decision by communicating the said decision to members through the annual demand note indicating the sums each member of the Society is required to contribute; that the demand notices are categorized depending on the number of years one has been in practice; and that in the said

demand notes, the traditional sums for practicing certificates have been shown as having a payment deadline of 1st February 2015 which is pursuant to Section 23 of the Advocates Act, but that the payments for the International Arbitration Centre have a deadline of 28th February 2015.

28. It is its case therefore, with regard to this payment, that its Council shall take a decision on the kinds of sanctions or enforcement mechanism after the deadline of 28th February 2015; and that it cannot at this time determine the kind of sanctions to be imposed on those who default on payment. It was its contention further that a total of 131 members had already complied and made their payments, but that the majority of members are awaiting the Accountant Certificates which are normally issued in December and January for accounting reasons.

29. The 1st respondent contends that it is still interested in resolving the issue with the petitioners; that at the Council meeting held on 3rd November 2014, the Council constituted a committee to look at the issues raised by some members relating to the possibility of converting the payments into shares and or incorporating a special purpose vehicle for the project; and that none of the petitioners had sent their proposals to the committee. It argues that the petitioners are not interested in any negotiations and their interest is to see the project collapse.

30. The 1st respondent further alleges that the funds collected for the International Arbitration Centre are banked in a separate special account until they are able to accumulate 30% of the project cost which is a pre-condition set by the financial institutions for the grant of a banking facility; that they may undertake not to use or withdraw such funds until the determination of the petition; and that if the petition is successful, the said funds shall be refunded to any member who so demands.

31. The 1st respondent avers that to stop the collection of the funds will have a negative effect on the project as the financial institutions shall not grant the banking facility; that this will not only lead to a loss of the sum of Kshs 23,545,314 so far expended but also expose the 1st respondent to risk due to the various consultancy agreements that it has entered into; and that all such expenditure and engagement of consultants were taken pursuant to resolutions of members at Annual General Meetings.

32. Counsel for the 1st respondent asked the court to refer the matter to arbitration as provided for by the Law Society of Kenya (Arbitration) Regulations 1997.

Submissions by the 2nd Respondent

33. The case of the 2nd respondent was presented by learned State Counsel, Mr. Munene, and is contained in the Replying Affidavit sworn by Ms. Anne A. Amadi on 13th November 2014. The 2nd respondent avers that by virtue of her office, she is the custodian of the Roll of Advocates and is mandated by **Section 21** of the **Advocates Act** to issue practicing certificates to admitted advocates authorizing them to practice as advocates.

34. Ms. Amadi further avers that in issuing Practicing Certificates, she is subject to the provisions of the Advocates Act which require that an application be made in duplicate,

signed by the applicant and including certain particulars set out in the Advocates Act; and that the applicant is also required by the Advocates Act to produce evidence satisfactory to her office that the applicant has paid to the Law Society the fee prescribed for a practicing certificate and the annual subscriptions payable to the Law Society and the Advocates Benevolent Association. She avers further that an applicant is also required to produce a written approval signed by the Chairman of the Law Society stating that there is no objection to the grant of the practicing certificate.

35. The 2nd respondent further avers that the **Advocates Act** provides that in any case, not being a case to which **Section 25** of the Act applies, where the Registrar, on an application duly made refuses to issue a practicing Certificate, the applicant may apply to the Chief Justice who may make such order in the matter as is just. It is her position therefore that this petition is premature as against the office of the Registrar as no application has been made by any of the petitioners and been declined.

36. The 2nd respondent states that the office of the Registrar is bound by the values and principles of good governance set out under **Article 10** of the **Constitution** including the observance of the rule of law in the performance of its duties and there is no reason to believe that it will act otherwise in the event proper applications are presented for consideration by any of the petitioners.

Determination

37. Two main issues arise for consideration and determination at this stage. The first is whether the court should grant the two related conservatory orders sought by the petitioners, first, restraining the 1st respondent from pegging the issuance of the 2015 practicing certificate on the payment of the amounts set for advocates for the construction of the LSK International Arbitration Centre; and second, a further order to stop the 1st respondent from enforcing the resolutions of the special general meeting held on 27th September 2014, and in particular from obtaining any loan from any financial institution pursuant to the aforesaid resolution. The second main issue is whether to issue an order for the release of the information sought by the 5th – 32nd petitioners.

38. Before entering into an inquiry into these issues, it is important to dispense with one preliminary matter that arises from the submissions of the 1st respondent with respect to the petition, in which the petitioners have lodged their claim in the form of constitutional petitions seeking relief for alleged violation of their rights under the Constitution.

39. The 1st respondent impugns the petitions and applications, arguing that the petitions do not raise with any degree of clarity, specificity and particularity any constitutional rights infringed and violated by the 1st respondent, and that the petitioners have not shown how, by whom, when and in what manner their constitutional rights under **Articles 23, 43, 35** and **50** of the **Constitution** were infringed.

40. The 1st respondent's submission is based on the principle with regard to constitutional petitions enunciated by the Court in the case of **Anarita Karimi Njeru –vs- The Republic (1976-1980) 1 KLR 1272,** which this court is in agreement with**.** However, I also agree with

the elaboration of this principle contained in the reasoning of the court in **Trusted Society of Human Rights Alliance –vs- the Attorney General & 5 Others, Petition No. 229 of 2012** with regard to what is expected of a petitioner in a constitutional petition under the new Constitution:

> ***[46]"We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."***

41. I am satisfied that in the present case, from the pleadings and submissions of the parties and as will become evident later in the ruling, the petitioners have placed sufficient material before the court to enable it consider whether they are entitled to the reliefs sought, and to enable the respondents answer the petitioners' claims. The petitioners' main argument, as I understand it, is that the acts of the 1st respondent are likely to violate their right to practice as Advocates, and thereby affect their right to a livelihood. I therefore turn to a consideration of the issues for determination in the matter.

Whether to Grant Conservatory Relief

42. Courts in this jurisdiction have pronounced themselves with regard to the principles and the circumstances under which the court should grant conservatory orders pending the hearing of a constitutional petition such as is presently before me. In the case of **Philip K Tunoi and Another -vs- Judicial Service Commission and Another Petition 244 of 2014**, the court cited with approval the Privy Council decision in **Attorney General -vs- Sumair Bansraj (1985) 38 WIR 286** in which Braithwaite J.A. expressed himself as follows:

> **"*Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of***

any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction." (Emphasis Added)

43. In **Centre For Rights Education and Awareness (CREAW) & 7 Others Petition No. 16 of 2011**, Musinga J (as he then was) stated that:

> ***"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."*** **(Emphasis added)**

44. I am also guided by the words of the court in **Martin Nyaga Wambora –vs- Speaker of The County Assembly of Embu & 3 Others Petition No. 7 of 2014 in which, the court pointed out that:**

> **[59]*In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: "… [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution"* [60] *To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.***
>
> **[61]*The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.***
>
> **[62]*The third principle is one recently enunciated by the Supreme Court in the election petition case of Gatirau Peter Munya –vs- Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013. The principle is that the public interest must be considered before grant of a conservatory order.*** **Ojwang and Wanjala JJSC stated that: "[86] *'conservancy orders' bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as 'the prospects of irreparable harm' occurring during***

the pendency of a case; or 'high probability of success' in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes."…

45. The first question to ask, in applying the above principles to the present case, is whether the petitioners have established a prima facie case with a probability of success. The crux of their case, as I understand it and bearing in mind that I have not fully heard the parties on the merits of their respective cases, is that the 1st respondent has no power to peg the issuance of the practicing certificate for 2015 on the payment of the levy for the arbitration centre; and that to so peg the issuance of the certificate is to threaten a violation of the petitioners' rights.

46. It is not disputed that a practicing certificate is a prerequisite for the practice of an advocate, and that to deny the petitioners such certificate threatens their livelihoods and is impermissible except for reasons that are allowed by law. The petitioners have alleged violation of Articles 23, 43, 47 and 50 of the Constitution, while the 1st respondent contends either that the petitioners have not established the violation of these rights or that the rights have not been violated or are guaranteed by the state. I am satisfied, however, on the material before me that the petitioners have established a threat to their livelihood which is encompassed in the rights protected under Article 43. In accordance with the provisions of Article 2 and 20, the Constitution and the Bill of Rights, which ***"…applies to all law and binds all State organs and all persons,"*** the rights guaranteed under the Constitution are enforceable both vertically -against the state- and horizontally, against "all persons", including bodies such as the 1st respondent.

47. I am satisfied also that the petitioners have met the second criteria for grant of conservatory relief. This is that if the conservatory orders are not granted, the matter shall be rendered nugatory. The 1st respondent has made a demand for the fees due for the 2015 practicing certificate in which it has included the levy for the International Arbitration Centre.

48. Before proceeding further on this point, I should state that I have noted some discrepancy in the demand notices annexed to the parties' affidavits. In the affidavit of Apollo Mboya sworn on 21st November 2014, the notice states that the amount of Kshs 39,000 **is to be paid in 3 equal instalments for 3 years,** then indicates that the levy of Kshs 13,000 is to be paid on or before 28th February 2015. The **"Demand Note for Fees"** annexed to the affidavit of the 1st petitioner, Mr. Deynes Muriithi, which indicates that the amount payable by the recipient of the demand note is Kshs 50,000, states that the levy payable is a ***"one-off levy payment for the LSK International Arbitration Centre on or before 28th February 2015."***

49. Of note, however, is that the Demand Notes in both cases state categorically at paragraph 1 that ***"The following sums are payable by you before 1st February 2015 if you wish to renew your practicing certificate in respect of the 2015 practicing year."***

50. In response to the application to restrain the demand for the levy, the 1st respondent has made somewhat contradictory averments. Mr. Mboya depones, first, that the funds collected will be kept in a separate account and will be refunded to those who wish to have a refund

should the petition succeed. It is also its case, however, that the funds collected for the Arbitration Centre are banked in a separate special account until the 1st respondent is able to accumulate 30% of the project cost which is a pre-condition set by the financial institutions for the grant of a banking facility. The 1st respondent also argues that it has not yet determined what sanctions to visit on defaulters as it will only know if there has been default after the 28th of February 2015.

51. It is not possible, nor is it proper to say at this stage whether the Special General Meeting impugned in the present petition was properly convened, or that the resolutions alleged to have been passed at the said meeting were properly carried. However, it is evident that serious questions do arise with regard to the meeting.

52. In his submissions on behalf of the 1st -4th petitioners, Mr. Anzala raised several questions with regard to the Special General Meeting. The petitioners imply in these questions that the Council of the LSK usurped the role of the Special General Meeting at which the members, not the Council, should make decisions such as the Council now wishes to implement; they pose the question whether the Council can make decisions affecting members without affording them an opportunity to be heard.

53. The petitioners also argue that the procedure at the meeting at which the resolutions were passed was in violation of the LSK Act which, at section 2, defines a special resolution as one which is passed at a Special General Meeting by at least 2/3 of members present. It was their submission that there was no count taken, and that Mr. Mboya has averred that a count was not called for but that the resolution was passed by acclamation. The petitioners therefore argue that a vote by acclamation does not amount to the 2/3 vote required under the LSK Act to pass a Special Resolution.

54. As stated above, the court cannot at this stage make any findings with regard to the alleged improprieties in the conduct of the Special General Meeting. It suffices to say, however, that on the material before me, it is evident that the 1st respondent has taken steps towards the implementation of the resolutions alleged to have been reached at the said meeting, and that if the conservatory orders are not granted, then the petition, in so far as it pertains to the pegging of the practicing certificates for 2015 on payment of the levy for the International Arbitration Centre, will be rendered nugatory. This is so bearing in mind the provisions of the Advocates Act relating to the issuance of practicing certificates. Section 21 provides that:

> "***21. The Registrar shall issue in accordance with, but subject to, this Part and any rules made under this Act certificates authorizing the advocates named therein to practice as advocates."***

55. However, section 22 provides as follows:

> ***(1) Application for a practising certificate shall be made to the Registrar—***
>
> ***(a) by delivering to him an application in duplicate, signed by the applicant specifying his name and place of business, and the date of his admission as an advocate;***

(b) by producing evidence satisfactory to the Registrar that the applicant has paid to the Society the fee prescribed for a practising certificate and the annual subscriptions payable for the time being to the Society and to the Advocates Benevolent Association; and

(c) by producing a written approval signed by the Chairman of the Society stating that there is no objection to the grant of the certificate. (Emphasis added)

56. I take the view that in light of this statutory requirement for written approval from the LSK for the Registrar to issue a practicing certificate, coupled with the demand contained in the notices sent to the petitioners that "***The following sums are payable by you before 1st February 2015 if you wish to renew your practicing certificate in respect of the 2015 practising year",*** the petitioners' apprehensions cannot be said to be without a legitimate basis. Given that the 1st respondent has not placed before the court any law or regulation that allows it to charge the levy, and the only basis for the levy are the impugned resolutions of 27th September 2014, I believe the interests of justice tilt in favour of the petitioners.

57. In addition, the court is required, in considering an application such as this, to consider where the public interest lies - see the **Gatirau Peter Munya** case. The 1st respondent seeks to enforce a decision that has financial implications on advocates practicing in Kenya. The decision sought to be implemented, which on the material before me has far-reaching implications on the LSK membership involving, as it does, a financial commitment said to be in the region of Kshs 1 billion, was reached at a meeting which has been described as a sham, at which the resolutions made were allegedly made in violation of the law, and in which, according to the petitioners, dissenting voices were not heard. These contentions are hotly denied by the 1st respondent. However, in the circumstances, I am satisfied that the public interest is better served by the grant of conservatory orders to allow the parties ventilate their respective positions on the matter, or seek an amicable resolution thereof.

Right to Information

58. The 5th -32nd petitioners have sought orders to compel the 1st respondent to release information pertaining to the LSK International Arbitration Centre to them, citing the provisions of Article 35 of the Constitution. This Article, which guarantees to all the right to information, is in the following terms:

35. (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

59. This court has in several decisions recognized the right of citizens to information, which is at the core of the proper exercise of their fundamental rights. In the case of **Nairobi Law**

Monthly Company Limited –vs- Kenya Electricity Generating Company & Others Petition No 278 of 2011, the court observed as follows:

> **"[26]** ***It is, I believe, beyond dispute that the right to information is at the core of the exercise and enjoyment of all other rights by citizens. It has been recognised expressly in the Constitution of Kenya 2010, and in international conventions to which Kenya is a party and which form part of Kenyan law by virtue of Article 2(6) of the Constitution."***

60. In the case of **Timothy Njoya –vs- Attorney General and Another Petition No 479 of 2013,** the court expressed itself as follows:

> *[35] "A plain reading of Section 35(1)(a) reveals that every citizen has a right of access to information held by the State which includes information held by public bodies such as the 2nd Respondent. In* ***Nairobi Law Monthly v Kengen (supra)*** *the Court dealt with the applicability of the right to information as follows; "The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest... this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the state to 'publish and publicize any important information affecting the nation', but also to provide open access to such specific information as people may require from the state."*

61. The 1st respondent may well argue that it is not "the state" or a state organ for the purposes of Article 35. However, at the core of this dispute is a proposed arbitration centre for the LSK which, according to the 1st respondent, is for the benefit and interests of its membership. Without even having to invoke Article 35, therefore, the petitioners are, in my view, entitled to information relating to a project said to be undertaken on their behalf by the Council of their membership body, a body established by statute, with funds sourced from their resources, and which, on the facts before me, they will collectively be responsible to repay. Furthermore, as a statutory body, the LSK and its Council is bound by the constitutional values and principles set out in Article 10, which include at Article 10 (2)(c), ***"good governance, integrity, transparency and accountability.***"

62. I note that the 5th - 32nd petitioners did demand the information that they seek in their application by the letter from their Advocates, Macharia Nderitu & Co. Advocates, dated 30th September 2014. It appears that the request received no response.

63. It may well turn out that the petitioners' fears are misplaced and that the project has been undertaken in a manner that is in all respects above board. However, the 1st respondent is, in my view, under an obligation to provide the information that the petitioners seek, to enable them enforce their rights as citizens, but also as part of its obligation as a statutory body to which the petitioners are, by statute, bound to be members as long as they are practitioners of law in Kenya, as provided under section 5 of the LSK Act and section 23 of the Advocates Act.

64. Further, the 1st respondent has not presented to this court any or any sufficient reason why they should not release to the petitioners the information that they have requested for nor demonstrated any harm or prejudice likely to be suffered if the information is released.

Disposition

65. For the above reasons, it is my view that the petitioners' applications succeed, and I therefore grant the following orders:

> ***a. That conservatory orders be and are hereby issued staying all the resolutions made by the respondents in the Special General Meeting held at Hilton Hotel on 27th September 2014 pending the hearing and determination of this petition or further orders of the Court;***
>
> ***b. That a conservatory order be and is hereby issued restraining the 1st respondent by itself, its agents and servants from compelling the petitioners to pay any monies towards the Law Society of Kenya International Arbitration Centre or in any way pegging the issuance of practicing certificates to the payment of the sad amount pending hearing and determination of this petition or further orders of the Court.***
>
> ***c. That the 1st respondent does, within 14 days of today, release to the petitioners all the information requested for in the letter dated 30th September 2014 and in prayer f of the application dated 3rd October 2014.***

66. Counsel for the 1st respondent submitted at the hearing that the overwhelming majority of its members support its action, and that a large number has made the payment towards the International Arbitration Centre. That may well be the case, although I note that the two petitions are said to be brought on behalf of 1047 and 1018 petitioners respectively. Nonetheless, and for the avoidance of doubt, the orders of this court issued hereinabove do not prevent any member of the Law Society who is **willing** to pay the amount demanded as a levy for the International Arbitration Centre from making such payment.

67. I finally turn to the question of the disposition of the issues in dispute in the petition. In the course of the hearing of the applications, Counsel for the 1st respondent, Mr. Abdullahi, asked the court not to issue the orders sought but to refer the matter to arbitration under the **Law Society of Kenya (Arbitration) Regulations 1997**. I have considered this submission and the regulations in question. Regulations 2-6 provide as follows:

> **2.** ***Where a dispute arises relating to the management of the affairs of the Law Society of Kenya—***
>
> ***(a) between a member or members of the Society and the Society; or***
>
> ***(b) between a member or members of the Society and the Council of the Society, such disputes shall be reported in writing to the Council of the Society by the aggrieved party or parties.***

3. The Council shall, upon receiving notice from a member that a dispute exists, refer such disputes for determination to an arbitrator or arbitrators appointed by the respective parties to such dispute:

Provided that the number of arbitrators so appointed shall not in relation to any one dispute exceed five.

4. In the event that the respective parties to the disputes cannot agree on an arbitrator or arbitrators, the Chairman of the Chartered Institute of Arbitrators, Kenya Section shall appoint an arbitrator or arbitrators from among members of the Society who are advocates of not less than ten years standing and who are not members of the Council of the Law Society of Kenya.

5. The arbitrator or arbitrators shall determine the dispute so referred to him or them in accordance with the Arbitration Act (No. 4 of 1995).

***6. The decision of the arbitrator or arbitrators shall be final and binding on all parties to such dispute.*"**

68. It seems to me that this was the prudent course of action for the 1st respondent's Council to follow once it emerged that there was a dispute with members regarding the levy for the International Arbitration Centre, and it is the course that commends itself to this court. This is because the issues in dispute relate to the management of the LSK, and in particular whether or not it should enter into financial arrangements to finance the International Arbitration Centre, the cost of which will be met by the Society and therefore by its members. It is a matter that cannot be resolved by the parties taking rigid positions, and is best resolved by placing all the information on the table and allowing a consensus or a decision to be made on arbitration.

69. In the circumstances, I direct the parties to forthwith proceed with the arbitration of the dispute in accordance with the **Law Society of Kenya (Arbitration) Regulations 1997**, such arbitration to be undertaken within sixty (60) days of today.

70. The parties are at liberty to seek further orders or directions of the court should the need arise, and to mention the matter within 60 days hereof.

Dated, Delivered and Signed at Nairobi this 9th day of January 2015

MUMBI NGUGI

JUDGE

Mr. Anzala instructed by the firm of Henia, Anzala & Associates for the 1st to 4th Petitioners

Mr. Kimani Muhoro instructed by the firm of Jengo Associates Advocates for the 5th - 32nd Petitioners

Mr. Ahmednasir instructed by the firm of Ahmednasir Abdikadir & Co. Advocates for 1st Respondent

Mr. Bitta and Mr. Munene instructed by the State Law Office for the 2nd Respondent