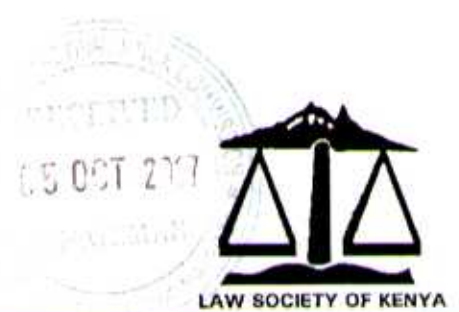


Law Society of Kenya



The Chairman
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Our Ref: LSK/FWW/EACC/SCOK

Your Ref: TBA

Date: 5TH October, 2017

Dear Archbishop (Rtd) Eliud Wabukala,

LETTER DATED 3RD OCTOBER 2017 FROM LSK PRESIDENT

I write to you in my capacity as the Vice-President of the Law Society of Kenya my attention having been drawn to a letter dated 3rd October 2017 addressed to you by Mr. Isaac Okero, the President of the Law Society of Kenya (LSK) which has received wide coverage in the media.

In the said letter, Mr. Okero asserts that the EACC has no authority whatsoever to conduct or undertake investigations in respect of allegations made against the Registrar of the Supreme Court, Ms. Esther Nyaiyaki regarding a scrutiny exercise undertaken in the course of the recently concluded Presidential Election Petition.

Mr. Okero predicates his assertion on the grounds that such investigations are within the exclusive jurisdiction of the Judicial Service Commission and that the commencement of investigations by the EACC is an affront on the independence of the judiciary.

I should point out that it is unusual for the LSK leadership to take contradictory views on a matter but I am compelled to do so in this instance for the following reasons:

- i) Mr. Okero's letter is not common ground among LSK Council Members who were not consulted before the letter was written, sent to you and shared for dissemination by the media.

Isaac Okero (President), Faith Waigwa (Vice-President)
Manthi Masika, Alex Gatundu, Alan Kosgey (General Membership Representatives)
Edwin Sifuna, Harriette Chiggai, Jemator Dorothy, (Nairobi Representatives)
Godfrey Kitiwa, Annet Nyukuri, David Njoroge, Jane Masai, (Upcounty Representatives)
Grace Okumu (Coast Representative)

- ii) The LSK is not only a professional body that represents advocates in this country but also a statutory body established under the provisions of The Law Society of Kenya, 2014 with the objects, set out at Section 4 of the Act, of among other objects, protecting the public in matters ancillary to the law and assisting the Government and the Courts in matters relating to legislation and the administration of justice.
- iii) It is thus of singular importance that statements emanating from the LSK leadership on matters of law and issues of critical public interest and importance be factual and the culmination of deliberations by Council members and even the general membership in the spirit of stakeholder participation that is now central to all statutory bodies in our current constitutional dispensation.
- iv) In discharging this statutory mandate and as the LSK draws its membership from lawyers of all shades of political persuasion, it is expected that the society will be impartial, objective, true to the law and shall not take partisan or sectarian sides especially in political matters. Unfortunately, this has not been the case as this issue has not been deliberated by the LSK Council and a position arrived at.

It's thus necessary that I set out the true state of the law regarding the matters of law contained in Mr. Okero's letter. The facts are as follows:

- i) Whilst the JSC has supervisory jurisdiction in employment and/or disciplinary matters concerning its employees, law enforcement agencies such as the EACC, the Kenya Police Service, Assets Recovery Agency, Office of the Director Public Prosecution and the Anti-Money Laundering Advisory Board retain a constitutional and statutory obligation to investigate and prosecute matters or allegations of a criminal nature arising from complaints made against judicial staff.
- ii) Judicial staff, like all other public servants, are expected to observe the provisions of Article 79 of the Constitution of Kenya which states that:

“Authority assigned to a State officer—

(a) Is a public trust to be exercised in a manner that—

- (i) is consistent with the purposes and objects of this Constitution;
- (ii) demonstrates respect for the people;
- (iii) brings honour to the nation and dignity to the office; and
- (iv) promotes public confidence in the integrity of the office; and

(b) Vests in the State officer the responsibility to serve the people, rather than the power to rule them.”

- iii) There is more than ample precedence of judicial staff being investigated and even charged in court over criminal matters including the following:
- a) At least two Judges have been charged and subsequently acquitted whilst in office in the Nairobi Chief Magistrate Criminal Case No. 1655 of 2009 and in Nairobi Chief Magistrate Anti-corruption Court case number 36 of 2009.
 - b) A former Chief Registrar of the Judiciary and 5 other senior judicial staff members have been charged and their matters are pending in court in Nairobi Anti-Corruption Case Numbers 15 and 25 of 2015.
 - c) Several Magistrates have been investigated and charged in court.
- iv) The then LSK leadership issued statements supporting investigations in some of the above cases culminating in charging of the judicial officers. It would be discriminatory for the society to now single out one judicial officer for preferential treatment without any basis in fact or law.
- v) Any doubts on this aspects of the law were recently put to rest in the case of **Abdulkadir Athman Salim EIKindy v Director of Public Prosecutions & another [2017] eKLR** where Honourable Justice Mativo stated as follows:

“36. Clearly, judges – like any other person – should be punished for any crimes they commit, be they general crimes, for example causing a car accident in a state of drunkenness, or specific crimes related to the judicial function, such as taking bribes for handing down favourable judgments or interfering with the administration of justice for which alone they swore to uphold. Judicial officers are bound by the constitution and the laws of the land and must live and uphold the spirit of the law. Like Ceaser's wife, they must be beyond reproach. It would be a sad day for the administration of justice if those charged with the responsibility of interpreting the law and upholding the rule of law are to be perceived as the ones breaking the law. The public will certainly lose confidence in the entire system of the administration of justice and the consequences cannot be imagined.

37. The justification for immunity for judicial officers-where it exists-cannot be to protect the judicial officer from criminal prosecution, but only from false accusations that are levelled against a judicial officer in order to exert pressure on him or her. It is my view that a contrary interpretation will have the inescapable effect of conferring an extra-constitutional immunity on judicial officers.

38. Thus, where an impropriety has been committed of the nature of criminal conduct which may include violations of law, or breach

of court rules or abuse of office or interfering with the flow of justice, then, such immunity cannot stand.”

I should nevertheless point out that, conversely, that all judicial staff, Ms. Nyaiyaki included, who are the subject of investigations or court cases must, like all Kenyans, be afforded fair treatment and the opportunity to rebut allegations made against them and must not appear to be the subjects of victimization for doing their jobs within the law. And for avoidance of doubt LSK stands for the rule of law and equal application of the law in all circumstances.

I trust the foregoing puts the facts and law in its proper perspective. Kindly stand guided.

Yours faithfully,



FAITH WAIGWA
VICE-PRESIDENT, LAW SOCIETY OF KENYA

- cc. The Secretary, Judicial Service Commission
- cc. The Chief Registrar of the Judiciary
- cc. Kilukumi & Company, Advocates
- cc. Director of Public Prosecutions
- cc. The Inspector General of Police
- cc. The Director of Criminal Investigations