



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(Coram: A. C. Mrima, J.)

PETITION NO. E070 OF 2022

BETWEEN

JAMLICK MURIITHI MWENDA.....PETITIONER

VERSUS

- 1. THE LAW SOCIETY OF KENYA**
- 2. LSK ELECTIONS BOARD (2022)**
- 3. LSK BRANCH CHAIR CAUCUS**
- 4. LINDAH KIOME**
- 5. MATTHEW NYABENA**
- 6. JUSTUS MUTIA**
- 7. ERICK THEURI**
- 8. SUSSY RAUTTO**
- 9. HENRY KENEI**
- 10. JOHN OCHANG'**
- 11. WILKINS OCHOKI.....RESPONDENTS**

RULING NO. 1

Introduction:

1. The members of the Law Society of Kenya (hereinafter variously referred to as '*the LSK*' or '*the Society*' or '*the 1st Respondent*') are, once again, gearing up to elect their officials in different positions come the 10th March, 2022.
2. To that end, an Elections Board was duly put in place.
3. The Petitioner herein, *Jamlick Muriithi Mwenda*, is a member of the Society. He presented his nomination to the Elections Board for the position of Up Country Representative of the LSK Council. The Elections Board, however, declined the Petitioner's nomination on the basis of non-compliance with the Law Society of Kenya Act, 2014.

4. Aggrieved, the Petitioner instituted the current proceedings.

5. In a rejoinder, the 1st Respondent filed a Preliminary Objection dated 22nd February, 2022 together with a Replying Affidavit sworn by one *Florence W. Muturi*, the Society's Acting Chief Executive Officer and Secretary. It also filed a Case Digest.

6. The 2nd Respondent was yet to file any response at the time the matter was heard whereas the rest of the Respondents relied on a joint Replying Affidavit sworn on their behalf by one *Lindah Kiome*, the Chairperson of the Branch Chairs Caucus, on 22nd February, 2022.

7. Given the nature of the matter and the timelines at hand, this Court directed that the Preliminary Objection be, in the first instance, orally heard and determined.

The Preliminary Objection:

8. The grounds in support of the objection were tailored as follows: -

1. This Honourable Court lacks jurisdiction to hear and entertain the Application as it offends the mandatory provisions of Regulation 44 of the Law Society of Kenya (General) Regulations 2020 requiring any party aggrieved by the results of election to lodge a Complaint with the Elections Board within 7 days in the first instance, thereafter file a reference in the High Court within 14 days if aggrieved.

2. The Applicant's Petition and Application is premature and unripe for determination by the Honourable Court as the Petitioner has not invoked or exhausted the dispute resolution mechanisms set under Regulations 95 and 96 of the Law Society of Kenya (General) Regulations 2020.

3. The Applicant's Petition and Application fails the test of precision: does not disclose with reasonable precision, the Constitutional rights and freedoms infringed or violated by the impugned decisions.

4. The Application has not met the threshold for the grant of conservatory orders as it lacks inherent merit, and does not demonstrate the nugatory aspect, or any public interest that supports its hearing, determination and grant.

9. At the hearing of the objection, Learned Counsel for the LSK, *Dr. B. M. Musau* and *Mr. Onyango*, limited their submissions to the first and second grounds of the objection.

10. The objection was supported by the rest of the Respondents and opposed by the Petitioner.

The 1st Respondent's submissions:

11. The thrust of the submissions in support of the objection was that the Petitioner had failed to exhaust the available internal dispute resolution mechanism under the Law Society of Kenya Act, 2014 (hereinafter referred to as '**the LSK Act**') and the Law Society of Kenya Act (General) Regulations, 2020 (hereinafter referred to as '**the Regulations**').

12. Counsel submitted that elections in general not an event, but a process which begins with the declaration of vacancies running through the nomination of candidates, the vetting of candidates, the voting and eventually the declaration of the results.

13. It was further submitted that since the Petitioner's nomination for the position Up Country Representative of the LSK Council of the Elections Board was rejected by the Elections Board due to non-compliance with Section 12 of the LSK Act, his recourse was in Regulation 44 prior to filing the current proceedings.

14. According to the Society, the Petitioner was yet to accord it an opportunity to deal with the dispute including the consideration of the Petitioner's application for Special membership among any of the issues on the alleged infringement of rights as raised in the Petition prior to instituting the Court proceedings.

15. It was posited that the framing of the Petition in a constitutional language cannot by-pass the statutory procedure which the Petitioner willingly chose not to comply with.

16. The 1st Respondent made reference to several decisions vouching the need to exhaust internal mechanisms of dispute resolution in urging this Court to uphold the objection.

The 2nd Respondent:

17. *Mr. Peter Wanyama*, Learned Counsel for the LSK Elections Board (2022) (hereinafter referred to as '**the 2nd Respondent**' or '**the Elections Board**') associated himself with the submissions made by the 1st Respondent.

18. In addition, Counsel submitted that there were sound administrative, juridical and ethical considerations justifying the position that non-practising members of the Society are not eligible to take part in the elections of the Society and that the Petitioner was formally so informed.

19. It was further submitted that the Petitioner was advised to contact the President of the Society with a view to initiate the arbitration process under Regulations 95 and 96. Instead, the Petitioner prematurely rushed to Court.

20. Counsel urged the Court to allow the objection.

The 3rd to 11th Respondents:

21. The Respondents, through Learned Counsel *Mr. Charles Kanjama*, filed a List of Authorities in support of the objection.

22. Counsel also associated himself with the submissions of the rest of the Respondents.

23. He reiterated the need to adhere to the arbitration process provided under the Regulations.

24. Buttressing the submission, Counsel referred to several decisions on the doctrine of exhaustion.

25. The Respondents urged the Court to allow the objection.

The Petitioner:

26. *Mr. Aseso*, Learned Counsel, appeared for the Petitioner. He opposed the objection through written submissions.

27. Counsel vehemently submitted that the Petition raised germane issues on the infringement of the political rights and the right to equal benefit of the law as well as the freedom from discrimination of the members of the Society who otherwise do not hold Practising Certificates and are not Special members.

28. Arguing that Regulation 44 did not apply to the matter, Counsel submitted that the provisions was applicable to disputes arising after the declaration of the results of an election and not before. It was further argued that even if it were that Regulation 44 was applicable still the issues on the infringement of the political rights and the right to equal benefit of the law as well as the freedom from discrimination of some of the members of the Society, being distinct constitutional issues, called for resolution by this Court.

29. On Regulations 95 and 96, Counsel argued that since four members of the Branch Chairs Caucus were taking part in the elections and that two of them were also running for the same position as the Petitioner, then the Petitioner would not be accorded a fair process if subjected to the arbitral procedures.

30. Counsel also argued that given the nature of the constitutional issues which touched on the Bill of Rights as raised in the Petition, then the purview of the arbitral process was ousted.

31. Counsel made a clarion call that an opportunity had availed itself for the longstanding issues on the infringement of the political rights and the right to equal benefit of the law as well as the freedom from discrimination of some of the members of the Society to be resolved by the Court.

32. This Court was urged to dismiss the objection.

Whether the objection is sustainable:

33. Given that the objection was raised by way of a preliminary objection, I will briefly look at the law on the subject.

34. The validity of any preliminary objection is gauged against the requirement that it must raise pure issues of law capable of disposing of a dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.

35. The foregoing nature of preliminary objections was discussed in *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*, (1969) E.A. 696 page 700 when the Court observed as follows: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

36. In *Civil Suit No. 85 of 1992, Oraro vs. Mbaja* [2005] 1 KLR 141, *Ojwang J*, as he then was, cited with approval the position in *Mukisa Biscuit -vs- West End Distributors* (supra) and stated as follows on the operation of preliminary objection: -

... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

37. In **Omondi -vs- National Bank of Kenya Ltd & Others** {2001} KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.

38. On the question as to whether jurisdiction is a point of law, the Supreme Court in **Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others**, [2014] eKLR, stated that ‘jurisdiction is a pure question of law’ and should be resolved on priority basis.

39. With the assurance that jurisdictional issues constitute pure points of law and can be raised by way of preliminary objections, I will now deal with the concerns raised in the Petition.

The issues:

40. A careful reading of the documents filed and on the basis of the submissions tendered, it can be discerned that two distinct issues were raised in the Petition.

41. The two issues are: -

(i) *The failure to nominate the Petitioner for the position of Up Country Representative of the LSK Council.*

(ii) *The status of Prosecution Counsel and State Counsel in relation to LSK elections.*

42. This Court will, therefore, deal with the said issues through the prism of the exhaustion doctrine. As such, it is imperative that I venture into the said doctrine.

43. The doctrine of exhaustion appears to be closely intertwined with the **doctrine of constitutional avoidance** which doctrine is also referred to as the **constitutional avoidance rule**. The doctrine is part of the wider doctrine of non-justiciability.

44. Speaking to the doctrine of constitutional avoidance, the Supreme Court in **Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR** observed thus: -

[105]. *We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. Black’s Law Dictionary, 10th Edition at page 377 defines it as:*

“The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion”

[106]. *The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR held:*

[256]. *The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.*

45. On the applicability of the doctrine of exhaustion in Kenya, suffice to say that the doctrine traces its origin from *Article 159(2)(c)* of the Constitution which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-

(a)...

(b)...

(c) *alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.*

46. Clause 3 is on traditional dispute resolution mechanisms.

47. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in *Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR. The Court stated as follows:

52. *The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:*

42. *This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:*

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. *While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.*

This is Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

48. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. *However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:*

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)

60. *As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.*

61. *The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.*

62. *In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.*

49. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in *Mombasa Civil Appeal No. 166 of 2018 Kenya Ports Authority v William Odhiambo Ramogi & 8 others [2019] eKLR* held as

follows: -

The jurisdiction of the High Court is derived from Article 165 (3) and (6) of the Constitution. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the Constitution encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of the Constitution and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of the Constitution became automatic. And in our view, it could not be ousted or substituted.

50. Further, in Civil Appeal 158 of 2017, **Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another** [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in *Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546* to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

51. The High Court has variously reiterated the position that it is only the High Court and Courts of equal status which can interpret the Constitution. (See **Royal Media Services Ltd. -vs- Attorney General & 6 Others** (2015) eKLR among others).

52. Having dealt with the jurisprudential aspect of the exhaustion doctrine, I will now deal with the first issue.

(i) The failure to nominate the Petitioner for the position of Up Country Representative of the LSK Council:

53. There is no doubt that the Petitioner is a member of the Society. It is also not in doubt that the Petitioner presented his nomination for the position of Up Country Representative of the LSK Council to the Elections Board.

54. It is further not disputed that the Elections Board declined the Petitioner's nomination on the basis that he failed to comply with Section 12 of the LSK Act in that the Petitioner was not a paid-up member and did not hold a current Practising Certificate.

55. The Petitioner challenged the decision *vide* these proceedings. Through the pending Petition and application, the Petitioner attempted to demonstrate how the impugned decision of the Elections Board cannot hold in the prevailing constitutional dispensation.

56. Part IV of the Regulations provide for Elections to Council. Regulation 25 is on the nature and integrity of the electoral system while Regulation 26 provides for the approval of the electoral body.

57. The establishment of an Elections Board is in Regulation 27. The Board is an *ad-hoc* entity.

58. The functions of the Elections Board are provided under sub-regulation 5 as to: -

(a) scrutinise the nomination papers submitted by Applicants;

(b) determine whether a person has validly been nominated;

(c) resolve disputes or complaints relating to the elections;

(d) deal with an election for the purpose of filling a vacancy in the Council arising within the period before the establishment of a new ad hoc elections board; and

(e) ensure that the electoral system, including electronic system of voting, and electoral processes are in accordance with the principles and requirements under this Part.

(Emphasis added).

59. The Elections Board is supposed regulate its own proceedings, but subject to Regulation 44.

60. Regulation 44 states as follows: -

44. Settlement of election disputes.

(1) A person who is aggrieved by the results of an election may, within 7 days of the announcement of the results, lodge a complaint in writing to the elections board.

(2) A complaint shall contain all the grounds, facts and evidence intended to be relied upon and shall set out the legal provision alleged to have been contravened.

(3) An applicant shall serve the complaint to the affected named parties within 3 days of lodging the complaint.

(5) The elections board shall expeditiously hear and determine the dispute or complaint referred, regard being had to the timelines set out under these Regulations.

(6) The elections board shall determine the complaint within not more than 14 days from the date of lodging the complaint.

(7) The elections board shall deliver a written, reasoned, decision on a date and time duly notified to the parties.

(8) **The elections board shall have power to—**

(a) cancel or nullify the nomination of a person;

(b) impose a condition on a candidate;

(c) nullify the election of a candidate;

(d) declare a candidate to be duly elected; or

(e) make such orders as it may consider just in the circumstances.

(9) The elections board may, for sufficient cause, allow a person to be enjoined as a party to a complaint before it.

(10) The decision of the majority of the members of the elections board shall be the decision of the board.

(11) A person who is dissatisfied with the decision of the elections board may appeal to the High Court within 14 days of the decision, and the law for the time being applicable to civil appeals shall, with necessary modification, apply to the appeal.

(12) Where an election is nullified, fresh election shall be held for the affected office, within 90 days.

(Emphasis added).

61. From the twin regulations, it is apparent that the Elections Board has the duty to, among others, scrutinise the nomination papers submitted by Applicants, to determine whether a person has validly been nominated and to resolve disputes or complaints relating to the elections. In discharging those functions, the Elections Board is empowered, *inter alia*, to cancel or nullify the nomination of a person, to impose a condition on a candidate, to nullify the election of a candidate, to declare a candidate to be duly elected and to make such orders as it may consider just in the circumstances.

62. It is, therefore, the standing position that the Elections Board has powers to deal with all disputes arising from the nomination of candidates to the declaration of results.

63. This Court finds legitimacy in the foregoing by dint of the finding of the Supreme Court to the effect that elections are a process and not an event. It is of importance to disclose that this Court dealt with the issue at hand in some length in Nairobi Petition No. E369 of 2020 **Kennedy Irungu Ngodi & Another vs. Mary Waithera Njoroge & 11 Others** (2021) eKLR.

64. In that case, I rendered myself as follows: -

79. Courts have addressed themselves to the entire process of elections and nominations in our country. The Supreme Court in **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate** case (*supra*) stated as follows in respect to the electoral process: -

[100] ... A Presidential election, much like other elected-assembly elections, is not lodged in a single event; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for “qualifications and disqualifications for election as President” – and this touches on the tasks of agencies such as political parties which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of the Presidential election.

80. More recently, in **Petition 2 & 4 of 2017 (Consolidated), John Harun Mwau & 2 others -vs- Independent Electoral and Boundaries Commission & 2 others [2017] eKLR**, the Apex Court grappled with the issue whether failure to conduct nominations for purposes of elections rendered the electoral process unconstitutional.

81. In a synopsis, it was the Petitioners’ case that upon nullification of the election held on 8th August 2017, all process pertaining to that election had been spent and as such were no longer usable in any other presidential election. They claimed that failure to nominate the 3rd Respondent (President Uhuru Kenyatta) as required under various provisions of the Constitution and Elections Act made him unqualified to participate in the fresh Presidential elections.

82. The Petitioners claimed that nomination under Article 137 of the Constitution and Section 14 of the Elections Act was a requirement under any election and as such fresh nominations was mandatory. On the foregoing, the Petitioners sought to nullify the presidential election.

83. In rebutting the proposition, the Respondents stated that based on the Supreme Court decision in *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR*, where presidential election was invalidated, there would be no need for fresh nominations. Candidates would be limited to the President-elect and those who had contested the first election. It was further their case that the repeat election was *sui-generis* and required no fresh nominations.

84. On the same issue, the 1st Interested-Party, Dr. Ekuru Aukot stated that there was no need for fresh nominations due to impracticalities occasioned by constitutional time-frames.

85. In resolving the rival positions, the Supreme Court comprehensively addressed the electoral process in Kenya. It shed light to the place of nominations in election process in Kenya. The Learned Judges observed:

[231] The nomination process is deeply rooted in the Constitution, which recognizes that an electoral contest must be preceded by the nomination of candidates to vie for elective positions.

86. The Court in reference to presidential election and the requirements under to Article 138(8) of the Constitution further pointed out the centrality of nomination and the fact that presidential election shall be cancelled if no person has been nominated. It then made an important remark on what nominations are in the electoral process. The Court observed as follows: -

...Nomination, therefore, is not just a formality, or an exercise in futility, nor can it be dispensed with, save for lawful cause.

...In summary, therefore, at a general level, nomination is depicted as a process through which candidates are identified for participation in an election, subject to them being properly qualified under the law, for the elective seat that they seek. **It is a critical component of an electoral process, without which there would be no election.** (emphasis added)

87. From the above analysis it can be only the case that the whole concept of election is a **process**. The electoral process has several components. Nomination is one such components in the line. Nomination is, therefore, inseparably conjoined to elections in an electoral process. The two cannot be divorced or isolated as distinct and totally independent events.

88. Accordingly, in a row of falling dominos, nomination is the first domino (‘the inciting incident’) that once tipped, launches a succession of chain of events that ultimately gets one announced as a validly elected candidate.

65. The foregoing discussion, therefore, buttresses the legal position that an election is a process and not an event.

66. Having so found, the submission by the Petitioner that Regulation 44 is only applicable to disputes arising from the declaration of results cannot hold. A holistic and purposive interpretation of Regulations 27(5) and 44 yields that the Elections Board has jurisdiction to deal with all disputes from the nomination of candidates to the declaration of results. For avoidance of doubt, Regulation 44 will, hence, apply with the necessary modifications depending on the nature of the dispute at hand.

67. The Petitioner disputed the decision by the Elections Board to reject his nomination. That decision was communicated by the Elections Board to the Petitioner through a letter dated 14th February, 2022. Whereas the Petitioner acknowledged receipt of the letter, the record is silent on which date the said letter was actually received by the Petitioner.

68. Drawing from the foregoing, pursuant to Regulation 44(1), the Petitioner had 7 days from the date of receipt of the decision by the Elections Board to lodge a **formal complaint in writing** against the impugned decision to the Elections Board since he was dissatisfied with the impugned decision.

69. As the Petitioner had submitted to the jurisdiction of the Elections Board, he was duty bound to comply with the internal dispute

resolution mechanism in place unless he satisfies this Court to the contrary.

70. From the record, the Petitioner did not give any reason as to why he did not lodge any complaint to the Elections Board as required under the Regulations. That being so, the Petitioner is barred from pursuing the current proceedings challenging the rejection of his nomination.

71. On that score, I will now deal with the next issue.

(ii) The status of Prosecution Counsel and State Counsel in relation to LSK elections:

72. The Petitioner was admitted to the Bar and signed the Roll of Advocates on 13th February, 2019. He then engaged in private practise and took out Practising Certificates for 2019 and 2020.

73. In October, 2020 the Petitioner was employed by The Office of Public Prosecutions as a Prosecution Counsel II DPP 10.

74. The Petitioner immediately informed the LSK of his employment and subsequent change of status and the LSK effected the appropriate changes in its records.

75. All was well until sometimes in December 2021 when the LSK declared vacancies in the Council among others and called for nominations.

76. The Petitioner then wrote to the LSK seeking clarification on the status of the members who were in the service of the Office of Director of Public Prosecutions and the Hon. Attorney General, him being one of them, since he was desirous of vying for the position of Up Country Representative of the LSK Council.

77. It was until January 2022 when the LSK communicated to the Petitioner *vide* its letter dated 24th January, 2022. In the letter, the LSK informed the Petitioner that he had raised a weighty legal issue which called for the intervention of a General meeting. The LSK undertook to place the matter before the next Annual General Meeting.

78. The LSK further informed the Petitioner that in the event he was aggrieved by its decision, he was at liberty to invoke the internal dispute resolution mechanism under the Regulations. To that end, the Petitioner was advised to get in touch with the President of the Society for appropriate guidance.

79. It was on that background that the Petitioner instituted the current proceedings.

80. As said, the Respondents contended that the Petitioner was to comply with Regulations 95 and 96 instead of instituting the instant proceedings.

81. Regulations 95 and 96 provide as follows: -

95. *Negotiation, conciliation & mediation.*

(1) Parties to a dispute referred to in regulation 96(1) may attempt to reach settlement by—

(a) negotiation;

(b) conciliation; or

(c) mediation.

(2) The procedure for negotiation, conciliation or mediation shall be simple and the process shall be guided by the international best practices or any law for the time being regulating negotiation, conciliation and mediation.

(3) A decision or settlement by the use of any of the methods under paragraphs (a), (b) or (c) of sub-regulation (1) shall be concluded within 28 days from the date of lodging the dispute.

(4) A decision or settlement by the use of any of the methods under paragraphs (a), (b) or (c) of sub-regulation (1) shall immediately be filed with the secretary and shall, subject to the Act and these Regulations, be binding on the parties to the dispute.

96. *Arbitration.*

(1) Where a dispute arises—

(a) relating to the exercise of the mandate or the management of the affairs of the Society, a branch or a chapter; or

(b) relating to the rights of a member against any other member or the Council, branch executive or chapter committee, the

aggrieved party shall—

(i) refer the dispute in writing to the secretary, where the dispute concerns the national office of the Society; or

(ii) refer the dispute in writing to the branch secretary of the relevant branch where the dispute involves an issue or a party at the branch level.

(2) A dispute may exist between or amongst one or more of the parties listed in sub regulation (1).

(3) Where a dispute has been lodged with a branch secretary and the dispute cannot be resolved within 30 days, the branch secretary shall, within 7 days, forward the dispute to the secretary and the procedure for hearing and disposal of the dispute provided under this regulation shall thereafter apply.

(4) The secretary or a branch secretary shall, within 14 days upon receiving **notification of a dispute** from an aggrieved party, or upon the secretary receiving **notification of a dispute** from a branch under sub regulation (3), refer the dispute to an arbitrator or arbitrators appointed by the parties to such dispute for determination.

(5) The number of arbitrators so appointed shall not, in relation to any one dispute, exceed three persons.

(6) Where a dispute is between—

(a) a member and another member; or

(b) a member and a branch executive or chapter committee, and the parties to the dispute cannot agree on an arbitrator within 14 days, the president shall appoint an arbitrator to hear and determine the dispute.

(7) Where a dispute involves—

(a) the Council; or

(b) a member of the Council, and any other party, and the parties cannot agree on an arbitrator within 14 days of lodging of the dispute, the arbitrator shall be appointed by the Chairperson of the Chartered Institute of Arbitrators, Kenya Chapter.

(8) The arbitrator or arbitrators shall hear and determine a dispute in accordance with the law for the time being regulating arbitration, and the decision shall be final and binding on all parties to such dispute.

(9) The time provided under this regulation for lodging or taking other step in dispute resolution process is subject to regulation 45 where the dispute concerns elections.

82. From the reading of Regulations 95 and 96, it comes out that whenever an appropriate dispute is lodged to the Secretary of the Society or a Secretary of a Branch of the Society, the Society's or the Branch's first port of call is to attempt an immediate amicable resolution.

83. In the unlikely event that there is no consensual resolution of the dispute, then any of the disputants is to formally lodge a **notification of a dispute** to the Secretary or the Branch Secretary as the case may be.

84. When the dispute concerns elections, Regulation 96(9) requires that such be dealt with within the timelines provided for under Regulation 44. However, it is worth-noting that Regulation 96(9) is erroneous in referring to Regulation 45 instead of Regulation 44. Regulation 45 does not provide for any timelines neither does it deal with election disputes. It is high time the error is attended to.

85. In this case, therefore, the Council, whose functions had been taken over by the Branch Chairs Caucus pursuant to the decree in **Nairobi High Court Petition No. E260 of 2021** (as consolidated), attended to the issue raised by the Petitioner. By that time the issue had not mutated into a dispute. The Petitioner just wanted a confirmation that Prosecution Counsel and State Counsel were eligible to take part in LSK elections.

86. The Branch Chairs Caucus was of the view that the matter was weighty and called for a resolution of a general meeting.

87. The Petitioner was duly informed of the decision in writing through a letter dated 24th January, 2022.

88. Having received the response and being aggrieved, the Petitioner was thereby called upon under Regulation 96 as read with Regulation 44 (since the matter related to elections) to lodge a **formal notification of a dispute** in writing to the Secretary within 7 days of the receipt of the response. Once the Secretary receives such a notification then the other processes under Regulation 96 are triggered in line with the timelines in Regulation 44.

89. As contended by the Respondents and admitted by the Petitioner, the Petitioner did not lodge any notification of a dispute to the Secretary.

90. The Petitioner, however, had a reason for not doing so. He posited that the decision to refer the matter to the general meeting was made by the Branch Chairs Caucus whose four of its members had expressed interest in the elections. Two out of the four members vied for the same position as the Petitioner. As a result, the Petitioner contended that the rules of natural justice were violated as the decision was made by interested parties. To that end, the Petitioner averred that his right to fair trial under Article 50(1) of the Constitution was violated.

91. Accordingly, the Petitioner further contended that since the issue was violation of his constitutional right under the Bill of Rights, then the appropriate forum to determine such violation was the High Court and not before an arbitrator.

92. In Nairobi High Court Petition No. E218 of 2021 *Okiya Omtatah Okiiti vs. The National Treasury & 3 Others* (unreported), this Court dealt with the question as to whether the Review Board established under the Public Procurement and Asset Disposal Act, No. 33 of 2015, being a quasi-judicial body, had the jurisdiction to apply and make findings as to whether the Constitution and the law had been infringed. In answering in the affirmative, this Court stated as follows: -

39. It is, therefore, clear that the Act fuses the relevant aspects of the Constitution such that whenever the Act is applied, that can only be within the confines of the Constitution. It, hence, means that the Board, being a creature of the Act must, in discharging its mandate, uphold and defend the Constitution. Of course that calling is expressly so provided for in Article 3 of the Constitution to the extent that every person, as defined in Article 260 of the Constitution, has an obligation to respect, uphold and defend the Constitution.

40. Putting it more succinctly, the Board has the jurisdiction to determine whether the Constitution and the law were violated by a procuring public entity in respect to public procurement and assets disposal proceedings.

93. That is the prevailing position in this matter. The LSK Act infuses various provisions of the Constitution such that its application is a realization of some of the constitutional imperatives. The Elections Board and the arbitrator contemplated under the Regulations, as well, have jurisdiction to apply and make findings as to whether the Constitution or the law is violated. I say so on the basis of Articles 3 and 10 of the Constitution.

94. Article 3 of the Constitution enjoins every person to respect, uphold and defend the Constitution. In Article 10(1), the Constitution binds all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution and/or law or makes or implements public policy decisions. However, it is of essence to clarify that under Article 165(3)(d) of the Constitution, it is only the High Court which is vested with the jurisdiction to interpret the Constitution in matters in which the High Court has jurisdiction over.

95. In this case, the Petitioner did not seek for the interpretation of the Constitution. He simply wanted the LSK to assert the rights of the members who otherwise did not hold Practising Certificates in relation to elections. In that case, an arbitrator or any quasi-judicial body can apply the Constitution and the law and made findings as to whether, in the circumstances of the matter, the Constitution or the law was infringed. To hold otherwise will be tantamount to crippling the respecting, upholding and defence of the Constitution. That will be a further impediment to Article 10(1) of the Constitution. Lastly, such a position will be in itself, unconstitutional.

96. It is the Petitioner's position that it is only the High Court that can make findings on the violation of the Constitution and the law. From the above discussion, such is a misguided position and is for rejection.

97. The upshot is, therefore, that the Petitioner had no justification in not relying on the internal dispute resolution mechanism under Regulations 95 and 96. In the event the Petitioner did not agree to await the resolution of the matter at a general meeting as directed by the LSK, then he was at liberty to initiate the arbitral process and the arbitrator would have been competent to apply and make findings on whether the Constitution and the law were violated.

98. As the Petitioner did not take the arbitral route aforesaid and without any legal justification, he is, hence, stopped from further journeying on that impermissible road.

Disposition:

99. From the foregoing discussion, it is ostensible that the Petitioner failed to adhere to the internal dispute resolution mechanisms in his pursuit of the rejection of his nomination by the Elections Board and the position taken by the Branch Chairs Caucus on the status of the Prosecution Counsel and State Counsel in relation to LSK elections.

100. The upshot is, therefore, that the Petition and the Notice of Motion dated 15th February, 2022 are unsustainable.

101. Consequently, the following final orders do hereby issue: -

(a) This Court lacks jurisdiction to entertain the Petition on account of the doctrine of exhaustion.

(b) The Petition and the Notice of Motion dated 15th February, 2022 are hereby struck out.

(c) Given the nature of the litigation, each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2022.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Aseso, Learned Counsel for the Petitioner.

Dr. B. M. Musau, Learned Counsel for the 1st Respondent.

Mr. Peter Wanyama, Learned Counsel for the 2nd Respondent.

Mr. Charles Kanjama, Learned Counsel for the 3rd to 11th Respondents.

Elizabeth Wanjohi – Court Assistant.