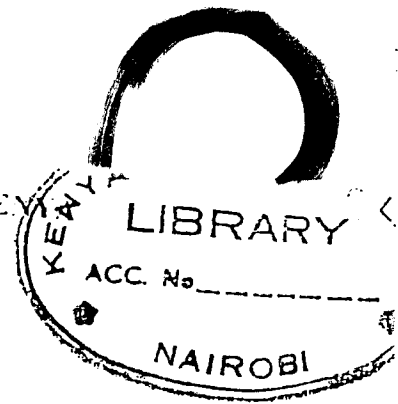


KENNETH KIPLAGAT V. THE LAW SOCIETY OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL SUIT NO. 542 OF 1996



S.4 of the Law Society Act - Whether it contravened the constitution - whether fee payable to the society was compulsory and therefore unconstitutional.

FACTS:

By an originating Notice of Motion, the applicant sought various reliefs as it appeared in the application. He sought a declaration that Section 4 of the Law Society Act was inconsistent with 70(b), 78(1) and 80(1) of the Kenyan constitution. The applicant therefore sought to have the objects clause in the Act namely section 4... struck out.

HELD:

- 1) Section 4 which was the objects section of the Law Society Act did not in any way make it any way make it compulsory for the applicant or any other Advocate to become a member of the Law Society and there was no reason for it to be struck out. To do so would give the Law Society unlimited powers as it would have no objects within which to work.*
 - 2) So far as the press releases were concerned, they were ultramires the powers of the Law Society. The Society's constitution did not allow the Society to indulge in matters of a political nature.*
- Application dismissed.*

CASE REFERRED TO:

Republic v. George Benedict Maina Karuki NAI 6 OF 1994

RULING

By an Originating Notice of Motion dated 5th June, 1996, the applicant sought various reliefs as appears in the application.

Firstly, it sought a declaration that Section 4 of the Law Society Act of Kenya (the act) is inconsistent with sections 70(b), 78(1) and 80(1) of the Kenyan Constitution. This Section falls in chapter 5 of the Constitution and provides for the protection of fundamental rights and freedom of the individual. Section 70(b) entitles every person in Kenya to the freedom of conscience of expression and of assembly and association. Section 78(1) states that:

"except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience".

And section 80 is in the following terms:

- 1. Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.*
- 2. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:-*

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;*
- (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons.*
- (c) that imposes restrictions upon public officers, members of a disciplined force, or persons in the service of a local government authority; or*
- (d) for the registration of trade unions and*

associations or trade unions in a register established by or under any law, and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or of members necessary to constitute an association of trade unions qualified for registration, and conditions whereby registration may be refused on the grounds that another trade union already registered or association of trade unions already registered, as the case may be, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

It will be seen that the freedom of assembly and association is subject to the exceptions set out in sub-section 2. It will also be seen that none of those exceptions are relevant in the present case. We also take the word "and except that" at the end of sub-section(2) to be conjunctive and therefore qualifies those matters, which are set out in (a) – (d) of sub-section (2). So that if any of those things are shown not to be justified in a democratic society, then they would not apply as exceptions. The question arises as to whether the right of freedom of assembly enables a person to refuse to be a member of an organisation which the law imposes on him, a duty to be member of. The applicant relied upon the case of *Keller vs. State Bar of California*, 496 U.S. 1. This is a case which was decided in the Supreme Court of the United States. Mr. G. B. Kariuki for the Law Society submitted that this was a decision of a foreign jurisdiction and that in any event the Constitution of the United States of America was absolute unlike in Kenya where it is qualified and that therefore this court should not take notice of that decision. We have considered the reasons

for the decision and in our view if the facts are sufficiently analogous and if the provisions of the law are similar, then this court would be entitled to adopt some or part of the reasoning which is relevant to the situation in Kenya. Not unlike the position in Kenya the State Bar of California required members to pay dues as a condition of practicing law. The object of the Bar was *"to promote the improvement of the administration of justice"* and the membership dues were for self-regulatory functions, such as formulating rules of professional conduct and disciplining members for misconduct. The Bar also used to lobby the legislature, to hold annual delegate's conferences for the debate of current issues and the approval of resolutions and engage in educational programmes. The petitioners brought in the State Court a suit claiming that through the latter activities the bar expends mandatory dues. Payments to advance political and ideological causes to which they did not subscribe, in violation of their rights under the 1st and 4th amendments, rights to freedom of speech and association and as a result they sought an injunction restraining the State Bar from those activities.

The first holding which is at page 2 of the record of the proceedings, states:

"The State Bar use of Petitioner's compulsory dues to finance political and ideological activities with which Petitioners disagree violates their First Amendment right of free speech when such expenditures are not necessary or reasonably incurred for the purposes of regulating the legal profession or improving the quality of legal services".

Applying this reasoning to the situation in Kenya, we are of the view that if the compulsory fees paid by a member of the Law Society are not used for purposes which fall within the objects set out in the Act then it is possible that the same can constitute an infringement of a member's rights under Constitution to freedom of assembly and association.

The power to declare void and provision of any law is given to the court by Sec 3 of the Constitution, which states as follows.

"This Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to Section 47, if any other law is consistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void".

What the applicant seeks to do in this case is to have the objects clause in the Act namely Section 4 struck out. The interpretation of the Section was dealt with by the Court of Appeal (In) Criminal Application No. NAI 6 of 1994 between *the Republic and George Benedict Maina Karinki* in which the learned judges at page 3 stated.

"The society is primarily meant to regulate the affairs and conduct of its members in their practice and provision of Law".

In that case the Learned Justices of Appeal held that the society had no power under its object clause to intervene in any proceeding before any court whether or not the parties to those proceedings agree to its intervention.

The Law Society must therefore act totally within the bounds of its objects but we shall deal with that matter later in this Ruling. It is necessary for the court therefore to decide whether or not by virtue of Section 4 of the Act the Applicant's constitutional rights are being infringed by being forced to become a member of the Law Society.

The compulsion to be a member of the Law Society is to be found in Section 21 (1)(b) and Section 23(1) of the Advocates Act which are in the following terms.

21(b) *"The Registrar shall issue in accordance with, but subject to, this Part and any rules made under this Act certificates and annual licences authorizing the advocates named therein to practice as advocates,"* and 23(1) *"Every advocate to whom a practising certificate is issued under this Part thereupon and without payment of any further fee, subscription, election, admission or appointment, and*

notwithstanding anything contained in the Law Society of Kenya Act or in any regulations made thereunder, become a member of the Society and the Advocates Benevolent Association and the subject to any provision of law or rule of the Society and the Advocates Benevolent Association for the time being affecting the members thereof".

The Applicant has however not applied to strike out these sections in his application. Had he done so the court would have had to consider whether these are reasonable and if so whether they should be struck out or not.

Section 4 which is the object's section of the Law Society Act in our view does not in any way make it compulsory for the Applicant or any other Advocate to become a member of the Law Society and we can see no reason why this should be struck out. In fact to do so would give the Law Society unlimited powers as it would have no objects within which to work. The other section of the Act which might have applied is Section 8 of the Law Society of Kenya Act which is in the following terms:

"Subject to the provisions of sections 27 and 28 of the Advocates Act, every member of the Society shall pay the Society such annual subscription as may be prescribed from time to time: Provided that no honorary member shall be liable to pay any such subscription."

In the circumstances we are not able to grant the declaration sought for in Prayer 3 of the application.

We now turn to the declaration sought in Prayer 4 of the Notice of Motion, which is in the following terms: Declaration that the only constitutionally justifiable activities that the Law Society of Kenya Act can sanction are activities which are germane to the practice of Law to wit - a) collection of dues b) discipline of members c) regulation of profession. We have already cited the decision of the Court of Appeal earlier in this Ruling and we would reiterate that the Law Society is bound to stay within the objects which are set out in the Act in Section 4 as to go outside these objects would be *ultra vires* its powers.