



REPUBLIC OF KENYA



**Odundo & 3 others v Havi & 20 others; Emukule & 22 others (Interested Parties)  
(Constitutional Petition 22 & E260 of 2021 & E379 of 2020 (Consolidated))  
[2021] KEHC 431 (KLR) (Constitutional and Human Rights) (20 December 2021) (Judgment)**

*Collins Odhiambo Odundo & another v Nelson Andayi Havi & 11  
others; Riziki Emukule & 20 others (Interested Parties) [2021] eKLR*

Neutral citation: [2021] KEHC 431 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**CONSTITUTIONAL PETITION 22 & E260 OF 2021 & E379 OF 2020 (CONSOLIDATED)**

**AC MRIMA, J**

**DECEMBER 20, 2021**

**(FORMERLY NAKURU HIGH COURT CONSTITUTIONAL PETITION NO. E017 OF 2021)**

**BETWEEN**

**COLLINS ODHIAMBO ODUNDO ..... 1<sup>ST</sup> PETITIONER**  
**JOHN OCHOLA OUMA ..... 2<sup>ND</sup> PETITIONER**  
**BRIAN KINYUA MACHINA ..... 3<sup>RD</sup> PETITIONER**  
**AKUSALA BORNINFACE ..... 4<sup>TH</sup> PETITIONER**

**AND**

**NELSON ANDAYI HAVI ..... 1<sup>ST</sup> RESPONDENT**  
**CAROLINIE KAMENEDE ..... 2<sup>ND</sup> RESPONDENT**  
**MERCY KALONDU WAMBUA ..... 3<sup>RD</sup> RESPONDENT**  
**LAW SOCIETY OF KENYA ..... 4<sup>TH</sup> RESPONDENT**  
**MAXWEL MIWAYA ..... 5<sup>TH</sup> RESPONDENT**  
**JANE ODIYA ..... 6<sup>TH</sup> RESPONDENT**  
**GEORGE KAMAU ..... 7<sup>TH</sup> RESPONDENT**  
**BOMBEGI GESICHO ..... 8<sup>TH</sup> RESPONDENT**  
**CLARISE MMBONE ..... 9<sup>TH</sup> RESPONDENT**  
**EMMANUEL KYOBICA ..... 10<sup>TH</sup> RESPONDENT**



LEVI MUNYERI .....	11 <sup>TH</sup> RESPONDENT
HERINE AKOTH KABITA .....	12 <sup>TH</sup> RESPONDENT
ESTHER ANG'AWA .....	13 <sup>TH</sup> RESPONDENT
JAMLICK MURIITHI .....	14 <sup>TH</sup> RESPONDENT
BERNHARD NGETICH KIPKOECH .....	15 <sup>TH</sup> RESPONDENT
ALUSO AILEEN INGATI .....	16 <sup>TH</sup> RESPONDENT
JULIETTE A. JAKAILA .....	17 <sup>TH</sup> RESPONDENT
GEORGE OMWANSA .....	18 <sup>TH</sup> RESPONDENT
BETH MICHOMA .....	19 <sup>TH</sup> RESPONDENT
FAITH ODHIAMBO .....	20 <sup>TH</sup> RESPONDENT
CAROLYNE MUTHIANI MUTHEU .....	21 <sup>ST</sup> RESPONDENT

**AND**

RIZIKI EMUKULE .....	INTERESTED PARTY
GEORGE ONWANSA .....	INTERESTED PARTY
ALUSO INGATI .....	INTERESTED PARTY
CARILINE MUTHEU .....	INTERESTED PARTY
FAITH ODHIAMBO .....	INTERESTED PARTY
BETH MICHOMA .....	INTERESTED PARTY
NDINDA KINYILI .....	INTERESTED PARTY
BERNHARD NG'ETICH .....	INTERESTED PARTY
LAW SOCIETY OF KENYA, COAST BRANCH .....	INTERESTED PARTY
LAW SOCIETY OF KENYA, RIFT VALLEY BRANCH .....	INTERESTED PARTY
LAW SOCIETY OF KENYA, NORTH RIFT BRANCH .....	INTERESTED PARTY
LAW SOCIETY OF KENYA, WEST KENYA BRANCH .....	INTERESTED PARTY
LAW SOCIETY OF KENYA, SOUTH WEST KENYA BRANCH .....	INTERESTED PARTY
LAW SOCIETY OF KENYA, MOUNT KENYA BRANCH .....	INTERESTED PARTY
LAW SOCIETY OF KENYA, SOUTH EASTERN BRANCH .....	INTERESTED PARTY
LAW SOCIETY OF KENYA, NAIROBI BRANCH .....	INTERESTED PARTY
KENYA COMMERCIAL BANK LIMITED .....	INTERESTED PARTY
ABSA BANK PLC .....	INTERESTED PARTY
STANDARD CHARTERED BANK LIMITED .....	INTERESTED PARTY
SBM BANK KENYA LIMITED .....	INTERESTED PARTY



SAFARICOM PLC ..... INTERESTED PARTY  
COUNCIL OF THE LAW SOCIETY OF KENYA ..... INTERESTED PARTY  
BRANCH CHAIR CAUCUS ..... INTERESTED PARTY

**The Council of the Law Society of Kenya is not duly constituted in the absence of its President and Vice-President.**

Reported by Kakai Toili

**Legal Practice** - advocates – Law Society of Kenya – Council of the Law Society of Kenya (Council) – composition of the Council - whether the Council was duly constituted in the absence of the President and Vice-President of the Law Society of Kenya – Law Society of Kenya Act, 2014, section 16(7); Law Society of Kenya (General) Regulations, regulation 78.

**Legal Practice** - advocates – Law Society of Kenya – Council of the Law Society of Kenya (Council) – disputes involving the Council - referral of disputes involving the Council to arbitration – whether a resolution of the Council was required to refer a dispute involving the Council to arbitration – Law Society of Kenya (General) Regulations, 95 and 96.

**Legal Practice** - advocates – Law Society of Kenya – President of the Law Society of Kenya – role of the President of the Law Society of Kenya - whether the President of the Law Society of Kenya was the spokesperson of the Law Society of Kenya.

**Legal Practice** - advocates – Law Society of Kenya – Secretary/ Chief Executive Officer of the Law Society of Kenya – role of the Secretary/ Chief Executive Officer of the Law Society of Kenya – implementation of resolutions of the Law Society of Kenya - what was the procedure to be followed by the Secretary of the Law Society of Kenya where they held the view that a resolution or directive required to be executed was unlawful.

**Legal Practice** - advocates – Law Society of Kenya – special general meeting of the Law Society of Kenya - requisitioning, convening and holding of special general meetings - what was the procedure to be followed in the requisitioning, convening and holding of special general meetings by the Law Society of Kenya – whether the agenda of a special general meeting could be amended to include new items - Law Society of Kenya Act, 2014, section 16(5), (6) and (7); Law Society of Kenya (General) Regulations, regulations 75(1), (2) and (3), 78, 79(2) and (3).

**Constitutional Law** – fundamental rights and freedoms - right to practice law - whether the right to practice law was a right or a fundamental freedom under the Bill of Rights - Constitutional of Kenya, 2010, article 24.

**Alternative Dispute Resolution** – arbitration – issues capable of being determined through arbitration – issues of a constitutional nature - whether an arbitrator could determine issues which were of a constitutional nature - Constitution of Kenya, 2010, article 165(3).

**Civil Practice and Procedure** – res judicata – nature and rationale - what was the nature and rationale of the doctrine of res judicata.

**Words and Phrases** - proxy – definition of proxy – someone who was authorized to act as a substitute for another; the grant of authority by which a person was so authorized - Black's Law Dictionary 11<sup>th</sup> Edition Thomson Reuters Publishers, page 1482.

#### **Brief facts**

The instant consolidated petitions comprised of three petitions namely Petition No. 22 of 2021, Petition No. E379 of 2021 and Petition No. E260 of 2021. Petition No. 22 of 2021 mainly challenged the manner in which a Special General Meeting (SGM) was convened and conducted in June 26, 2021 and the resultant resolutions. Petition No. E379 of 2021 dealt with the manner in which a Special General Meeting was convened in September 24, 2021. The meeting was, however, not conducted on account of some conservatory orders.



Petition No. E260 of 2021 mainly dealt with the general administrative operations of the Law Society of Kenya (LSK) and how the rights of the members of the LSK were and continued to be allegedly affected. There was also the question as to whether the members of the Council of the LSK were fit to hold any positions within the LSK or any other public office.

### **Issues**

- i. Whether the Council of the Law Society of Kenya was duly constituted in the absence of the President and Vice-President of the Law Society of Kenya.
- ii. Whether a resolution of the Council of the Law Society of Kenya was required to refer a dispute involving the Council to arbitration.
- iii. Whether an arbitrator could determine issues which were of a constitutional nature.
- iv. What was the nature and rationale of the doctrine of *res judicata*?
- v. Whether the President of the Law Society of Kenya was the spokesperson of the Law Society of Kenya.
- vi. What was the procedure to be followed by the Secretary of the Law Society of Kenya where he/she held the view that a resolution or directive required to be executed was unlawful?
- vii. What was the procedure to be followed in the requisitioning, convening and holding of Special General Meetings by the Law Society of Kenya?
- viii. Whether the agenda of a Special General Meeting could be amended to include new items.
- ix. What was the nature of the rule of law?
- x. Whether the right to practice law was a right or a fundamental freedom under the Bill of Rights.

### **Relevant provisions of the Law**

#### **Law Society of Kenya Act, 2014**

#### **Section 18 - Eligibility of election as member of the Council.**

*(1) A person is eligible for election as the president or vice-president if the person-*

*(a) is a member or former member of the Council; or*

*(b) is qualified to be a Judge of the Supreme Court.*

*(2) A person is eligible for election as a member of the Council if the person-*

*(a) is a member of the Society;*

*(b) has been practise for at least two years, from the date of admission;*

*(c) has not been found liable for professional misconduct by the Disciplinary Committee established by the Advocates Act (Cap. 16), in the three years immediately preceding the election; and*

*(d) meets the requirements of Chapter Six of the Constitution.*

#### **Section 31 - Requisitioning a special general meeting.**

*(1) A special general meeting shall be convened at any time-*

*(a) if requisitioned by at least five percent of the members from each branch; or*

*(b) by the Council on its own motion after giving a thirty days notice.*

*(2) The notice requisitioning a special general meeting under subsection (1)(a) shall-*

*(a) be in writing;*

*(b) be signed by the members from all the branches as specified in subsection (1);*

*(c) specify the object of the proposed meeting;*

*(d) be submitted to the secretary to the Society.*

*(3) The Council shall, within fourteen days of receiving a requisition submitted under subsection (2), convene a special general meeting of the Society.*

*(4) If the Council fails, within fourteen days after the requisition, to convene a general meeting in accordance with the requisition, and specifying that it shall be held within thirty days, the members may themselves convene that general meeting to be held at any time within two months after such requisition.*



## Held

1. Regulations 95 and 96 of the Law Society of Kenya Regulations (Regulations) provided in certain terms the procedures to be followed in the event of disputes arising within the Law Society of Kenya (LSK). Since the dispute involved the Council of the Law Society of Kenya (Council), regulation 96(7) mandated that if the parties could not agree on an arbitrator, then the arbitrator should be appointed by the Chairperson of the Chartered Institute of Arbitrators, Kenya Chapter. The reference of any dispute contemplated under the Regulations to arbitration did not require a resolution of the Council.
2. The existence of a dispute within the Council even to an extent that the Council could not make any resolution could not *ipso facto* be a reason why a dispute could not be referred to arbitration. The only time any dispute contemplated under the Regulations would not be capable of referral to arbitration was when the exceptions to the doctrine of exhaustion applied.
3. The issues raised in the petition were of a serious constitutional nature. They called for the interpretation of the Constitution of Kenya, 2010, (Constitution) determination as to whether the Constitution was breached, whether rights and fundamental freedoms in the Bill of Rights had been violated, denied, infringed or threatened and whether the respondents ought to hold any public office. Such issues transcended the purview of an arbitrator. The arbitrator(s) would have no jurisdiction over the issues raised in the petition. The issues in the petition were those contemplated under article 165(3) of the Constitution to be within the exclusive jurisdiction of the High Court. The petition was not barred by the doctrine of exhaustion.
4. Petition No. 22 of 2021 mainly challenged the legality of the June SGM whereas Petition No. E260 of 2021 mainly dealt with the management and administration of the LSK and whether the members of Council were fit to hold any office in the LSK and any public office. The two matters were based on different causes of action. There was no nexus between the two matters.
5. The rationale behind *res judicata* was based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensured the economic use of court's limited resources and timely termination of cases. It promoted stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promoted confidence in the courts and predictability which was one of the essential ingredients in maintaining respect for justice and the rule of law.
6. Without *res judicata*, the very essence of the rule of law would be in danger of unravelling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law could be raised as a valid defence. It was a doctrine of general application and it did not matter whether the proceedings in which it was raised were constitutional in nature.
7. Both Petition No. E379 of 2021 and Judicial Review No. E1146 of 2020 challenged the manner in which Special General Meetings(SGM) of the LSK were convened. However, the SGM in each of the matters was separately convened, hence the causes of action were different. Judicial Review No. E1146 of 2020 was struck out and the dispute referred to arbitration. In that case, the issues were not determined with finality by the court. None of the two matters had been finally determined by a competent court. In that case, the doctrine of *res judicata* could not apply to bar Petition No. E379 of 2021.
8. All the petitions under consideration were instituted by advocates and who were members of the LSK. The petitions were pointed in that they challenged specific actions and resolutions of the organs of the LSK. Each of the members of the LSK was, in one way or the other, affected by the decisions of the organs of the LSK. As such, any aggrieved member had the requisite *locus standi* to institute constitutional petitions over the actions and resolutions of the organs of the LSK. There was no demonstration of bad faith in the filing of the petitions. The petitions were simply about members who were variously aggrieved by the organs of the LSK. Therefore, none of the petitions was a proxy petition.



9. The Law Society of Kenya Act (LSK Act) and the Regulations were silent on who the spokesperson of the LSK was. It was the Law Society of Kenya Council Charter (Revised 2020) (the Council Charter) which made such a provision. The position taken by the Council Charter on the spokesperson of the LSK was in line with the internationally accepted standards of good corporate governance. In a company set-up, for instance, the chairperson of the board of directors was the official spokesperson of the company especially in relation to stakeholders and the general public. Therefore, the President of the LSK was the official spokesperson of the LSK and could be deputized by the Vice-President in case need arose.
10. The Council was one of the organs of the LSK provided for in section 15 of the LSK Act. Under section 17(1) of the LSK Act, the Council was the governing body of the LSK. Therefore, it meant that without the Council the governance of the LSK was at stake. The composition of the Council was provided for in section 17(2) of the LSK Act. The Council was comprised of the President, the Vice-President and 11 Council members thereby making a total of 13 persons.
11. The functions of the President, the Vice-President and the Council members were variously provided for in the LSK Act, the LSK Regulations and the Council Charter. A closer look at the provisions of section 18 of the LSK Act revealed that Parliament intended to have two cadres of persons within the Council. The first cadre comprised of the President and the Vice-President and the second cadre was comprised of the Council members. That could be the logical reason as to why the two cadres had distinct qualifications for appointment into office.
12. The President and the Vice-President had to be persons who had previously or were currently serving in the Council. The effect of that requirement was to ensure that the President and the Vice-President were possessed of experience of the workings of the Council and the LSK at large. Such persons had to also possess the requirements of a Supreme Court Judge under article 166(3) of the Constitution. However, that was not the case with the rest of the Council members. The qualifications of the rest of the members were largely far below those of the President and the Vice-President with an exception of the Council member who had to be an advocate of at least twenty-five years' standing. It was on that basis that the LSK Act, the Regulations and the Council Charter designated specific functions to the President and the Vice-President.
13. The only instance where the law provided for what happened when both the President and the Vice-President of the LSK were absent in a meeting was during a general meeting under section 16(7) of the LSK Act and regulation 78 of the Regulations. In that case, one of the Council members present would chair the meeting and if none was neither present nor willing to chair the meeting, the senior most member of the LSK present would chair that general meeting.
14. The law was silent on what happened to a meeting of the Council where both the President and the Vice-President were absent. In that case, just like in the case of a Cabinet meeting where both the President and the Deputy President were absent, the Cabinet meeting could not be held, the same position applied to the Council in the absence of both the President and the Vice-President. In that case no Council meeting could be held. The Council of the LSK could not be duly constituted in the absence of the President and the Vice-President of the LSK.
15. The LSK, despite being constituted by advocates, principally discharged public duties including the maintenance and advancement of constitutionalism, justice and the rule of law, the protection of public interest, maintenance of integrity and professionalism among others. The LSK was, hence, one of those bodies contemplated under article 10(1) of the Constitution to be bound by the national values and principles of governance. As such, LSK had a duty under article 3 of the Constitution to respect, uphold and defend the Constitution. The LSK, as a caged animal, had to operate, but within the confines of the law. That was to say, whatever the LSK undertook through its members, officers, staff or agents had to be in line with the the law.



16. The LSK was under a constitutional duty to pass resolutions and to also give instructions to the Secretary/Chief Executive Officer of the LSK (Secretary) which resolutions and instructions were within the law. The position augured well with section 29(1) of the LSK Act which provided for the liability of Council members, officers and employees of the Society. If a Council member, officer or an employee of the LSK while discharging his/her duties did not act in good faith, then such would be personally liable to any action, claim or demand as the case could be.
17. A determination as to whether an action was done in good faith would largely depend on the circumstances surrounding the impugned action. All in all, a Council member, officer or an employee of the LSK had to, while discharging their duties, always ensure that they remained within the confines of the law.
18. The Chief Executive Officer of the Society and the Secretary of the Council could only execute lawful resolutions and instructions of the LSK, the Council, the President and/or the Vice-President as the case could be. The Secretary had to, however, be careful in the manner in which they decided not to execute a resolution or directive on account of unconstitutionality or illegality. There were two reasons for such caution. The first reason was that the LSK Act and the LSK Regulations did not provide for such an eventuality and the second reason was that the Secretary was an employee of the LSK and risked the wrath of the LSK and the Council in the event the LSK or the Council held a contrary position to that held by the Secretary on the resolution or directive.
19. Whenever a Secretary found himself or herself in a situation where they genuinely held the view that a resolution or directive required to be executed was either unconstitutional or unlawful, such a Secretary had to without delay, and with comity and decorum, and in the spirit of co-operation and consultation reach out to the President of the LSK over the issue. If need be, the Secretary could do a written memorandum on the matter to the President. What the Secretary could not do was to publicly show their disapproval of the impugned resolution or directive. Firmly put, the Secretary could not speak on behalf of the LSK unless expressly so lawfully authorized.
20. Section 31 of the LSK Act provided for the requisitioning for a SGM. Regulation 77 of the Regulations required that the notice requisitioning a SGM under section 31(2) of the LSK Act would be in Form LSK-15 in the First Schedule and would be submitted to the Secretary. Once the SGM was properly requisitioned, the meeting had to be convened as directed by the Council or by the members as the case may be.
21. Under regulation 75(1), (2) and (3) of the Regulations, the Secretary had to issue a notice convening the meeting. Once the notice of the meeting was duly issued, the Secretary pursuant to regulation 75(4) of the Regulations had to then issue the agenda of the meeting. The agenda had to be sent to the members not later than 14 days before scheduled meeting. The Secretary could, in consultation with the President, send any other information or document to members for the purpose of the meeting. Regulation 75(6) was to the effect that any accidental omission to give notice of a meeting to a member or the non-receipt of the notice by a member, or non-receipt of a matter under regulation 75(4) or (5) would not invalidate the proceedings or a resolution made at the general meeting. The special general meeting would then be held once it was properly requisitioned and convened through the issuance of the notice and the agenda.
22. The first business of the day at the SGM was to ascertain the presence of the presiding officer. Section 16(6) and (7) of the LSK Act and regulation 78 of the Regulations provided that it was the President and in the absence the Vice-President of the LSK who would preside over the general meeting. In the absence of both the President and the Vice-President, the Council would nominate one of its members present to preside. If it occurred that no member of the Council was present or none of the members of the Council present were willing to preside over the meeting, the members of the LSK present would then nominate and appoint the senior most member to preside over the meeting.



23. In case the meeting would be presided over by any other person than the President, regulation 78(2) of the Regulations gave that person the power or discretion conferred upon the President regarding the conduct of a general meeting. The position augured well with section 29(1) of the LSK Act which provided for the liability of Council members, officers and employees of the LSK. In case the meeting would be presided over by any other person than the President, regulation 78(2) of the Regulations gave that person the power or discretion conferred upon the President regarding the conduct of a general meeting.
24. Upon settlement of the presiding officer, the next issue was the ascertainment of the quorum of the meeting. Section 16(5) of the LSK Act set the quorum for a general meeting to be at least five percent of all the members of the LSK. In the event the presiding officer of the meeting ascertained that the meeting had the requisite quorum, then the officer steered the meeting in line with the rules of debate in the LSK Act and the Regulations. If the presiding officer ascertained that the requisite quorum for the meeting was not met, then the provisions of regulation 79(2) and (3) of the Regulations would come to play.
25. In a SGM, no other item except the ones in the agenda could be discussed. The rationale was that SGM's were requisitioned and convened for specific reasons and they were not open for any other business not in the agenda. In other words, the agenda of a SGM could not be amended to include any new items. The only instance where other items not in the agenda could be dealt with at a general meeting was during an ordinary general meeting. That was so provided for in regulation 76(1) of the Regulations where a member could in appropriate instances move a notice of motion.
26. The deliberations of the agenda items eventually yielded the resolutions of the meeting. Discussions on the agenda items were usually conducted in a manner that any matter requiring a decision to be made would, in the first instance, be by show of hands. In the event a poll was to be made, regulations 82 and 83 of the Regulations took effect unless such a demand for the poll was withdrawn. Voting would be undertaken thereby resulting to resolutions. In the course of voting, the threshold was usually simple majority unless where a special resolution was to be passed under section 33(2) of the LSK Act.
27. Every member present at a general meeting of the LSK had only one vote except the President or the presiding officer who would have both a deliberative and a casting vote. The Secretary was required under the law to maintain a register of all resolutions made in general meetings and all minutes of a previous general meeting had to be signed by the President in order to be conclusive and binding on members of the LSK.
28. Once a resolution was made at a general meeting, regulation 36 of the Regulations provided that a resolution of the LSK in a general meeting should not be altered or rescinded within nine months after the passage of the resolution without a special resolution of the LSK. However, there was a qualification to that provision. For such a resolution to assume the intended indefeasible nature, the meeting that resulted in such a resolution had to, in the first instance, have been requisitioned and convened within the law otherwise the resolution would not be binding on the Society and/or its members.
29. The June SGM was held on the basis of the notice dated June 14, 2021 and without the benefit of the arbitral process. In issuing the notice, the members intentionally avoided to capture the part of the order of the court referring the matter to arbitration. There was no evidence that any attempts were made to initiate the arbitral proceedings as ordered or at all. Simply put, the orders of the court were outrightly ignored. The June SGM was held in contravention of the order of the court made in Judicial Review No. E1146 of 2020 *R. v Nelson Andayi Havi & Others ex parte Gad Aguko*.
30. The rule of law was one of the national values and principles of governance in article 10(2)(a) of the Constitution. At its most basic level, the rule of law was the concept that both the Government and citizens knew the law and obeyed it. It implied that every entity and person was subject to the law. Adherence to the rule of law was fundamental in the administration of justice, it commanded the



- proper functioning of the society and enhanced order and certainty in the general affairs of a country. The converse led to anarchy and lawlessness.
31. The reason why courts would punish for contempt of court was to safeguard the rule of law which was fundamental in the administration of justice. It had nothing to do with integrity of the Judiciary or the court or even the personal ego of the presiding judge. Neither was it about placating the applicant who moved the court by taking out contempt proceedings. It was about preserving and safeguarding the rule of law. On one hand, obedience of court orders was a way of upholding the rule of law. On the other hand, disobedience of court orders was an affront to articles 2(1), 3 and 10(2)(a) of the Constitution.
  32. Apart from contravening articles 2(1), 3 and 10(2)(a) of the Constitution, the refusal to obey the order in Judicial Review No. E1146 of 2020 *R v Nelson Andayi Havi & Others ex parte Gad Aguko* to refer the matter to arbitration further contravened article 159(2)(c) of the Constitution. It, therefore, meant that all actions taken on the basis of the said disobedience remained unconstitutional. As the June SGM was convened in disobedience of the orders of the court then the meeting did not yield any lawful and/or binding resolutions or at all. It was a nullity.
  33. More than 15 members of the LSK including the 1<sup>st</sup> petitioner in Petition No. E260 of 2021, decided to and deliberately ignored and disobeyed an order of the court and then rushed to the very court they had disobeyed for further judicial intervention. The disobedience was by advocates who were officers of the court. It was tantamount to a mockery of the legal profession when members preached water, but instead drunk wine. As officers of the court, advocates were expected to be the first port of call in obeying court orders.
  34. Given that the Caretaker Council was a product of the impugned June SGM, being a fruit of a poisoned tree, no lawful resolutions could be made by the Caretaker Council. Likewise, given that the President and the Vice-President of the LSK were not part of the other wing of the Council, that wing of the Council could also not yield any lawful resolutions or at all. There had been no functional Council of the LSK since June 26, 2021 when the June SGM was held. The requisitioning and convening of the September SGM was a nullity.
  35. The actions complained of against the respondents could have affected the manner in which the advocates practised law, however, it could not be the position that an advocate could contend that his/her right to practise law under the Bill of Rights had been or was threatened with infringement. The petitioners could not argue that the advocates' right to practise law had been limited in contravention of article 24 of the Constitution since no such right was part of the Bill of Rights.
  36. There was some degree of indolence on the part of the general membership of the LSK in dealing with the affairs of the Council and the LSK at large. That was either by way of action or inaction. As such, it would be imprudent for the court to lay blame on the 2<sup>nd</sup> to 13<sup>th</sup> respondents who were only but a few of the members of the LSK. Whereas the 2<sup>nd</sup> to 13<sup>th</sup> respondents were at the governance seat of the LSK, which was the Council, the current situation could have been mitigated had the general membership or the organs of the LSK at least taken the liberty to initiate the arbitration processes or bring the inability to the court for further intervention.
  37. Given the myriad of actions and inactions on the part of the organs and the general membership of the LSK, it was a tall order to declare that the 2<sup>nd</sup> to 13<sup>th</sup> respondents singularly contravened the Constitution or that each or any of them was unfit to hold office within the LSK and any other public office.
  38. None of the twin Councils had assumed any legality, hence the composition of the Council had to revert back to how it was before the wrangles set in. The members of the Council should have endeavoured to work together for the remainder of their term more so for the benefit of the general membership, the LSK and the public given the role played by the LSK. There could be no differences which were irreconcilable even in any worst imagined scenario.



39. Members of the Council owed a fiduciary duty to the LSK. The Council had to stand up to that calling and demonstrate leadership. Good leadership demanded servant leadership. The interests of the general membership, the LSK and the public had to supersede any individual interests of the Council members. The LSK was a key stakeholder in the justice chain in Kenya and it ought not remain in the state it was in even a day more. The members of Council had to demonstrate that indeed they could be trusted with the affairs of the LSK, and by large, those of the rest of the Kenyans.

*Consolidated petitions partly allowed.*

### **Orders**

- i. *A declaration was issued that the President of the LSK was the spokesperson of the LSK.*
- ii. *A declaration was issued that the Council of the LSK could not be lawfully constituted in the absence of the President and the Vice-President of the LSK.*
- iii. *A declaration was issued that main role of the Chief Executive Officer and the Secretary of the LSK was to diligently execute all lawful resolutions and instructions of the LSK, Council and the President of the LSK.*
- iv. *A declaration was issued that the special general meeting of the LSK convened and held on June 26, 2021 was in contravention of the orders of the court in Milimani High Court Judicial Review No. E1146 of 2020 R v Nelson Andayi Havi & Others ex parte Gad Aguko. The meeting contravened articles 2(1), 3, 10(2)(a) and 159(2)(c) of the Constitution and rule 3(6)(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. All the resolutions made at the said meeting were invalid, null and void. They were thereby quashed.*
- v. *A declaration was issued that the Caretaker Council constituted vide Resolution No. 11 of the special general meeting of the LSK convened and held on June 26, 2021 was an unknown organ or entity of the LSK hence of no legal effect, null and void. It was thereby quashed.*
- vi. *A declaration was issued that the special general meeting of the LSK which was scheduled for September 24, 2021 was not lawfully and properly requisitioned. The notice of the said meeting was thereby quashed.*
- vii. *A declaration was issued that the membership of the Council of the LSK was comprised of the President, the Vice-President, Herine Akoth Kabita, Esther Ang'awa, Bernhard Ng'etich (The Treasurer), George Omwansa, Carolyn Mutheu, Aluso Ingati, Faith Odhiambo, Beth Michoma, Ndinda Kinyili and Riziki Emukhule.*
- viii. *A declaration was issued that the members of the Council comprising of the President, the Vice-President, Herine Akoth Kabita, Esther Ang'awa, Bernhard Ng'etich (The Treasurer), George Omwansa, Carolyn Mutheu, Aluso Ingati, Faith Odhiambo, Beth Michoma, Ndinda Kinyili and Riziki Emukhule had not, whether jointly and/or severally, contravened the Constitution. As such, they were fit to hold office within the LSK and any other public office.*
- ix. *Mercy Kalondu Wambua was the Chief Executive Officer/Secretary of the LSK.*
- x. *The Council of the LSK was to within 21 days thereof convene and hold its meeting, (whether an ordinary or an extra-ordinary meeting either in person and/or virtually), with a view of attending to the affairs of the LSK.*
- xi. *In the event the Council was unable to either convene or hold the meeting as ordered above, the Branch Chairs Caucus would forthwith take charge of the role of the Council for the remainder of the term of the Council.*
- xii. *The Branch Chairs Caucus would convene and hold meetings including general meetings in attending to the affairs of the LSK.*
- xiii. *All resolutions and decisions which the Branch Chairs Caucus would make would be subject to ratification by the general meetings of the LSK.*
- xiv. *Once the Branch Chairs Caucus took over the role of the Council, none of the members of the Council, including the Mercy Kalondu Wambua (the Secretary) would in any manner whatsoever deal with any of the affairs of the LSK in their respective capacities as members of the Council and/or the Secretary, as*



the case could be. For avoidance of doubt, the Secretary would nevertheless continue to be an employee of the LSK.

- xv. Further, if the Branch Chairs Caucus took over the role of the Council, the Chairperson thereof would preside over all general meetings of the LSK and would exercise the powers of the President of the LSK including being the spokesperson of the LSK for the remainder of the term of the Council.
- xvi. Parties were at liberty to apply.
- xvii. Each party was to bear its own costs.

## Citations

### Cases

1. *Akusala, Borniface & another v Law Society of Kenya & 12 others; Law Society of Kenya Nairobi Branch (Interested Party)* Constitutional Petition E260 of 2021; [2021] eKLR — (Explained)
2. *Anarita Karimi Njeru v Republic* [1979] 1 KLR 54 — (Explained)
3. *Attorney General v Kituo Cha Sheria & 7 others* Civil Appeal 108 of 2014; [2017] eKLR — (Explained)
4. *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others*; Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated); [2014] eKLR — (Explained)
5. *Council of Governors v Salaries & Remuneration Commission* Constitutional Petition 328 of 2016; [2018] eKLR — (Explained)
6. *Muoki, Daniel Muthama Ministry of Health & another; Shenzhen Mindray Bio-Medical Electronics Co Ltd & 5 others (Interested Parties)* Petition 172 of 2019; [2020] eKLR — (Explained)
7. *Matiang'i, Fred Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* Civil Application 1 of 2017; [2018] eKLR — (Explained)
8. *Mukwe, James Lusweti Independent Electoral and Boundaries Commission & 2 others* Petition 25 of 2018; [2019] eKLR — (Explained)
9. *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* Civil Appeal 42 of 2014; [2015] eKLR — (Explained)
10. *Mwau, John Harunv Independent Electoral and Boundaries Commission & another* Petition 26 of 2013; [2013] eKLR — (Explained)
11. *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* Constitutional Petition 86 of 2016; [2018] eKLR — (Explained)
12. *Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party)* Petition 203 of 2020; [2020] eKLR — Explained
13. *Law Society of Kenya v Standard Chartered Bank Kenya Limited* Civil Suit 57 of 2021; [2021] eKLR — (Explained)
14. *Mumo, Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] eKLR — (Explained)
15. *Havi, Nelson Andayiv Law Society of Kenya & 3 others* Petition 607 of 2017; [2018] eKLR — (Explained)
16. *Okoiti, Okiya Omtatah & 2 others v Attorney General & 3 others* Petition 58 of 2014; [2014] eKLR — (Explained)
17. *Waweru, Peter K v Republic* Miscellaneous Civil Application No 118 of 2004; [2006] eKLR — (Explained)
18. *Renita, Choda vs Kirit Kapur Rajput* Petition E040 of 2021; [2021] eKLR — (Explained)
19. *Republic Ex Parte Chudasama v Chief Magistrate's Court, Nairobi & another* [2008] 2 EA 311 — (Explained)
20. *Republic v Kombo & 3 others ex parte Waweru* (2008) 3 KLR (EP) 478 — (Explained)
21. *Republic v Parliamentary Service Commission & 2 others; Morris Kimuli & another (Interested Parties)* ([2021] eKLR) — (Explained)
22. *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* [2014] eKLR — (Explained)



23. *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR — (Explained)
24. *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others* [2018] eKLR — (Explained)
25. *Total Kenya Limited vs Kenya Revenue Authority* [2013] eKLR— (Explained)
26. *Truth Justice and Reconciliation Commission v Chief Justice of the Republic of Kenya & another* [2012] eKLR — (Explained)

***South Africa;***

Fose v Minister of Safety & Security ([1977] ZACC 6) — (Explained)

***United Kingdom;***

Macfoy v United Africa Company ([1961] 3 All ER 1169) — (Explained)

**Statutes**

***East Africa;***

1. Civil Procedure Act (cap 21) section 7 — (Interpreted)
2. Constitution of Kenya, 2010 articles 19, 20, 22(1); 25(c); 27; 36; 36(1); 47; 48; 50(1)(3(1) - (Interpreted)
3. Fair Administrative Action, 2015 (Act No 4 of 2015) section 4(3) — (Interpreted)
4. Law Society of Kenya Act (cap 18) sections 15, 16(5)(6)(7); 17; 19; 27; 35 — (Interpreted)
5. Law Society of Kenya (General) Regulations, 2018 (Act No 21 Sub Leg) regulations 18(2); 21; 23(1); 63(2); 77; 79(1), 83(4); 84(1)(8); 96 — (Interpreted)

**Advocates**

1. Mr. Amanywa for for the petitioners
2. Mr Ochiel for for the 3rd respondent
3. Mr Kiprono for for the 1st & 8th Interested parties
4. Mr Theuri for for the 9th to 16th Interested parties
5. Mr Nelson Havi for 1st , 2nd, and 5th to 12 respondents
6. Mr BM Musau for for the 1st respondent
7. Miss Kabita for for the 2nd respondent

## JUDGMENT

**Introduction:**

1. This is a consolidated judgment in respect of three Petitions. They are Petition No 22 of 2021, Petition No E379 of 2021 and Petition No E260 of 2021. The petitions were, however, not consolidated. This judgment will, nevertheless, cover all issues raised in the petitions.
2. Petition No 22 of 2021 was initially filed in the High Court at Nakuru. It was registered as Petition No E017 of 2021. The petition mainly challenged the manner in which a Special General Meeting was convened and conducted on the 26<sup>th</sup> June, 2021 and the resultant resolutions.
3. Petition No E379 of 2021 dealt with the manner in which a Special General Meeting was convened for the 24<sup>th</sup> September, 2021. The said meeting was, however, not conducted on account of some conservatory orders.
4. Petition No E260 of 2021 mainly dealt with the general administrative operations of the Law Society of Kenya and how the rights of the members of the Law Society of Kenya were and continue to be allegedly affected. There was also the question as to whether the members of the Council of the Law



Society of Kenya were fit to hold any positions within the Law Society of Kenya or any other public office.

5. All the petitions were strenuously opposed and supported in equal measure.
6. In order to enable this court to effectively consider the issues raised in the petitions, I will look at the respective Petitions.

### **Petition No 22 of 2021:**

#### **The Petitioners' Case:**

7. The petitioners, Collins Odhiambo Odundo and John Ochola Ouma are Advocates of the High Court of Kenya and Members of the Law Society of Kenya. I will hereinafter refer to the Law Society of Kenya as 'the LSK' or 'the Society').
8. The petition was filed together with an application by way of a notice of motion. The application was filed under a certificate of urgency. The Petition and the application were both dated 15<sup>th</sup> July, 2021 and were supported by the affidavit of Collins Odhiambo Odundo deponed to on the even date.
9. As stated earlier, the petition challenged the requisitioning and conducting of the Special General Meeting on the 26<sup>th</sup> June, 2021 and the resultant resolutions. I will hereinafter refer to the Special General Meeting held on the 26<sup>th</sup> June, 2021 to as 'the June SGM').
10. The petitioners contended that sometimes in 2020, the LSK collected signatures from the members of each branch for purposes of requisitioning a Special General Meeting since the Council could not agree to such a resolution.
11. It was averred that through a letter dated 23<sup>rd</sup> November, 2020 the President of the LSK asked one Collins Odhiambo, as the purported Acting Secretary/Chief Executive Officer of the LSK to make arrangements for the holding of the Special General Meeting on 5<sup>th</sup> December, 2020.
12. Aggrieved by the said events, one Gad Auko, petitioned the High Court in Judicial Review Application No E116 of 2021, *R v Nelson Andayi Havi & others ex-parte Gad Auko*. The petitioner challenged the manner in which the President of the LSK had solely convened the meeting.
13. In the interim, the High Court suspended the holding of the Special General Meeting. When the matter was fully heard, the court in its judgment delivered on 7<sup>th</sup> May, 2021 struck out the Petition and referred the dispute on the procedure to hold a general meeting to arbitration in accordance to regulation 96 of the *Law Society of Kenya (General) Regulations*.
14. The petitioners contended that despite the referral to arbitration, no steps were taken to effect the judgment of the court.
15. On 14<sup>th</sup> June, 2021, it is pleaded that, some members of the LSK issued notice informing the rest of the membership that the Special General Meeting which had been scheduled for 5<sup>th</sup> December, 2020 had been rescheduled to 26<sup>th</sup> June, 2021. The venue was to be at the offices of the LSK. That was to be the June SGM.
16. Indeed, the June SGM was held. A total of 14 resolutions were passed.
17. The petitioners herein then filed the current petition. In faulting the manner of convening and holding the June SGM, the petitioners raised several grounds. One of the grounds was that the notice did not meet the required legal threshold. That, the notice was for less than 14 days which was in violation of



- regulation 75 of the Law Society of Kenya (General) Regulations (hereinafter referred to as ‘the LSK regulations’) which required at least a 28 days’ Notice. A second ground was that regulation 23(1) of the LSK Regulations was also infringed. The regulation required a vacancy to be declared within 14 days of the such occurrence.
18. There was a third ground. It was that the Notice had indicated that the June SGM was to be conducted physically. Instead, the June SGM adopted a hybrid mode and it was conducted both physically and virtually to the total utter shock and surprise of the membership.
  19. The fourth ground was that the June SGM lacked quorum. It was posited that the June SGM did not attain the required 5% of all the members of the Society. As such, none of the resolutions that were passed in the June SGM is legally holding.
  20. The petitioners further raised another ground. It was contended that the Notice convening the June SGM was amended on the floor and 7 new agenda introduced. The petitioners averred that, by its very nature, a Notice convening a Special General Meeting could not be amended.
  21. There was also another ground. It was averred that, despite the irregular manner in which the agenda on the 3<sup>rd</sup> respondent herein, Mercy Kalondu Wambua, was made, the discussion thereof and the resolution sending her on compulsory leave were in contempt of court orders. The Petitioners contended that the President of the LSK was well aware of the orders issued in ELRC 090 of 2020, *Mercy Kalondu Wambua v Nelson Andayi Havi, Council of The Law Society of Kenya & others* where the Respondents had been restrained from interfering with the employment of Mercy Kalondu Wambua as the Secretary and Chief Executive Officer of the Society.
  22. Again, on another footing, the petitioners averred that despite the irregular manner in which the agenda to remove some Council members was made, the petitioners took issue with the resolution that removed the 1<sup>st</sup> to 8<sup>th</sup> interested parties as Council Members of the LSK. The petitioners contended that none of the said Council members were neither given any notice of such intention to remove them as Council members nor were they accorded any opportunity to be heard. The petitioner also contended that the Council members were not given any written reasons for their removal.
  23. The petitioners then objected to the manner in which the 5<sup>th</sup> to 12<sup>th</sup> respondents herein were appointed as a Caretaker Council of the LSK despite the fact that no law provided for such a Caretaker Council. To that end, the Petitioners averred that the resolution was *ultra-vires*.
  24. The petitioner further challenged the legality of appointing the 5<sup>th</sup> to 9<sup>th</sup> respondents as signatories to all the bank accounts of the LSK in place of the 8<sup>th</sup> interested party and the 3<sup>rd</sup> respondent. It was hence contended that the instructions to the 17<sup>th</sup> to 20<sup>th</sup> interested parties to change the signatories to the accounts of the LSK pursuant to Resolutions 10 and 11 were unlawful and unreasonable. Resulting from the foregoing, the petitioners posited that the acts of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> to 12<sup>th</sup> respondents were exposing the funds of the LSK to embezzlement and misappropriation.
  25. It was, therefore, strongly asserted by the petitioners that the June SGM was illegal and *ultra-vires* on account of the defectivity of the Notice convening the said meeting which was, instead, to be a 21 days’ notice under regulation 84(1) of the LSK regulations.
  26. It is also the petitioners’ case that the ousted Council Members, that is the 1<sup>st</sup> to 8<sup>th</sup> interested parties’ right to fair administrative action under article 47 of the Constitution and section 4(3) of the *Fair Administrative Actions Act* was violated for failure to be heard and to be given reasons for their dismissal.



27. The petitioner further posited that under article 48 of the Constitution, the members of the LSK deserve justice and protection from the dictatorial acts of the President. It was their case further that the actions of the President violated article 50(1) of the *Constitution* which require all disputes to be resolved by application of the law and be decided in a fair and public hearing before a court of law or impartial tribunal.
28. The petitioners then prayed for the following Orders: -
- (a) A declaration that the Special General Meeting convened on the 26<sup>th</sup> June 2021 was convened in contravention of the Law Society Act 2014 and Law Society of Kenya (General) Regulations 2020.
  - (b) A declaration that all decisions and resolutions made by the Special General Meeting convened on the 26<sup>th</sup> June 2021 are unconstitutional in violation of the rights and freedoms of the petitioners under article 25(c) 28, 36(1), 47, 48 and 50(1) of the Constitution of Kenya 2010.
  - (c) As an alternative to prayer (b) above, a declaration that resolution No 6, 10 and 11 as made by Special General Meeting convened on the 26<sup>th</sup> day of June 2021 are unconstitutional and in violation of the rights and freedoms of the petitioner under article 25(c), 28, 36(1), 47, 48 and 50(1) of the Constitution of Kenya 2010.
  - (d) An order compelling the 17<sup>th</sup> and 18<sup>th</sup> interested parties to reinstate the 8<sup>th</sup> interested party and respondent as signatories to all the bank accounts in the name of the Law Society of Kenya.
  - (e) A declaration that the 1<sup>st</sup> respondent is unfit to hold office of the President of the Law society of Kenya or any public office within Kenya.
  - (f) The petitioners be paid costs of this petition.
29. In further support to the petition, the petitioners filed written submissions dated 1<sup>st</sup> November, 2021. They reiterated the averments in the petition and identified the issues for determination as follows: -
- (a) Whether the petitioners met the conditions requisite for granting of the orders prayed and;
  - (b) Whether the petitioners are entitled to be granted the prayers sought.
30. On the first issue, the petitioners submitted that articles 19 and 20 of the Constitution asserted the Bill of Rights as an integral part of Kenya's democratic State and that such rights belong to each individual and that they bind all State organs and all persons. Reference was made to *Attorney General v Kituo cha Sheria & 7 others* [2017] eKLR and *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR where reference was made to the South African Court in *Phumelela Gaming and Leisure Ltd v Gründlingh and others* where the following was said: -
- A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law. In this, no court has a discretion.
31. On the right to association, the petitioners submitted that the LSK is established as a Society under section 3(1) of the *Law Society of Kenya Act* (hereinafter referred to as 'the LSK Act') and that under



- section 7 thereof, it is comprised of Advocates. As such, it follows that the LSK is an association of Advocates meant to carry out specific functions and meet specific objects under the constituting law.
32. In reference to section 15 of the LSK Act, the petitioners submitted that effective governance of the Society required the General Meeting, the Council, the Secretariat and the Branches. Further, section 16 of the LSK Act provided that the General meeting, which consist of all the members of the Society shall be the supreme authority of the Society which shall approve all resolutions and important decisions of the Society.
  33. On the role of the Secretary, the petitioners submitted that regulation 75(1) of the LSK Regulations required that before the convening of a Special General Meeting, the Secretary must send out a Notice of such a general meeting to members of the Society at least 28 days before the date set for the meeting, setting out the date, time and venue of the meeting.
  34. While impugning the manner in which the June SGM was convened, the petitioners submitted that there is no proof, whatsoever, that any appropriate Notice was circulated to the members of the LSK. To the contrary, a defective notice was only issued less than 28 days from the day the said impugned June SGM was to be convened. It was also submitted that the Secretary of the Society was not involved.
  35. As regards the newspaper advertisement of the June SGM, the petitioners submitted that whereas it reached a wide audience, it was issued barely 3 days to the day of convening the impugned June SGM, thus in violation of Regulation 75(1) of the LSK Regulations.
  36. The petitioners submitted that all the notices that were issued in respect of the June SGM were in violation of the LSK Act and the LSK Regulations thereby constituting a violation of the LSK members' right to freedom of association.
  37. On the inadequacy of quorum, it was submitted that no registration and verification happened on those who attended the impugned June SGM. The petitioners submitted that according to section 16(5) of the LSK Act, "the quorum of the general meeting shall be at least five percent of all the members of the Society." It was stated that without quorum after 15 minutes from the time appointed for the meeting, regulation 79(2)(a) of the LSK regulations required that the meeting be dissolved. Thus, without ascertaining quorum, the impugned June SGM cannot be said to have been an appropriately convened meeting.
  38. The petitioners submitted that the failure to ascertain quorum and not allowing votes to be taken during the passing of the alleged resolutions was an unfair administrative action on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> to the 12<sup>th</sup> respondents especially the 1<sup>st</sup> respondent who presided over the impugned June SGM.
  39. On the issue as to whether petitioners were entitled to the prayers sought, it was submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> to the 12<sup>th</sup> respondents quest to justify their actions on the basis of regulation 83(4) of the LSK Regulations was erroneous and unconstitutional. It was submitted that the drafters of the Regulations could not have intended regulation 83(4) to be used to remove the protection of the General meeting from violations of the Constitution.
  40. In the oral highlights, Mr Amany Counsel submitted that section 16 (5) of the LSK Act requiring the quorum of a general meeting to be at least five percent of all the members of the Society was violated; section 17(3) of the LSK Act requiring members of the Council to be elected by all the members of the Society in accordance with the LSK Act was also violated; section 22 of the LSK Act setting down the procedure for removing a member of the Council was also breached, section 31 of the LSK Act giving the procedure for requisitioning a Special General Meeting and section 35 of the LSK Act guiding



the voting procedure were both violated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to the extent of exposing the President of the LSK as incompetent.

41. To buttress the impropriety of the 1<sup>st</sup> respondent's actions reference was made to *Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party)* [2020] eKLR where it was observed as follows: -

29. .... The Constitution is the Supreme Law as provided under article 2(1) of the Constitution of Kenya, 2010 which provides: - "2. Supremacy of this Constitution (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. (2) No person may claim or exercise State authority except as authorised under this Constitution."

30. From the above-quoted provisions of the Constitution, it is clear that every member of the public whether individually or collectively is enjoined to respect, uphold and defend the Constitution and any alleged violation of the Constitution by any individual is a very serious matter and an affront to the constitutionalism, and sets a dangerous precedent in the violation of the constitution; which can, if not checked, result in serious harm to the country and every citizen. It is therefore proper and prudent for the courts to act in public interest and consider granting the appropriate reliefs in the circumstances where such orders are deserved.

42. The petitioners prayed that the orders sought be granted.

43. Since the 3<sup>rd</sup> respondent herein, Mercy Wambua Kalondu, supported the Petition, it is ideal that I now deal with her case.

### **The 3<sup>rd</sup> Respondent's Case:**

44. The 3<sup>rd</sup> respondent herein, Mercy Wambua Kalondu, described herself as the Chief Executive Officer and the Secretary to the Council of the LSK. She supported the petition through her affidavit sworn to on 12<sup>th</sup> November, 2021.

45. It was deposed that as the Secretary, she is responsible according to sections 26 and 27 of the LSK Act to the Council for the day to day administration and management of the Secretariat and the affairs and functions of the Society as the Council determines.

46. She deposed that the LSK Act established the organs of the Society as The General Meeting, The Council, The Secretariat; and The Branches and assigned each of them defined roles.

47. It was her case that her employment contract provided for her responsibilities as the day to day administration and management of the Secretariat, affairs and function of the LSK as determined by the Council, implementing the Society's strategic plan, conceptualizing and developing programme ideas in tandem with the Society's mandate, objectives and Strategic Plan, attending meetings and coordinating and liaising with stakeholders on behalf of the Council and the Society, implementing decisions of the Council, overseeing financial affairs of the organization, handling personnel matters, legal and policy research, taking minutes of the Council meetings and other Committees of the Society, coordinating preparation of donor proposals, overseeing and coordinating the administrative function of the Secretariat, handling litigation and disputes involving the Society, budgeting and overseeing the execution of the approved work plans and budgets.



48. In reference to section 16 of the LSK Act, she deposed that her further responsibilities include being the lawful representative of the Society in the exercise of its legal identity; keeping the functioning of the Society under constant review to ensure that the objects of the Society are achieved; implementing the programs, activities and studies approved by the General Assembly, and from time to time submit appropriate reports to the Council and to the General Meeting; on her own initiative or at the direction of the Council or the General meeting conduct such investigation or activities as are necessary for the advancement of the objects of the Society; being responsible for the management and supervision of the funds of the Society; being responsible for the administration of the Society; appointing and dismiss agents and employees of the Society in consultation with the Council; supervising all the activities of the Society and or its office or offices; considering all applications for individual membership; being responsible for keeping the membership records of the Society; receiving and following up payments for membership subscriptions; receiving income from sources other than membership subscriptions; carrying out any other function as specified by the General Meeting or the Council.
49. In giving a chronology of the events that transpired since she assumed office and her purported ouster, she deposed that the Council assumed office on March 24, 2020. It was her case that on September 14, 2020 the President Mr Nelson Andayi Havi, issued a Notice of intention to remove her from office as the CEO/Secretary. She contested the removal.
50. She deposed that on October 19, 2020 she received a letter from the Council communicating the decision of the Council on the notice of intention to remove her from office as the CEO/Secretary. The said letter notified her that the Council had considered the allegations levelled against her, as well as her detailed response filed on 29<sup>th</sup> October, 2020 and resolved that the allegations did not amount to gross misconduct and/or incompetence.
51. She stated that in the meeting held on October 16, 2020, 9 out of 13 Council members voted against the motion on her removal from office, as the Chief Executive Officer/Secretary and as such she resumed her duties.
52. She further deposed that, notwithstanding the said decision of the Council, the President of the LSK proceeded to issue her with a letter terminating her employment upon which she filed Employment Case No E090 *Mercy Wambua vs Nelson Havi & The Council of the Law Society of Kenya*.
53. She further deposed that conservatory orders were issued in the case stopping her ouster pending hearing and determination of the case. It was her deposition that the orders were still in force.
54. She also deposed that the Council held a Special General Meeting on 18<sup>th</sup> January, 2021 and resolved to suspend 9 Council members from office. It is her case that the resolution was challenged in Constitutional Petition No E025 of 2021, *Adrian Kamotho v LSK & 12 others* where the court stayed the implementation of the resolutions of the Special General Meeting held on January 18, 2021 and that the matter is now pending ruling on an appeal.
55. She deposed further that Judicial Review Application No E005 of 2021 *Lempaa Suyinka & 5 others vs Nelson Havi & others* was also filed and is still pending before an appellate court. She further deposed that the High Court struck out the Petition and referred the dispute to arbitration, an order which, she stated had not been complied with to date.
56. The 3<sup>rd</sup> respondent deposed that after the Special General Meeting of January 18, 2021, Mr Nelson Andayi Havi, Ms Carolyne Kamende, Ms Herine Kabita and Ms Esther Ang'awa declined to attend any Council meetings and/or to work with the rest of the Council members in execution of Council statutory mandate.



57. As a result of the foregoing, operations of the Society Bank Accounts have been adversely affected as a result of failure by the Vice President to undertake her bank signatory mandate.
58. With respect to the notice dated November 20, 2020 issued by Collins Odhiambo on instructions of the President requisitioning for a Special General Meeting for December 5, 2020 she deposed that the Notice contravened the law as the Notice provided the date of the meeting as 5<sup>th</sup> December 2020, contrary to section 31 of the LSK Act that required the Council of the LSK to set the date of the meeting. It is only upon the failure of the Council to call a meeting within 14 days from date of receiving the requisition that the members who requisitioned can set a date.
59. She also deposed that the President cannot receive a notice requisitioning a Special General Meeting as such a Notice is supposed to be received at the Secretariat, which Secretariat will then in consultation with the President call a Council Meeting to deliberate on the notice, determine if the threshold for holding the meeting as required by statute has been met and then fix a date within fourteen days from the date of receipt.
60. The 3<sup>rd</sup> respondent further impugned the letter dated June 14, 2021 purporting to call for a Special General Meeting because it was neither addressed to the Secretary nor to the Council of the LSK. The letter was also not signed by at least five percent of the members from each of the Branches as required under section 31 of the LSK Act and regulation 77 of the LSK regulations.
61. It was her case that the letter that purported to convene the June SGM sought to deliberate agenda that were *sub-judice* ELRC Petition No 087 of 2020 *Murigi Kamande v Nelson Andayi Havi, Law Society of Kenya & Mercy Kalondu Wambua* and ELRC Petition No E090 of 2020 *Mercy Kalondu Wambua v Nelson Andayi Havi & Council of the Law Society of Kenya*.
62. It was her case the June SGM was not validly held more so no signed register of those who attended the purported meeting was availed in evidence. She deposed that record book shows that only approximately 27 persons entered the compound of the LSK offices located at Gitanga Road between 10.00am to 3.45pm. She stated that June SGM, therefore, lacked quorum and was in violation of section 16(5) of the LSK Act and regulation 79(1) of the LSK regulations which provided that the quorum of the meeting shall be at least 5 percent all the members of the Society.
63. In further impugning the quorum and the manner in which the June SGM was conducted, she deposed that since the Advocates in the scheduled venue did not constitute quorum, a link for a virtual meeting was circulated to a limited section of membership on the same day and without notice hence converting the purported meeting to both physical and virtual.
64. The 3<sup>rd</sup> respondent further deposed that the resolution that was passed in the June SGM that purported to appoint of Mr Majimbo Georgiadis as the Secretary was illegal, unprocedural and in contempt of court orders in ELRC Petition No E090 of 2020 *Mercy Kalondu Wambua vs Nelson Andayi Havi & Council of the Law Society of Kenya* and a further violation of section 26 of LSK Act which calls for a competitive process in appointing a Secretary. Further, the said Mr Majimbo Georgiadis was faulted as having not attained the threshold of being an Advocate with at least ten years' experience.
65. She deposed that on 8<sup>th</sup> July, 2021, the Council of the LSK protested the resolutions of the June SGM by issuing a communication to members notifying them that the June SGM was not legitimate and the purported resolutions emanating from the said meeting as communicated by the President in his statement dated 28<sup>th</sup> June, 2021 were null and void.



66. In challenging the legality of the Caretaker Committee, the 3<sup>rd</sup> respondent deposed that the resolution that Dr Maxwell Miyawa, Jane Odiya, George Kamau, Bonbegi Gesicho, Claris Mmbone, Emmanuel Kyobika, Jamlick Muriithi and Levi Munyiri do replace Bernhard Kipkoech, George Omwansa, Carolyne Mutheu, Aluso Ingati, Faith Odhiambo, Beth Michoma, Ndinda Kinyili and Riziki Emukhule was contrary to regulation 23(1) of the LSK regulations and section 17 of the LSK Act that set the criteria for appointment of Council members when vacancy arises.
67. On the foregoing, she deposed that no vacancies in the positions of Council members ever arose on the June SGM and if at all any arose, no declaration of vacancy was made and no elections were undertaken, consequently, any purported appointment of any Caretaker Council members during the disputed June SGM are illegal, null and void.
68. The 3<sup>rd</sup> respondent further deposed that all the actions of the Caretaker Council in recruiting (a) Jakaila Juliette Akoth purportedly employed as Deputy CEO and Director Compliance and Ethics a position currently held by Ms Florence Muturi b) Ms Veronica Achieng Odipo purportedly employed as Director Compliance and Ethics a position currently held by Ms Mary Kitonga and (c) Mr Josephat Mutunga Mutisya purportedly employed as CEO/Secretary for the position she holds allegedly to start with effect on 1<sup>st</sup> March, 2022 are all illegal.
69. It was the 3<sup>rd</sup> respondent's case that the operations at the LSK have been brought to a halt due to the refusal by the Vice President to sign cheques for payment of utilities, delayed in payment of salaries, failed to pay for staff medical cover and statutory deductions among others.
70. In the end, she deposed that it will be good and in the interest of justice if the current challenges affecting the Society are resolved in the interest of members and the Society at large while ensuring that good corporate governance, rule of law and court orders are respected and adhered to.
71. Mr Ochiel Counsel appeared for the 3<sup>rd</sup> respondent. In his oral highlights, he stated that the June SGM ought to be quashed for having been held in violation of court orders, the rules of natural justice, the right to fair hearing and that it flouted the LSK Act hence illegal.
72. Counsel reiterated that the orders issued by the courts referring the dispute to arbitration and directing LSK not to intermeddle with employment status of the Secretary pending hearing and determination of the suit were and are still being disobeyed.
73. On the resolution to remove Council members, Mr Ochiel submitted that it was not part of the agenda and the said agenda item was in violation of the pending case of Judicial Review Application No E005 of 2021 *Lempaa Suyinka & 5 others v Nelson Havi & others* which stayed the removal of Council members.
74. While submitting on violation of the rules of natural justice, Counsel stated that everyone is entitled to fair administrative decision. Support was found in *Chama cha Mawakili v AG & Supreme Court in Albert Chaurembo Mumba & 7 others* where the court observed that fair hearing is important and must be upheld and that a decision without fair hearing is not a decision.
75. On illegality, Counsel stated that *Joy Brenda Mande v LSK* remains relevant. He submitted that the 21 days' notice requirement under regulation 84(1) of the LSK regulations was violated and that no notice for removal of the Council members was issued.
76. Counsel further stated that the agenda in the June SGM ballooned from 4 items to 12 items and no basis for such was demonstrated. He also took issue on quorum stating that the signatures were not recorded and as such could not be ascertained.



77. Counsel urged this court to allow the petition.
78. As the 1<sup>st</sup> to 8<sup>th</sup> interested parties also supported the petition, I will consider their case as well.

**The 1<sup>st</sup> to 8<sup>th</sup> Interested Parties' Case:**

79. Mr Aluso Ingati who described himself as an elected member of the Council of the LSK swore an affidavit on 22<sup>nd</sup> July, 2021 in support of the petition. The affidavit was on his own and on behalf of 1<sup>st</sup> to the 8<sup>th</sup> interested parties.
80. It was his disposition that the petition is meritorious and deserving of the orders sought for since section 12 of the LSK Act entitled the petitioners to participate in the Society's affairs, decisions and elections.
81. With respect to the June SGM, he deposed that it illegally expanded the scope of the agenda thus including suspension of 1<sup>st</sup> to 8<sup>th</sup> interested parties from office. He deposed that the resolution to introduce 7 additional agenda items in the meeting was not in the requisition of the June SGM and accordingly, the agenda to remove Council members and to introduce a Caretaker Council was not in the agenda.
82. He further deposed that the manner in which the June SGM was convened violated regulation 36 of the LSK Regulations that call for 28 days' notice before the date set for the meeting. He also stated that the meeting failed to achieve the desired quorum in violation of section 36 of the LSK Regulations.
83. The manner in which the 1<sup>st</sup> respondent changed bank signatories was also challenged. It was posited that resolution 12 was as a result of the impugned agenda items and that the appointment of the 5<sup>th</sup> to 9<sup>th</sup> respondents could not hold.
84. As regards appointment of the Acting CEO/Secretary, Mr Ingati submitted that at no point did a vacancy arise in the said position. He stated that the alleged Acting Secretary did not possess a valid Practicing Certificate and faced disciplinary proceedings.
85. On the removal of some of the Council members, he deposed that the same was in violation of their right to fair trial and hearing and their right to fair administrative action.
86. He urged that the court allows the petition as prayed.
87. Mr Kiprono, Counsel appeared on behalf of the 1<sup>st</sup> and 8<sup>th</sup> Interested Parties.
88. Counsel submitted that the petition raised constitutional issues and was merited. To that end, he referred the court to Mutunga Rules and submitted that paragraph 13 to 18 of the petition was clear on the threshold required of constitutional petitions.
89. On whether the petition was merited, he stated that the June SGM violated article 36 of the Constitution that entitled people to participate in matters that affect them. It was his submission that according to section 31 of the LSK Act and regulation 75 of the LSK Regulations, the requisition of the June SGM fell below the required legal bar.
90. In their written submissions, the 1<sup>st</sup> to 8<sup>th</sup> interested parties mainly reiterated the contents of their replying affidavit.
91. Counsel submitted that the additional agenda items were irregular and that the mutation of the meeting from physical to a virtual one was contrary to section 31 of the LSK Act and regulation 75 of the LSK Regulations.



92. He also submitted that the removal of some Council Members was in violation of section 17 of LSK Act since the affected members were not given an opportunity to be heard.
93. On the election of the Caretaker Council, Mr Kiprono submitted that their participation in affairs of LSK violated section 19 of the LSK Act.

**The 9<sup>th</sup> to 16 Interested Parties' Case:**

94. The 9<sup>th</sup> to 16<sup>th</sup> interested parties relied on the replying affidavit sworn on 3<sup>rd</sup> August, 2021 by one Mathew Nyabena who was the then Chairperson of the Branch Chairs Caucus. They also relied on their written submissions dated 15<sup>th</sup> November, 2021.
95. Mr Theuri, counsel appeared for the 9<sup>th</sup> to 16<sup>th</sup> interested parties. He supported the petition and thus associated himself with the submissions of the petitioners, the 1<sup>st</sup> - 8<sup>th</sup> interested parties as well as those of the 3<sup>rd</sup> respondent.
96. He reiterated the issues of quorum, requisition of the June SGM and employment status of the 3<sup>rd</sup> respondent. He submitted that there was a pattern of mischief and deliberate refusal to comply with the laws and regulations governing the running of LSK.
97. It was his submission that the pattern of disobedience of court orders had led to a situation where there is a parallel Caretaker Council yet regulation 20 of the LSK Regulations envisages only one Council.
98. He submitted that the possibility of a breakdown in the Society is a continuing threat and can crystallize at any time. That the Council members are in violation of their fiduciary duty owed to members of LSK and as provided for under regulations 20(5) of the LSK Regulations.
99. Counsel urged that it is only proper that this court invalidates the resolutions of the June SGM and all the proceedings undertaken by that Council.
100. Mr. Theuri submitted that given the deliberate culture that has plagued the entire term of the Council, he asked the court to make an order of structural interdicts to enable monitoring the actions of the Council.
101. Finally, counsel urged the court to consider the pattern of disobedience and mischief and come up with a decision that will not only set aside the illegalities but also set the steps that must be undertaken to steer the Society forward.

**The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> to 12<sup>th</sup> Respondents' Case:**

102. The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> to 12<sup>th</sup> respondents opposed the Petition through the replying affidavit of Caroline Kamende Daudi, the Vice President of the LSK, sworn to on 18th July, 2021.
103. She deposed that the petition was an abuse of court process on account of being *sub-judice* and *res-judicata* Constitutional Petition No E260 of 2021, *Akusala A Boniface & Collins Odundo v The Law Society of Kenya & others*.
104. She further deposed that the 1<sup>st</sup> petitioner is guilty of material non-disclosure in seeking *ex-parte* orders in this court having failed to get such orders in the said Petition No E260 of 2021.
105. It was further her case that this court had no jurisdiction to entertain the petition.



106. She deposed that the 2<sup>nd</sup> petitioner is an employee of the Bernhard Ng'etich, the 8<sup>th</sup> interested party who until his removal had constituted himself as the President of the LSK and ran a parallel outfit with the 3<sup>rd</sup> respondent and the 1<sup>st</sup> to 7<sup>th</sup> interested parties to sabotage the 1<sup>st</sup> respondent and herself.
107. In a bid to lend credence to the claim that the petitioners were proxies and were abusing the court process, she deposed that the petition was instituted after their removal from office in the June SGM.
108. She deposed that the complaints in respect to the requisitioning and holding of the June SGM are *res-judicata* in view of the fact that the issues were to be deliberated upon in the general meeting of 5<sup>th</sup> December, 2020 where details of bank accounts were to be discussed, whether Safaricom Limited should release to the Council all M-Pesa statements relating LSK, whether the forensic audit should be conducted, whether notice of recruitment of Secretary should be issued and recruitment completed within 45 days; whether any communication from and on behalf of LSK should be effected by the Secretary or a Council member without express authority of the President of the LSK and whether the Secretary or a Council Member should call for and hold meetings of the Council without consultation with and approval of the President.
109. She further deposed that the 1<sup>st</sup> respondent, Council member Herine Kabita and herself attended the June SGM in which 14 resolutions were made by the LSK members who numbered over 700, way over 5%. She stated that the agenda of the meeting was in the hands of the members.
110. The Vice-President deposed that the petitioner in Petition No E260 of 2021 attended the June SGM, contributed to the deliberations thereat at the initial stage but left upon being outvoted on several questions.
111. It was her case that the June SGM was held in strict compliance of Part VIII of the LSK Regulations in terms of quorum, agenda, amendments thereof, voting on each and every resolution made. She deposed that if there was any irregularity, the same was covered under regulation 83(4) of the LSK Regulations.
112. She stated that the dispute as raised by the petition did not constitute a constitutional dispute but an internal management concern between the members and the 4<sup>th</sup> respondent which dispute is possible to be settled on the basis of the LSK Regulations.
113. In rebutting impropriety on the operations of the LSK Bank accounts, she deposed that the LSK operated accounts with four Banks and that the details of the transactions will be ascertained through the forensic audit.
114. She deposed that the justification for change in bank signatories was informed inter-alia by the idea that former three Council members that left the office five years ago still operated an account of LSK, a manifestation which she claimed was lack financial probity.
115. It was her case that there is an unexplained debit entry of Kshs 6,050,000.00/- at SBM Bank which require explanation through forensic audit. She stated that the 19<sup>th</sup> Interested Party was instructed to release the Bank statements of all accounts held with it by the 4<sup>th</sup> respondent and effect change of the signatories.
116. It was her case that there is an entrenched relation between the 3<sup>rd</sup> respondent and officers of all Banks where LSK's accounts are domiciled.
117. With respect to the removal of the 3<sup>rd</sup> respondent from the office, she deposed that she was sent on compulsory leave and the recruitment of the Secretary commenced on when a notice was published on the Daily Nation Newspaper of 30<sup>th</sup> June, 2021.



118. Flowing from the above, she deposed that the recruitment process did not contravene any law or amount to disobedience of court orders in ELRC 090 of 2020, *Mercy Andayi Havi & Council of The Law Society of Kenya*. It was her case that the 3<sup>rd</sup> respondent's contract was terminated on 19<sup>th</sup> October, 2020.
119. She stated that the contract of service of the 3<sup>rd</sup> respondent would have come to an end on 27<sup>th</sup> February, 2022 which in any event necessitated fresh recruitment irrespective of the outcome in the ELRC 090 of 2020, *Mercy Andayi Havi & Council of The Law Society of Kenya*.
120. In reprimanding the conduct of the 3<sup>rd</sup> respondent in countermanding the instructions the 4<sup>th</sup> respondent gave to Institute of Certified Public Accountants of Kenya (ICPAK) to conduct forensic audit, she deposed that it was not permissible for the petitioners to pursue any claim on behalf of the 3<sup>rd</sup> respondent arising out of the June SGM.
121. She further stated that it is not permissible for the petitioners to pursue any claim on behalf of the 1<sup>st</sup> to 8<sup>th</sup> interested parties for removal as Council members arising out of the June SGM because it is the 1<sup>st</sup> to 8<sup>th</sup> interested parties that ought to front such claims and not through proxies.
122. She deposed that this court should not permit the 3<sup>rd</sup> respondent and the 1<sup>st</sup> to 8<sup>th</sup> interested parties to use the court process as a means to resist forensic audit sought against them.
123. She stated that the 3<sup>rd</sup> respondent has been acting unlawfully in cohorts with the 1<sup>st</sup> to 8<sup>th</sup> interested parties purporting to suspend the 1<sup>st</sup> respondent as the President of the LSK.
124. She deposed that the 3<sup>rd</sup> respondent and the 1<sup>st</sup> to 8<sup>th</sup> interested parties have no power to countermand the implementation of the resolutions of LSK members made at the June SGM as they did with the 17<sup>th</sup> to 21<sup>st</sup> interested parties and ICPAK. It was her case that they did not have such powers even before being sent on compulsory leave.
125. Seeking to buttress the relevance of the President in the LSK Council, she referred the court to Machakos High Court Judicial Review No 3 of 2021, *Republic v Parliamentary Service Commission & others ex-parte Alphonse Kilonzo* where it was observed that the President of the LSK is its official spokesperson and there can be no meeting or decision of the Council without the President and the Vice-President and no Council member can countermand instructions given by the President.
126. From the foregone, she deposed that the instant petition is one which this court's jurisdiction is ousted by regulations 95 and 96 of the LSK Regulations. She posited that the process provided therein has not been invoked by the petitioners.
127. It was her further case that the petition has been fully determined in Nairobi JR No E1146 of 2020 and also that it had been determined in Petition No E260 of 2021 and in Nairobi ELRC Petition No E090 of 2020.
128. Without prejudice to the foregoing challenge on this court's jurisdiction, she deposed that the entire claim in the petition ought to have been raised in Petition No E260 of 2021, *Akusala Boniface & Collins Odhiambo v Law Society of Kenya & others*.
129. She also deposed that the claims against the President regarding exercise of powers were *ultra-vires*; that the claim of unfair administrative action and allegation of violation of the right to fair hearing as pleaded in paragraphs 40,41, 42,43, 45 and 46 in the petition are scandalous, oppressive and irrelevant. She urged the court to strike them out and reprimand the petitioner's supporting affidavit for professional misconduct.



130. She prayed that the petition and the application be dismissed with costs.
131. The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> to 12<sup>th</sup> respondents filed written submissions dated 12<sup>th</sup> November, 2021.
132. On whether the petition raised constitutional issues, it was submitted that the petitioners did not particularize how the conduct complained of in respect to the June SGM that amounted to the denial, violation and infringement of rights and fundamental freedoms due to them under articles 25(c) of Constitution of Kenya. To that end, reference was made to *James Lusweti Mukwe v Independent Electoral and Boundaries Commission & 2others* [2019] eKLR where it was observed that: -
- Even if we assume therefore that the reference to article 25 means article 25(c) which is the right to fair trial, the petitioner has not shown how the Court of Appeal ignored any of the ingredients of a fair trial as provided for under article 50(2) of the Constitution and how in any case, his case fits within the definition of article 50(2).
133. It was their case that the violation of the right to dignity and association and fair administrative action under article 28, 36 and 47 of the Constitution respectively is without evidence. They submitted that the petitioners have not demonstrated to the court that they sought access to the June SGM and were denied entry to warrant a declaration under article 36 of the Constitution.
134. On the foregoing, they submitted that the petition falls short the threshold set in *Anarita Karimi Njeru v Republic* [1979] eKLR.
135. While seeking to buttress the fact that the petition is a proxy petition and that the petitioners do not have personal interest in the matter, reference was made to paragraphs 48, 49, 53 and 55 of the petition where the petitioners stated that it is the rights of the 1<sup>st</sup> to 8<sup>th</sup> petitioners.
136. It was submitted that the petitioners have also failed to demonstrate inability by the 1<sup>st</sup> to 8<sup>th</sup> interested parties to bring their own petition so as to warrant *locus* to institute proceedings under article 258 of the Constitution. This court was asked to adopt the finding in *Daniel Muthama Muoki v Ministry of Health & another; Shenzhen Mindray Bio-Medical Electronics Co Ltd & 5 others (Interested Parties)* [2020] eKLR to stop the petitioners mischief by dismissing the petition. In the said case it was observed as follows: -
59. A party in a petition, I find should not ground an action on alleged grievances that do not relate to him at all but rather to some disclosed third party. The issue of great concern is whether the petitioner in such circumstances is clothed with any *locus standi* to make complaints on behalf of the County governments. If not, then this remains a clear case of proxy litigation and or abuse of the court's process.
137. It was submitted that the claim of violation the right to access justice under article 48 of the Constitution was recklessly pleaded not to demonstrate infringement of the Petitioners' rights but in furtherance of a private agenda to unprocedurally remove the 1<sup>st</sup> respondent from office.
138. In asserting propriety of the June SGM it was submitted that none of the allegations made in the manner of requisitioning and holding of the June SGM are sustainable to impeach the requisitioning and the holding of the said meeting.



139. It was their case that the petitioners ought to have challenged the resolutions at the June SGM. Support was found in regulation 83(4) of LSK Regulations which deems a general meeting regular if it not objected to at the meeting.
140. It was further submitted that it was far late in the day for the petitioners to seek to rescind the resolutions of the June SGM. Further reference was made to section 36 of the LSK Act that provides as follows: -
- A resolution of the Society in a general meeting shall not be altered or rescinded within nine months after the passage of the resolution without a special resolution of the Society.
141. It was also submitted that the petition was filed solely to overturn the will of the members of the Society. It was urged that it be struck out with costs on the basis that it had failed to demonstrate constitutional violations, was a proxy Petition and as such an abuse of court process.
142. Mr Nelson Havi appeared on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> to 12<sup>th</sup> respondents in highlighting the submissions.
143. Counsel outrightly submitted that the petition ought to be dismissed with costs. It was his strong submission that the petition is not a constitutional petition but a challenge on the contravention of LSK Act and Regulations.
144. Further, he submitted that the allegation of constitutional violations is not merited and that it should be dismissed since the petition is a proxy petition filed on instructions and on behalf of 3<sup>rd</sup> respondent in conjunction with the 1<sup>st</sup> to the 16<sup>th</sup> interested parties.
145. On the basis of *Anarita Karimi Njeru* case (*supra*), Counsel submitted that not every violation of the law amounts to a constitutional violation.
146. Seeking to demonstrate the failure to demonstrate constitutional violations, counsel submitted that prayer one seeks to declare the June SGM illegal and not unconstitutional.
147. On the second prayer regarding contravention of the right to fair trial counsel submitted that there was no trial at the June SGM. On the right to dignity under article 28 of the Constitution, counsel stated that nothing shows to what extend it was violated and that no facts were even availed.
148. On the right in article 47 of the Constitution and the Fair Administrative Action Act, Counsel submitted that such a right may crystalize in a properly pleaded scenario, but that was not the case in this matter.
149. On the prayer seeking the removal of the President, he submitted that it is not a function of court to remove the President of LSK, rather it is the function of members of LSK.
150. On the propriety of the June SGM, counsel submitted that it is the responsibility of the Secretary under section 31 of LSK Act to convene a general meeting, but if the Secretary fails to do so, the members themselves can set a date. Counsel referred the court to the ruling of Nyamweya J of 26<sup>th</sup> June 2021 where the quest to challenge a requisition made by members was dismissed.
151. On the quorum at the June SGM, it was submitted that there were over 600 members present but the Secretary was absent and as such the meeting had to go on.
152. On the amendment of the agenda on the floor of the meeting, counsel submitted that regulation 81(8) of the LSK Regulations so permits. He pointed out that it was in fact Mr Akusala who moved the



- agenda item for the removal of Council members and as such, the Petition remains an abuse of court process.
153. Counsel also submitted that according to regulation 75(6) of the LSK Regulations, the accidental omission to give notice to a member or non-receipt of such a notice shall not invalidate the proceedings or negate the resolutions of such a meeting.
  154. Regarding the challenge on the Caretaker Committee, counsel stated that it cannot be impugned since it wasn't raised at the floor of the meeting.
  155. While urging to have the petition dismissed for being a proxy petition Counsel relied on the decision on *Muthama Mwiki v Ministry of Health, the one in Okiya Omtatah v Attorney General* and in the *Truth and Justice and reconciliation Commission v The Chief Justice* where court remarked on a proxy Petition.
  156. Counsel prayed that the petition be dismissed with costs and that exemplary damages be made against the proxy petitioners.

### **Petition No E379 of 2021:**

#### **The Petitioner's Case:**

157. The petitioner herein, Brian Kinyua Machina, approached this court with the Petition dated 22<sup>nd</sup> September, 2021 together with an application by way of a notice of motion of even date. The application was filed under certificate of urgency. Both the Petition and the application were supported by the petitioner's affidavit deponed to on the even date.
158. In the application, the petitioner sought conservatory orders staying and suspending the LSK's Special General Meeting scheduled for the 24<sup>th</sup> September, 2021 pending hearing and determination of the application and the main petition. I will hereinafter refer to the said Special General Meeting to as 'the September SGM'.
159. The petitioner further sought that the case be exempted from Alternative Dispute Mechanism, a requirement under regulations 95 and 96 of the LSK Regulations.
160. On 23<sup>rd</sup> September, 2021 this court considered the application and suspended the September SGM.
161. The petition and the application share a common factual background. The petitioner contended that on 25<sup>th</sup> August, 2021 Juliet Jakailla, the 6<sup>th</sup> respondent herein, while purporting to be an Acting Chief Executive Officer of the LSK issued a notice for the September SGM. The communication was selectively sent to some members of the Society.
162. It was the petitioner's case that the no notice had been issued by the Secretary of the Secretary one Mercy Kalondu Wambua and as such, the 6<sup>th</sup> respondent was an imposter who was neither an employee of LSK nor the Secretary of LSK.
163. The petitioner was further aggrieved that on 27<sup>th</sup> August, 2021, that is two days after the first communication, a further communication was issued by Mercy Kalondu Wambua on behalf of the Council of the LSK. The subsequent communication informed the members of the Society that the September SGM was not going to be convened and that the 1<sup>st</sup> interested party intended to requisition for a Special General Meeting on a later date.



164. Further to the foregoing, the communication by Mercy Kalondu Wambua gave a list of people who had applied for appointment to the Elections Board for elections of the President, Vice President and Council members for the period 2022-2024.
165. The petitioner posited further that on 10<sup>th</sup> September, 2021 Juliet Jakailla subsequently communicated to members stating that the September SGM would proceed. It further gave a conflicting list of names of persons who had allegedly applied for appointment to the Elections Board for elections of President, Vice President and Council members for the period 2022-2024.
166. It is the foregoing divergent communication and conflict in leadership at the LSK that the petitioner sought the intervention of this court.
167. It is his case that since the notice of the September SGM was sent to only a select few members of the Society, it discriminated against the other members. The petitioner posited that the September SGM would, therefore, be convened illegally and as such any resultant resolutions passed would be illegal.
168. It was further posited that the notice for the September SGM was in contravention of sections 26(3) and 31 (1) (d) of the LSK Act as read together with regulation 75(1) of the LSK Regulations which require the Secretary to give members a 30 days' notice of a general meeting before the date set for the meeting, setting out the date, time and venue of the meeting.
169. The petitioner faulted the participation of Dr Maxwell Miyawa and Jamlick Muriithi (the 4<sup>th</sup> and 5<sup>th</sup> respondents respectively) in running the affairs of LSK, the petitioner stated that they were irregularly in office since regulation 23 of the LSK Regulations required that in the event of a vacancy in the Council, the Secretary would declare a vacancy and an election be held within 90 days from the date of such declaration.
170. On the foregoing, the petitioner averred that articles 2(1), 3(1), 19, 20, 22(1), 27, 36(1) of the Constitution on the supremacy of the Constitution, the right to respect uphold and defend the Constitution, recognition of the Bill of Rights as an integral part for realization of socio-economic and cultural policies, application of the Bill of Rights, entitlement of every person to institute proceedings to protect their fundamental rights and freedoms, equality before the law and the right to freedom of association respectively, had been contravened by the manner in which the September SGM was convened.
171. Resulting therefrom, the petitioner prayed for the following orders: -
- a. A declaration that the Special General Meeting scheduled for 24<sup>th</sup> September 2021 was called illegally and the same cannot proceed since it is in violation of article 27 and 36 of the Constitution together with section 26(3) and 31(1)(d) of the *Law Society of Kenya Act*.
  - b. An order of *certiorari* to remove into this honourable court for the purpose of being quashed the communication sent to some members from an unknown email address [lsk@lawsocietyofkenya.org](mailto:lsk@lawsocietyofkenya.org) signed off by the 6<sup>th</sup> respondent, purporting to be the Acting Secretary/Chief Executive Officer of the Law Society of Kenya calling for a Special General Meeting scheduled to take place on 24<sup>th</sup> September 2021.
  - c. An order of prohibition restraining the 6<sup>th</sup> respondent from representing herself as the Acting Secretary/Chief Executive Officer of the Law Society



of Kenya and also restraining her from undertaking any duty as the Acting Secretary/Chief Executive Officer of the Law Society of Kenya.

- d. An order of prohibition restraining the 3rd and 6th respondent or anyone howsoever acting under their directions and control from convening a Special General Meeting of the 2nd respondent other than through the laid down procedures in the LSK Act and Regulations.
  - e. The costs of this petition be borne by the 3rd and 6th respondents personally.
  - f. Any other relief as may be expedient.
172. The petitioner filed written submissions dated 5<sup>th</sup> October, 2021. He largely reiterated the averments in the Petition.
173. He submitted that the Petition was compliant with the principle of reasonable precision as established by the case of *Anarita Karimi Njeru v Republic No 1* (1979) I KLR, 54 and *Mumo Matemu v Trusted Society of Human Rights Alliance Civil App 290/2012* (2013) eKLR.
174. It was his case that the 6<sup>th</sup> respondent's call for the September SGM violated his right to non-discrimination and equality guaranteed under article 27 and the right to association under article 36 of the Constitution.
175. With respect to the invitation to bypass the ADR mechanisms under regulations 95 and 95 of LSK Regulations, the petitioner submitted that the constitutional questions raised could only be determined by this court and not an Arbitrator. Reliance was placed on the decision in *Akusala Borniface & another v Law Society of Kenya & 12 others; Law Society of Kenya Nairobi Branch (Interested Party)* [2021] eKLR.
176. To fortify the claim that not all members of LSK received the impugned communication convening the September SGM, the petitioner submitted that the 6<sup>th</sup> respondent was disowned by the other faction of the LSK and members were warned against placing reliance on her communications.
177. The petitioner contended that communications from the LSK have always been made through the official email address which is lsk@lsk.or.ke and that the email address lsk@lawsocietyofkenya.org was not only unknown to members, but was also used selectively used to reach some members thus discriminating against other members of the Society.
178. To buttress the incidence of discrimination, the petitioner referred the court to *Council of Governors v Salaries & Remuneration Commission* [2018] eKLR and *Peter K Waweru v Republic* [2006] eKLR.
179. It was submitted further that as a result of being discriminated against, the petitioner's right to access to information and freedom of association was infringed upon in violation of article 35 of the Constitution. Support on the right to association was sought from *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* [2014] eKLR.
180. In the end, the petitioner submitted that LSK, a statutory institution should not be run casually as has been by the President, the 3<sup>rd</sup> respondent herein. He urged the petition to be allowed.

### **The 1<sup>st</sup> Respondent's Case:**

181. The 1<sup>st</sup> respondent, Mercy Kalondu Wambua, supported the Petition through her replying affidavit deposed to on 29<sup>th</sup> October, 2021.



182. She deposed that as the Chief Executive Officer and Secretary of the Society, she is accountable to the Council in the management of LSK's affairs as directed and determined by the Council pursuant to section 16 of the Council's Charter 2020.
183. It was her case that on the 14<sup>th</sup> September, 2020 the President of LSK, the 3<sup>rd</sup> respondent herein, issued her a Notice of intention to be removed from office on account of gross misconduct.
184. She deposed that the Council deliberated upon her removal and by a letter dated the 19<sup>th</sup> October, 2020 she was notified that by a vote 9 to 3 members with one abstention, the Council found that the accusations levelled against her did not amount to gross incompetence or gross misconduct to warrant removal from office.
185. It was her deposition that despite the finding by the Council, the 3<sup>rd</sup> respondent purported to terminate her employment by a letter dated 19<sup>th</sup> October, 2020.
186. It was her case that she resumed duties but faced a lot of disruption from the 3<sup>rd</sup> respondent including being physically denied access to her office.
187. She deposed that she subsequently moved to the Employment and Labour Relations Court in ELRC Cause No E090 of 2020 *Mercy Wambua v Nelson Havi & the Council of Law Society of Kenya* where she obtained temporary conservatory orders that restrained the respondents from; purporting to enforce the 3<sup>rd</sup> respondent's Notice of Termination of Employment; Interfering with her position as the Chief Executive Officer of the Society in the management of the Society, publishing information regarding her employment status and also from making disparaging remarks on her employment.
188. She deposed that the Employment Court further restrained the 3<sup>rd</sup> respondent from enforcing or implementing the substance of the 3<sup>rd</sup> respondent's letter dated the 23<sup>rd</sup> November, 2020 that purported to convene a Special General Meeting for the 5<sup>th</sup> December, 2020 to debate or vote on her appointment or tenure as the Society's Chief Executive Officer.
189. It was her case that according to section 16(3) of the LSK Act she is the custodian of all proceedings, resolutions and records of the Society.
190. She also deposed that pursuant to section 31(1) of LSK Act and regulation 75 of the LSK Regulations the responsibility to issue notices convening any general meeting by the Council of the Society was vested in her.
191. From the foregoing, the 1<sup>st</sup> respondent deposed that the Council for the LSK did not convene the September SGM and that there was no Council resolution directing her as the CEO and Secretary to the Council to issue a notice convening the impugned September SGM.
192. As regards the appointment of the 6<sup>th</sup> respondent herein, Juliette Jakailla, by the 3<sup>rd</sup> respondent, she deposed that the same was done despite an order in ELRC No E090 of 2021 (*supra*) staying any recruitment for her position.
193. On the basis of the foregoing, she deposed that the notice purportedly issued by the 6<sup>th</sup> respondent as Acting CEO convening for September SGM was illegal and unprocedural and ought to be quashed in order to restore order in the operations of the Society.

#### **The 1<sup>st</sup> Interested Party's Case:**

194. The 1<sup>st</sup> interested party, The Council of the Law Society of Kenya, supported the petition.



195. It relied on a Replying Affidavit sworn by one Kipkoech Bernhard Ng'etich, deposed to on 29<sup>th</sup> October, 2021 who described himself as one of the up-country representatives of the LSK and the Treasurer of the Society.
196. He deposed that upon notice of termination of the 1<sup>st</sup> respondent's tenure, the Council deliberated on the issue and subjected the decision to a vote. It was his case that by a vote of 9 to 3 members in favour of the 1<sup>st</sup> respondent, the Council made the finding that the conduct the 1<sup>st</sup> respondent did not amount to gross misconduct and as such the 1<sup>st</sup> respondent was directed to resume her duties.
197. He deposed that despite the resolution to retain the 1<sup>st</sup> respondent, the 3<sup>rd</sup> respondent made her working condition extremely difficult.
198. In respect of ELRC No E090 of 2021 (*supra*) filed by the 1<sup>st</sup> respondent, he deposed that the orders issued in that case were still in force.
199. He deposed that on 18<sup>th</sup> January, 2021 pursuant to Section 31 of the LSK Act, the Council held a Special General Meeting where a resolution to suspend the Council members who were against the removal of the 1<sup>st</sup> respondent was made. I will hereinafter refer to that general meeting as 'the January SGM'.
200. It was deposed that Nairobi High Court Constitutional Petition No E025 of 2021 *Adrian Kamotho v LSK & 12 others* was filed and orders of stay of the Implementation of the resolution passed at the January SGM were granted. Those dissatisfied with the order appealed against it and the matter is pending before the Court of Appeal.
201. It was his case that the ever since the January SGM, the Society's President and the Vice-President together with Herine Kabita and Esther Ang'awa declined to attend Council meetings or to work with the rest of the 8 Council members in execution of the Council's mandate.
202. He further deposed that on 23<sup>rd</sup> November, 2020 the 3<sup>rd</sup> respondent issued notices requisitioning for a special general meeting for 5<sup>th</sup> December, 2020. The Notice was undated and contravened section 31 of the LSK Act that required the requisition to be submitted to the Secretary and for performing a function reserved for the Council. I will hereinafter refer to that general meeting as 'the December SGM'.
203. The 1<sup>st</sup> interested party posited that following the illegal requisitioning of the December SGM Nairobi High Court Judicial Review No El146 of 2020 *R v Nelson Andayi Havi & others ex parte Gad Aguko*, was filed. The court suspended the December SGM and later struck out the Petition. The matter was referred to arbitration and that since then the process of appointment of an arbitrator has not been commenced.
204. Responding to the June SGM, the 1<sup>st</sup> interested party posited that the same was requisitioned despite the order issued in Judicial Review No El146 of 2020 *R v Nelson Andayi Havi & others ex parte Gad Aguko* case where the matter was referred to arbitration.
205. It was further deposed that the Notice was only addressed to the members of the Society to the exclusion of the Secretary and the 8 Council members. Further, agenda items 3 and 4 were *sub-judice* ELRC Petition No 087 of 2020 and ELRC Petition No. E090 2020 where the court had issued appropriate restraining orders.
206. He also deposed that the Notice purporting to requisition the June SGM was in violation of section 31 of the LSK Act.



207. He subsequently deposed that the June SGM was in violation of section 16(5) of the LSK Act that required a quorum of general meeting to be at least 5 percent of all members. According to him, only 27 persons entered the LSK premises which number is far below the required 924 in view of the fact that the LSK's membership is 18,469.
208. It was deposed that on realizing that the June SGM lacked quorum, a virtual link to host other members online was created yet the notice for the meeting did not indicate the said meeting would be a hybrid one, that is both physical and virtual.
209. The 1<sup>st</sup> interested party impugned the communication by the 3<sup>rd</sup> respondent purportedly informing members of the Society that the June SGM took place as scheduled and passed 12 resolutions.
210. He deposed that there was no evidence of the fact that 660 members of the Society participated in the meeting as stated in the minutes and in any event the said members did not still meet the quorum.
211. He stated further that the June SGM purported to appoint Mr Majimbo Georgiadis as the Secretary contrary to the orders made by the Hon Judge Nzioki wa Makau in ELRC E090 of 2021. He deposed further that the June SGM resolved to recruit a Secretary within 14 days of the SGM in view of the compulsory leave the incumbent had been subjected to.
212. Given the illegal nature of the alleged resolutions from the June SGM, the Council issued a communique to its members notifying them that the June SGM was illegal and that the resolutions passed therein were null and void.
213. The 1<sup>st</sup> interested party deposed that the purported recruitment of the 6<sup>th</sup> respondent by the Caretaker Council, an entity unknown in law, remain without any legality and as such the notice issued on the 26<sup>th</sup> August, 2021 by the 6<sup>th</sup> respondent for the SGM were invalid. The 6<sup>th</sup> respondent remain a stranger to the Society.

#### **The 2<sup>nd</sup> Interested Party's Case:**

214. The 2<sup>nd</sup> interested party also supported the petition.
215. Mr Theuri, counsel appeared for the 2<sup>nd</sup> interested party. Counsel associated himself with the submissions of those who were also in support of the Petition. Counsel submitted that the issue of the Secretary of the LSK was such a serious matter and ought not to be taken lightly.
216. Responding to the concurrent sources of power in the Society, Counsel submitted that the Caretaker Committee was not legitimate and none of its decisions can be purported to bind the Society.
217. Counsel urged the court to intervene and regularise the unhealthy situation at the Society.

#### **The 3<sup>rd</sup> Respondent's Case:**

218. The 3<sup>rd</sup> respondent herein, Nelson Andayi Havi, is the President of the LSK, the 2<sup>nd</sup> respondent herein. He opposed the petition and the application. To that end, he filed a replying affidavit he deposed to on 29<sup>th</sup> September, 2021 on his own behalf and that of the 5<sup>th</sup> and 6<sup>th</sup> respondents herein, Jamlick Muriithi and Juliette Jakailla, respectively.
219. The President deposed that the petition did not plead or particularize the rights or fundamental freedoms under the Bill of Rights alleged to have been threatened, denied or violated by the him, the 5<sup>th</sup> or the 6<sup>th</sup> respondents.



220. The President further identified that issues in the Petition as; who is the Spokesperson of the LSK; who constitutes the Council for the LSK, who calls for, chairs and signs decisions of the Council of LSK; whether the 1<sup>st</sup> respondent can countermand communication by the President or communication made on authority of the President; whether the 6<sup>th</sup> respondent is an employee and Director Compliance and Ethics/ Deputy Secretary and CEO of LSK; whether the 6<sup>th</sup> respondent is the Acting Secretary/ CEO of LSK; whether there is a decision of the Council calling for a General Meeting of the LSK for purposes of appointing and approving six members to serve in the Elections Board for elections of LSK leaders for period 2022-2024 and whether the September SGM violated articles 27 and 36 of the Constitution as read with section 26(3) and 31(1)(d) of the LSK Act.
221. Before delving into the foregoing issues, the 3<sup>rd</sup> respondent deposed that the petition was a proxy petition instituted by the petitioner on behalf of the 1<sup>st</sup> respondent, Bernhard Ng'etich, George Omwansa, Carolyne Mutheu, Aluso Ingati, Faith Odhiambo, Beth Michoma, Ndinda Kinyili and Riziki Emukhule.
222. It was his case that after the June SGM, the said proxies filed Nairobi High Court Petition No E260 of 2021, *Akusala Boniface & Collins Odundo v LSK & others* seeking to declare him unsuitable to hold office of the President of LSK or any other public office.
223. In what he terms as forum shopping, the 3<sup>rd</sup> respondent deposed further that the resolutions made by at the June SGM were unsuccessfully challenged by the proxies in Nakuru High Court Petition No E017 of 2021, *Collins Odhiambo Odundo & John Ochola Odhiambo Ouma v Nelson Havi & others*.
224. It was his case that Bernhard Ng'etich, George Omwansa, Carolyne Mutheu, Aluso Ingati, Faith Odhiambo, Beth Michoma, Ndinda Kinyili and Riziki Emukhule purported to write to members of LSK on 7<sup>th</sup> September, 2021 falsely urging them to ignore communications from the 6<sup>th</sup> respondent on the basis that the 6<sup>th</sup> respondent was not an employee of LSK.
225. On the strength of the foregoing depositions, the 3<sup>rd</sup> respondent deposed that it was evident that the petition was filed by the petitioner as a proxy, which is abuse of court process.
226. On the main issues he identified, the 3<sup>rd</sup> respondent referred to the Council Charter and deposed that all communications of the Society ought to be made by him or the Vice President in the event he is incapacitated and or by the CEO with his prior authority or that of the Vice President as the case may be.
227. It was further his case that as the President, he is the Spokesperson of LSK. To that end, he referred to Clause 12.1.9 Council Charter which provides that the President shall be the spokesperson of the LSK.
228. It was his further deposition that no Council exist in exclusion of the President. He claimed that no number of Council Members can make the Council of the LSK to the exclusion of the President. To that end, he referred to the Machakos High Court JR No 3 of 2021, *Republic v Parliamentary Service Commission & others, ex parte Alphonse Kilonzo Muli*.
229. In reference to section 31 of the LSK Act, the President deposed that General Meetings of the LSK are called for by the Council of LSK or on the requisition by members of LSK. He stated that it is the President, in his absence the Vice President, in his absence a member of the Council nominated by the Council that chairs a general meeting of the LSK in terms of section 16(6) & (7) of the LSK Act.
230. He further deposed that according to regulations 18(2) and 21 of LSK Regulations and the Charter of the Council, it is the President that calls for meetings of the Council of the LSK and as such,



- the 1<sup>st</sup> respondent has no authority to countermand any communication by the President or any communication made on the authority of the President.
231. He deposed further that the 1<sup>st</sup> respondent was removed from office and her contract terminated on 19<sup>th</sup> October, 2020 and it is then that she disabled the President's email address in collusion with ICT Officer, one Geoffrey Karani.
232. He stated that the 1<sup>st</sup> respondent contested her removal and that the matter is pending determination in ELRC Cause No E090 of 2020. Despite such pendency, he deposed that the 1<sup>st</sup> respondent constituted herself as President of LSK and purported to run parallel Council of the LSK in collusion with Bernhard Ng'etich, George Omwansa, Carolyne Mutheu, Aluso Ingati, Faith Odhiambo, Beth Michoma, Ndinda Kinyili and Riziki Emukhule.
233. The 3<sup>rd</sup> respondent also deposed that members of the LSK disapproved the conduct of the nine Council members and at the June SGM they resolved to send the 1<sup>st</sup> respondent on compulsory leave and to remove the nine as Council members.
234. Subsequent upon removal of the 1<sup>st</sup> respondent and the nine Council members, the 3<sup>rd</sup> respondent deposed that at the June SGM members of the LSK appointed Dr Maxwell Miyawa, Jane Odiya, George Kamau, Bonbegi Gesicho, Claire Mmbone, Emmanuel Kyobika, Jamlick Muriithi and Levi Munyeri as Caretaker Members of the Council of the LSK for the remainder of the term of the Council members that were elected.
235. As regards the conservatory orders issued in ELRC Cause No E090 of 2020, the 3<sup>rd</sup> respondent deposed that on 24<sup>th</sup> September, 2021 the court declined to extend the temporary orders it issued on 23<sup>rd</sup> July, 2021 on the basis that there was no material disclosure in the matter.
236. In respect to the change in the email address used to communicate to members, the 3<sup>rd</sup> respondent deposed that on 9<sup>th</sup> July, 2021, the LSK resolved to register a domain to host [lsk@lawsocietyofkenya.org](mailto:lsk@lawsocietyofkenya.org) in order to communicate with members in view of the fact that the nine ousted members had seized access to [lsk@lsk.or.ke](mailto:lsk@lsk.or.ke).
237. On the propriety of the employment status of the 6<sup>th</sup> respondent, the 3<sup>rd</sup> respondent deposed that the 6<sup>th</sup> respondent was employed on 23<sup>rd</sup> July, 2021 following summary dismissal of Florence Wairimu on 9<sup>th</sup> July, 2021. He stated that the 1<sup>st</sup> respondent lost the quest to stop the 6<sup>th</sup> respondent from acting as Secretary and CEO in ELRC Petition No E116 of 2021, *Florence Wairimu Muturi v Nelson Andayi Havi & others*.
238. The 3<sup>rd</sup> respondent deposed that all communications to the members impugned in this petition were made by the 6<sup>th</sup> respondent in her capacity as the Acting Secretary with the authority of the Council of the LSK and him as the President.
239. The President deposed that the September SGM was only for the purpose of appointing and approving six members to serve in the Elections Board for the elections of the LSK President, Vice President and Council members for the period 2022-2024 and the consideration and approval of the Independent Electoral and Boundaries Commission as the body to conduct the elections. It was his case that the SGM did not violate the petitioner's rights under articles 27 and 36 to the Constitution as well as section 26(3) and 31(1)(d) of the LSK Act.
240. It was his case that the petition was an abuse of court process in view of the decision in Meru High Court Petition No E018 of 2021, *Jamlick Muriithi v LSK & others* and Nairobi High Court JR No E116, *Republic v Nelson Andayi Havi & others, ex-parte Gad Aguko* where it was observed that the



holding of a General Meeting of the LSK ought not be challenged in court but the outcome thereof maybe challenged.

241. In urging the court to dismiss the petition and application with costs to the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents stated that it is manifestly clear that the petition was vexatious, frivolous and abuse of court process.
242. The President further deposed that in view of regulations 95 and 96 of the LSK Regulations, this court has no jurisdiction in relation to internal affairs of the LSK.
243. The 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents filed joint written submissions dated 10<sup>th</sup> November, 2021.
244. Miss Carolyne Daudi, counsel appeared for the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents in highlighting of the submissions.
245. Counsel submitted that the petition failed to state with precision the manner in which articles 27 and 36 of the Constitution had been infringed, a requirement of constitutional Petitions established by the case *Anarita Karimi Njeru v Republic* [1979] eKLR. Further reliance was placed in *John Harun Mwau v Independent Electoral and Boundaries Commission & another* [2013] eKLR where it was stated that: -
- It must be clear that a person alleging a violation of article 27 of the Constitution must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law
246. On the foregoing, it was submitted that the petitioner had not demonstrated how the communication sent by the 6<sup>th</sup> respondent to members of the 2<sup>nd</sup> respondent on the respondents stated that there was no evidence demonstrating that the petitioner had not received the said communication.
247. It was submitted further that the petition as drafted was undeserving of any constitutional reliefs or as prayed for. The 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents stated that section 16 of the LSK Act designated the General Meeting as the supreme authority of the Society.
248. It was further their case that the petitioner's quest for exemption from alternative dispute resolution mechanism was against regulations 95 and 96 of the LSK Regulations as read with article 159 of the Constitution which prescribe negotiation, conciliation, mediation and arbitration as the forum for resolution of all disputes relating to the internal management and affairs of the Society.
249. In stating that the petitioner had not demonstrated why he should be exempted from alternative dispute resolution mechanism and in urging the court not to intermeddle with the affairs of the Society, reliance was placed on *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR where the court stated as follows: -

[105] I agree with the first respondents Counsels submissions that, any Member aggrieved by the above provision has the option of raising the issue at AGM for deliberation, consideration and voting.

[106] Decisions of a society taken by its majority cannot be thwarted at the instance of one individual. In the first place, it has to be borne in mind that it is established law that at the instance of one member courts are highly reluctant to interfere; at any rate, would not lightly interfere with the functioning of a corporate body or a society.



[115] ...Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

250. While showing the indispensable nature and importance of the President in the making of the Council of the LSK, it was submitted that section 17 of the LSK Act makes it that no number of Council Members exclusive of the President and the Vice President no matter its numerical majority can make the Council of the LSK. Support was found in *Republic v Parliamentary Service Commission & others, ex parte Alphonse Kilonzo Muli* [2021] eKLR where it was observed that: -

[50] What is however, clear is the composition of the Council of the Law Society of Kenya. The Council of the Law Society of Kenya and the General meeting are the decision – making organs of the Society and the Council is constituted of the President, Vice President and Council Members in terms of section 17(2) of the *Law Society of Kenya Act* No 21 of 2014. The section provides that the Council of the Law Society of Kenya shall constitute of the President, Vice president and eleven members of the council.

251. To buttress the significance of section 31 of the LSK Act and regulation 18(2) and 21 of the LSK Regulations on the role of the President in calling General Meetings, it was submitted that the President, in his/her absence, the Vice President, in his/her absence, a Member of the Council nominated by the Council chair General Meetings of the Law Society of Kenya in terms of section 16 (6) and (7) of the LSK Act. To that end, reliance was placed on the decision in Meru High Court Petition No E018 of 2021, *Jamlick Muriithi v Law Society of Kenya & others*.

252. It was, therefore, submitted that the actions of the 1<sup>st</sup> respondent to countermand the actions of the President by the communication to the 6<sup>th</sup> respondent purporting to challenge her employment, the Notice to members on 30<sup>th</sup> August, 2021 falsely notifying them that the 6<sup>th</sup> respondent is not an employee of the Society and urging them to ignore all communications from her and that the September SGM was not going to be convened, were made without authority.

253. The President took refuge in *Jamlick Muriithi v Law Society of Kenya & others* where the court held that: -

(71) .... It is this court's view, it is not an excuse that the leadership wrangles do not allow for compliance with the law and if at all this was the case, the conveners of the meeting ought to have approached the court to seek for indulgence and sanction of their actions, otherwise not recognized in law. It is also this courts view that the argument that the General Meeting is the supreme organ of the society and members can decide on who will preside over the meeting at the very meeting does not hold water because the requirements under section 16(6) and (7) were enacted for a reason which to this court's mind was to ensure certainty, orderliness and a standard way of conducting meetings of the Society.

254. The respondents in urging the court to disallow the petition and the application, stated that the Petitioner had not shown how he is likely to suffer if the orders sought are not granted. It was their case that they had demonstrated how the Society will be rendered dysfunctional the approval of six members to serve in the Elections Board for the elections of the Society for the President, Vice President and Council Members for the period 2022-2024.



255. In the end, the respondents urged the court to dismiss the petition with costs.

### **Petition No E260 of 2021:**

#### **The Petitioners' Case:**

256. The petitioners herein, Akusala A Borniface and Collins Odhiambo Odundo are Advocates of the High Court and Members of the Society. Their petition is dated 5<sup>th</sup> July, 2021 and is supported by the Affidavit of Akusala A Borniface deponed to on even date.
257. The petitioners contended that the members of the Society are all Advocates of the High Court of Kenya by profession. They are by law mandated to act on behalf of their clients, draw legal instruments, proffer legal opinions and advice to their clients, and apply their knowledge and skills within the law to protect the interests of their clients and assist courts as officers thereof, in view of entrenching the right to a fair trial.
258. The petitioners contend that in order to fulfil the foregoing, each Advocate is mandatorily required to procure a Practicing Certificate, whose payment is done to the 1<sup>st</sup> respondent, and the said 1<sup>st</sup> respondent undertakes processes that would lead to issuance of the said Practicing Certificate by the Registrar of the Judiciary.
259. They posited that the application process is purely automated. It commences with the applicant Advocate downloading documents of compliance from the 1<sup>st</sup> respondent's website, and filling them aptly, then uploading them. After this, the 1<sup>st</sup> respondent automatically generates an invoice, and the applicant pays online, and finally the 1<sup>st</sup> respondent produces an automatic receipt.
260. They averred that having successfully applied, Advocates are issued with Practicing Certificates and as such are ready to practice, and their identity in the Advocate's Search Engine is labelled as active. The petitioners averred that one can use such information in the search engine to prove their status as Advocates, and that they are allowed to practice.
261. The petitioners are aggrieved that the respondents have continually and erratically disabled the LSK Website making Advocates unable to apply for Practicing Certificates. The Advocates' Search Engine is consequently unavailable and Advocates cannot access their portal and hence cannot practice law.
262. The petitioners further posited that Advocates cannot process and obtain Letters of no objection from the LSK in order for them to register law firms at Sheria House. It was their case further that Advocates cannot get Certificates of Good Standing from LSK in order to apply for jobs and tenders and as such their information as to the legitimacy of a business name or standing of an Advocate cannot be verified.
263. The petitioner are further aggrieved that the 1<sup>st</sup> Respondent has failed to offer Continuous Professional Development to enable the Advocates qualify for Practicing Certificate for the following year.
264. The petitioners claimed that the Secretariat that is under the payroll of the members is not serving the members of LSK. They posited that it is unconscionable for Advocates to be denied the right to practice and earn a living, and to grow themselves professionally.
265. The petitioners further claimed that the Advocates are unable to get informed about the current happenings in the profession, through newsletters and updates as a result of disabling e-mail services in violation of their right to information under article 35 of the Constitution.



266. The petitioners stated that the foregoing state of affairs is an affront to the rule of law, constitutionality and the pursuit and defence of justice by citizens of Kenya, especially Advocates who are being legally recognized as essential service providers.
267. It is their case that the respondents have breached their right to fair administrative action and limited Advocates rights to practice law under article 24 of the Constitution without any justification.
268. On failure to facilitate the procedure necessary to comply for the issue of Practising Certificates and other documents, the petitioners claimed that the rights of the Advocates to earn a living continue to be violated in contravention of socio-economic right, consumer rights under articles 43 and 46 of the Constitution respectively.
269. The petitioners further claimed violation of the right to equal protection of the law. It is their case that newly admitted Advocates have been disenfranchised, and unequally treated compared to the older colleagues.
270. It is their case that the Advocates right to dignity under article 28 of the Constitution has been infringed by unlawfully denying them the right to practice law, and earn a living, subjecting them to a state of deprivation.
271. The petitioners posited further that the respondents conduct has resulted in denying persons who are eligible to register a chance to join LSK in violation of article 36 of the Constitution which entitles Advocates to the right of association.
272. The petitioners contended that Advocates, by the conduct of the respondents, have been denied their right to earn a living, arbitrarily, without a basis and as a consequent are suffering, and are being tortured psychologically by the respondents' acts and/or omissions.
273. By extension, the petitioners contended that the conduct of the respondents has resulted in violation of the rights of arrested persons and right to fair trial under article 49 and 50 of the Constitution respectively.
274. The petitioners enjoined the 2<sup>nd</sup> to 13<sup>th</sup> respondents for sabotaging the administrative processes that would warrant Advocates' right to practice. They posited that they have fallen short the threshold under Chapter 6 of the Constitution that outlines the guiding principles of leadership and integrity to include selfless service solely on the public interest through honesty in the execution of public duties, and accountability to the public for decisions and actions.
275. Petitioners prayed for the following orders: -
- i. A declaratory order, that the Law Society of Kenya, by dint of its membership and statutory role, is an Essential Service Provider, and as such its services should not be interrupted by all means.
  - ii. A declaratory order, that the action of the respondents to disable the portal used for Application of Practicing Certificates, and halting the issuance of Supporting Documents necessary for Practice of Law, is a violation of the petitioner's and other Legal Practitioners rights enshrined in Articles 10, 20, 21, 22, 23, 24, 25, 27, 28, 29, 35, 36, 41, 43, 46, 47, 48, 49, 50, 159, 165, 232 and 258.
  - iii. A declaratory order, that any inhibition of Advocates' right to represent their clients and disabling the Advocates' Search Engine by the respondents by the



respondents contravenes the citizens' constitutional rights, under articles 10, 22, 23, 35, 47, 48, 49, 50, 165, 232 and 258.

- iv. A declaratory order, that the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th and 13th respondents have jointly and severally acted contrary to the Constitution and as such they are unfit to hold office within the Law Society of Kenya and any public office.
- v. A mandatory injunction, compelling respondents to permanently operationalize the LSK Website and Advocates' Search Engine, and facilitate the applications by Advocates to procure documents necessary for the Practice of Law.
- vi. A mandatory injunction, compelling the respondents to implement the Continuous Professional Development of Advocates in compliance with the LSK CPD Rules, 2014.
- vii. An order of structural audit, for this honourable court to supervise compliance with its Orders.
- viii. Any other relief the court deems fit to grant.
- ix. Costs of this petition and appurtenant applications be borne by the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th and 13<sup>th</sup> respondents.

276. Mr Amanya, Counsel, held brief for Mr Akusala for the Petitioners. He adopted the submissions made in Petition No 22 of 2021.

#### **The 1<sup>st</sup> Respondent's Case:**

277. The 1<sup>st</sup> respondent supported the petition through the affidavit of Mercy Kalondu Wambua, the alleged Chief Executive Officer and Secretary to the Council of the LSK.
278. She deposed that pursuant to section 26 of the LSK Act, she is responsible to the Council for the day-to-day administration and management of the Secretariat and the affairs and functions of the Society as the Council determines.
279. It was her case that the woes that bedevil the smooth operation of the LSK commenced when she was reinstated to her duties after majority of the Council members made a decision that Mercy Kalondu Wambua had not grossly misconducted herself.
280. She deposed that after the January SGM, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents declined to attend any Council meetings and or to work with the rest of the Council members in execution of Council statutory mandate and only showed up at the Secretariat to cause chaos.
281. She stated that the operations of the Society's Bank Accounts were affected as from the 18<sup>th</sup> January, 2021 as a result of failure by the 3<sup>rd</sup> respondent to undertake her bank signatory mandate.
282. It was her case that the Society's Bank signatories have not been changed since the resolution made on April 2, 2021. She posited that the signatories remain as Carolyne Kamende Daudi the Vice President), Roseline Odede (Council Member representing members who are over 25 years' post-admission. She, however, resigned on January 18, 2021), Bernhard Kipkoech Ng'etich (The Treasurer) and Mercy Kalondu Wambua (the CEO/Secretary).



283. It was her further disposition that the instructions given by the 2<sup>nd</sup> respondent to Collins Odhiambo Odundo to issue a notice to a section of members of the Society and requesting him to make arrangements to enable the holding of the December SGM in line with an undated Notice requisitioning for a Special General Meeting contravened the law as it provided the date of the meeting as 5<sup>th</sup> December, 2020 contrary to Section 31 of the LSK Act that required the Council of the LSK to set the date of the meeting by itself.
284. It was her case that in Nairobi High Court Judicial Review No E1146 of 2020 *R v Nelson Andayi Havi & others ex-parte Gad Aguko* the dispute as to the procedure for convening of the general meetings of the Society was referred to arbitration, which orders, she deposed are yet to be complied with.
285. With respect to her employment, Mercy Kalondu Wambua deposed that the court refrained the respondents from making any pronouncements in view of the pendency of the case in ELRC Petition No 087 of 2020 *Murigi Kamande v Nelson Andayi Havi, Law Society of Kenya & Mercy Kalondu Wambua* and ELRC Petition No E090 of 2020 *Mercy Kalondu Wambua v Nelson Andayi Havi & Council of the Law Society of Kenya*.
286. In respect to the June SGM, it was deposed that the meeting was not valid. She stated that there was no signed register of those who attended the purported meeting. She referred to the Record Book which showed that only 27 persons entered the compound of the LSK offices. The meeting was, therefore, in violation of section 16(5) of the LSK Act which provided that the quorum of the meeting shall be at least 5 percent all the members of the Society.
287. She further deposed that the June SGM passed 12 resolutions all of which were illegal. It was her case that that the purported appointment of Mr Majimbo Georgiadis as the Secretary was illegal, unprocedural and in contempt of court orders in ELRC Petition No E090 of 2020 *Mercy Kalondu Wambua vs Nelson Andayi Havi & Council of the Law Society of Kenya*.
288. She deposed further that on 28<sup>th</sup> June, 2021 the 2<sup>nd</sup> respondent purportedly issued her with a letter communicating a purported resolution that she had been sent on compulsory leave.
289. It was contended that the impugned letter was unlawful and amounted to interference with her employment contract and remained contrary to the orders issued in ELRC Petition No E090 of 2020 *Mercy Kalondu Wambua v Nelson Andayi Havi & Council of the Law Society of Kenya*.
290. It was her case that matters of compulsory leave are administrative in nature and fall within the mandate of the Council and not the general membership.
291. As regards the removal of 8 Council members, it was deposed that the resolution could not stand in light of regulations 22 and 33(2) of the LSK Regulations which provided how a duly convened meeting with a requisite quorum could pass a resolution to remove a Council member.
292. On the recruitment of Jakailla Juliette Akoth (Deputy CEO and Director Compliance and Ethics), Ms Veronica Achieng Odipo (Director Compliance and Ethics) and Mr Josephat Mutunga Mutisya (CEO/Secretary) by the Caretaker Council, she deposed that the same was made without legal mandate, and accordingly were illegal as the positions do not exist.
293. She deposed that as the Head of the Secretariat, she had not assigned any of the said three alleged employees any duties as employees of the Society and neither do they have in their records any contracts of employment and or terms of reference.



294. It was her case that the disputes in the management of the Society have continued to affect its operations more so as a result of the refusal by the Vice President to sign cheques for payment of utilities, salaries, staff medical cover and statutory deductions among others.
295. She deposed that with interrupted internet and electricity supply, the Secretariat operations and provision of members services had been brought to a total halt.
296. She enumerated the online services affected as; sending, receiving and/or responding to emails requesting for certificates of good standing and letters of no objection for registration of law firms; the Advocates search engine; the Advocates online portal; application for practicing certificates; booking and payment of online CPD events; remittance of monies via Kenya Commercial Bank (KCB); M-Pesa payments cannot be updated on the LSK ERP system; activation of members after payment and submission of their practicing certificate applications on the LSK Website; adjournment of the online Disciplinary Tribunal Committee sittings; back up data online; online security updates; and LSK online meetings.
297. The 1<sup>st</sup> respondent filed undated written submissions and further written submissions dated 15<sup>th</sup> November, 2021 in support of their case. The contents thereof were mainly a reproduction of the disposition in the replying affidavit of Mercy Kalondu Wambua.
298. Other than reiterating the dispositions, it was submitted that under section 29 of the LSK Act, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents' actions at the 1<sup>st</sup> respondent were deliberate and motivated by ill will and as such cannot be protected as having discharged their mandate as *bona fide* agents of the Council.
299. It was submitted the respondents should be held personally liable as public officers for their conduct. To that end, reference was made to *Miguna Miguna v Fred Matiang'i Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others* [2018] where the Court cited with approval the case of *Republic v Kombo & 3 others ex parte Waweru* Nairobi HCMCA No 1648 of 2005 [2008] 3KLR (EP) 478 where it was observed that: -

The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong...or which infringes a man's liberty...must be able to justify its action as authorised by law and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which he can safely disregard.

300. On the foregoing, they submitted that the membership of the 1<sup>st</sup> respondent should not be burdened by being compelled to shoulder the consequences of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents' actions which are marred with impunity.
301. It was further submitted that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents have deliberately created an environment of confusion to cause the stalemate and installing of operations of the 1<sup>st</sup> respondent and should be held liable in respect of any arising suits against the 1<sup>st</sup> respondent for failure to provide services to its members.



302. It was also submitted that in the interest of justice the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents ought to bear the costs of this suit, for their illegal actions.
303. In his oral highlights, Mr BM Musau, Counsel for the 1<sup>st</sup> respondent submitted that there is a complete failure of corporate governance as a result of the events of the June SGM. He argued that rules of corporate governance apply to LSK as in the case of *Rose Wangui & 2 others v Limuru County Club & 17 others*.
304. Counsel submitted that in terms of corporate governance principles the Board is distinct from the management and that the Board should not perform management functions. He further submitted that the Board appoints the Chief Executive Officer who represents the Board in the management. He further argued that the Chief Executive Officer makes operational decisions and policies.
305. He submitted that the Chief Executive Officer and the management are supposed to send resolutions to the Board. He made reference to *Richard Nduati v Leonard Kariuki & another* where it was observed that the pursuit of profit and power and operation of constitutionalism was a means of checks and balances.
306. Applying the foregoing to the case at hand, counsel submitted that this court should provide guidelines on the leadership and stability of the Society since the standoff is oppressive to the legal profession. Counsel made further reference to *Stephen Mwangi Muriithi v Daniel Toroitich arap Moi* in recognizing breaches of the private rights as guaranteed in the then Constitution and where the court came up with various examples towards solving a problem.
307. Mr Musau urged the court to penalize those who had abdicated their duties and bear penal and personal responsibilities for the good governance of the Society now and in the future.

#### **The 6<sup>th</sup> to 13<sup>th</sup> Respondent's Case:**

308. The 6<sup>th</sup> to 13<sup>th</sup> respondents partly supported the petition through the replying affidavit of George Omwansa, deposed to on 28<sup>th</sup> October, 2021.
309. In giving a background of the stalemate at the LSK, it was deposed that any decision of the LSK cannot be valid unless it is made by the whole Council and in the manner set out in the LSK Regulations and thus the President cannot make lawful and binding unilateral decisions on behalf of the Council.
310. He deposed that the LSK has been in state of partial functional paralysis since the President attempted to override the Council's decision that voted against his agenda to dismiss the Secretary and substitute it with his unilateral decision to sack the Secretary in contravention of Section 22 of the LSK Act.
311. He deposed that in order to perpetuate his schemes, the President engineered illegal amendment of the agenda summoning the January SGM to include the agenda for suspension of the 8 Council members for the remainder of the term. He deposed that the same said unilateral actions were challenged in High Court Constitutional Petition No E025 of 2021 *Adrian Kamotho v LSK & others*.
312. It was also deposed that the Caretaker Council appointed at the June SGM is an unknown entity that is responsible for the chaos in malfunction at the LSK.
313. He deposed that the President declined to recognize the Secretary and the 8 Council members as being legally in office and frustrated the operations of the Secretariat by instructing the Vice President not to sign cheques until the desired changes were achieved.



314. He further deposed that there is no basis to apportion blame in the failure at LSK to the 6<sup>th</sup> to 13<sup>th</sup> respondents.
315. In their written submissions dated 26<sup>th</sup> July, 2021, the respondents submitted that the 2<sup>nd</sup> to 13<sup>th</sup> respondents were elected to office individually and are enjoined in this suit by virtue of being Council members of the LSK.
316. It was their case that decisions of the Council are made by a majority of the members (being a quorum of 5 members) pursuant to regulation 19 of the LSK Regulations.
317. It was submitted that despite the foregoing, the 2<sup>nd</sup> to 5<sup>th</sup> respondents constituted themselves as being rebellious members of the Council as against majority 6<sup>th</sup> to 13<sup>th</sup> respondents by planning and executing the purported June SGM that appointed an unknown enterprise called the Caretaker Council to bulldoze the 2<sup>nd</sup> respondent's dictatorial actions.

**The 2<sup>nd</sup> Respondent's Case:**

318. The 2<sup>nd</sup> respondent herein, Nelson Andayi Havi, vehemently opposed the petition. He filed a replying affidavit he deposed to 27<sup>th</sup> September, 2021.
319. It was his case that there is no pleaded or particularized right or fundamental freedom due to the petitioners under the Bill of Rights which he has denied violated or infringed.
320. He deposed that the petition as pleaded is incapable of a response as a constitutional petition.
321. On the operations at the 1<sup>st</sup> respondent, it was deposed that the complaints by the petitioners relate to administrative and clerical duties and functions of the Secretary and the Secretariat of the LSK and which roles are not among those of the President.
322. He, however, deposed that the search engine of the LSK is and has always been functional. He deposed that the petitioners did not avail any evidence to court to the contrary. He posited that he had not disabled or directed the disabling of the Advocates search engine.
323. It was further his case that the petitioners have filed a similar Petition in Nakuru High Court being Petition No E017 of 2021 *Collins Odundo & another v Nelson Havi & others*.
324. On the requirement to fulfil Continuous Professional Development, he deposed that the same were waived by members in June SGM and that no payment would be demanded from members for Certificates of good standing and Letters of No Objection.
325. He also deposed that upon sending the Secretary on compulsory leave and termination of the employment of Florence Wairimu and Mary Kitonga, the Certificates of Good Conduct and Letters of No Objection were being signed by the Director of Practice and Standards at no cost to members.
326. It was his case that the petition was manifestly vexatious, frivolous and an abuse of the process of the court and has no basis for the grant of the orders sought. He prayed for it to be dismissed with costs to him.
327. Miss Kabita, Counsel made oral highlights in support of the 2<sup>nd</sup> respondent's case.
328. Counsel reiterated the 2<sup>nd</sup> respondent's disposition in the highlights and reiterated that the operations of the Secretariat are up and running as usual.



329. While referring to *John Harun Mwau v IEBC & 2 others*, Counsel submitted that it must be clear that a person alleging violation of article 27 of the Constitution has the duty to demonstrate that he has been denied equal protection of the law in relation to others.
330. She also submitted that the breach of the right to dignity, the freedom of association and the socio-economic rights had not been well pleaded and elaborated. To that end, Counsel referred to *Moi Educational Centre v William Musembi & others*.
331. Counsel reiterated the call for the dismissal of the Petition.

### **The 3<sup>rd</sup> Respondent's Case:**

332. The 3<sup>rd</sup> respondent herein, Carolyne Kamende Daudi, opposed the Petition through her replying affidavit she deposed to on 28<sup>th</sup> September, 2021.
333. She deposed that she was the Vice-President of the LSK and the Chairperson of Staff, Budget and Finance Committee, a standing Committee of the Council. She was also a signatory to all the Bank accounts of the 1<sup>st</sup> respondent.
334. She deposed that the petitioner's case was speculative and did not disclose a real controversy capable of resolution by this court. It was her case that the Petition is predicated on unspecified actions by the respondents who are separate and distinct legal entities and as such the court cannot grant omnibus orders based on non-existent violation of rights.
335. She further deposed that the petitioners did not properly exhibit any evidence in support of the petition as required by law and as such the orders sought are incapable of being granted.
336. It was her case that petition was an abuse of court process. She stated that she was unable to access the 1<sup>st</sup> Respondent's website and as such unable to disable it as alleged by the petitioners. She further stated that she was unaware of any member of the 1<sup>st</sup> respondent that had been denied access to the LSK Website, portal, Certificate of good standing, practising certificate and letters of no objection.
337. With respect to facilitation of Continuous Professional Development conferences for purposes of complying with requirements for issuance of Practising Certificates, she deposed that the collection of points was waived at the June SGM where the 1<sup>st</sup> petitioner was present.
338. It was further deposed that the June SGM also waived any fees for obtaining Certificate of good standing and the Letters of no objection and that the members of 1<sup>st</sup> respondent were duly notified.
339. In contending that she has continually discharged her mandate as an elected member of the LSK, she argued that this court cannot, therefore, issue any orders declaring her as unsuitable to hold any public office.
340. She urged that the petition be dismissed with costs.

### **The 4<sup>th</sup> Respondent's Case:**

341. The 4<sup>th</sup> respondent herein, Herine Akoth Kabita, opposed the Petition through her affidavit deposed to on 27<sup>th</sup> October, 2021.
342. Responding to section 21(1) of the LSK Act which provided for liability of the Council or any officer or member of Staff, it was her case that a claim against the Society, a corporate body cannot be made against it together with its Council members or members of the Society.



343. She deposed that the petitioners have no claim against the 2<sup>nd</sup> to 13<sup>th</sup> respondents but against the LSK, the 1<sup>st</sup> respondent.
344. It was her case that the claim of disabling the LSK website is false as the website is managed by Kinetic Technology Limited and as such the 2<sup>nd</sup> to 13<sup>th</sup> respondents do not in any way manage the website to be able to disengage it.
345. She also deposed that the 2<sup>nd</sup> respondent has been issuing Letters of no objection and Certificates of good standing and that no Advocate had so far made an application to be issued with any of those and the request declined.
346. On the basis of the foregoing, she urged the court to decline to grant the prayer for mandatory injunction to permanently operationalize the LSK website.
347. She also prayed that the petition be dismissed with costs to the 2<sup>nd</sup> to 5<sup>th</sup> respondents for lack of merit and for being an abuse of court's process.

**The 1<sup>st</sup> to 8<sup>th</sup> Interested Parties' Case:**

348. The 1<sup>st</sup> to 8<sup>th</sup> interested parties took a more or less neutral position in the matter. They filed and relied on the affidavit of Mathew Nyabena, deposed to on 28<sup>th</sup> October, 2021.
349. The deponent was the Chairman of the LSK Coast Branch and the Chair of the LSK Branch Chairs Caucus.
350. He deposed that regulation 63(2) of the LSK Regulations established the Caucus of Branch Chairs for purposes of coordinating common or mutual interests of the various branches and that the LSK branches were enjoined pursuant to a court order.
351. It was its case that whereas the Caucus acknowledged the fact that the Branches are autonomous bodies from the Council, the matters raised in the Petition had serious implication in the management of the Society and service provision to the members and the public at large.
352. He deposed that its participation in the case would only be limited to the law so as to assist the court arrive at a just determination.
353. He stated that section 16 of the LSK Act provided that the General Meeting shall be the supreme authority of the Society. It was its case that the procedure adopted before a general meeting could be constituted included a quorum of at least 5% of all members of the Society.
354. He further stated that for a General and/or a Special meeting to be valid, the record of the meeting captured in the minutes must show that there was a determination that the necessary quorum was ascertained as a preliminary requirement.
355. On the basis of the foregoing, he deposed that the validity of the disputed January SGM and the June SGM tilted on the examination of the record of the meetings to verify the number of the people who attended the meetings, how they voted and whether the thresholds were achieved.
356. It was posited that any absence of the records of the meetings would mean that no resultant resolutions of any such meetings would be sustainable. He deposed that resolutions in ordinary meetings required a simple majority whereas in special meetings the threshold was at least two thirds of the members present.



357. It was posited that section 33 of the LSK Act spelled out the matters requiring special resolution under the LSK Act.
358. It was section 22 required a notice of the allegations to be issued well in advance of the General Meeting for determination of the complaint and failure to comply with the procedure, any resolution by members is void on account of procedural impropriety and breach of the rules of natural justice.
359. It was his case that during General meetings, the President presides over such meetings and has an obligation to ensure that no motion contravened the Constitution.
360. For the case of Special General Meetings, he deposed that the Convener of the meeting, be it the Council or a member, must give the agenda to be discussed at the meeting and it is not open to admit additional agenda items on the floor of the meeting otherwise the meeting assumes the character of an ordinary general meeting.
361. Mr Nyabena urged the court to review if the correct procedure was adopted as well as determine the legality of the resolutions arrived at in those meetings.
362. With respect to the Caretaker council, he deposed that it has ushered in more confusion in the running of the affairs and making decisions on behalf of the LSK. He deposed that despite court orders barring replacement of Council members, a faction of the Council led by the President and the Vice President proceeded to fire the Deputy Secretary and Director of Compliance and made their replacement further complicating the operations of Advocates Disciplinary Tribunal.
363. He deposed that the newly appointed Deputy Secretary as the Secretary has been issuing communication to members on email address usually not associated with the Society hence creating a parallel Secretariat and throwing into a spin where Branches ought to address any applications for Practising Certificates, Good Conduct and certificate of No Objection on registration of a Business Name inevitably affecting ability of an Advocate to practice.
364. On the non-payment of bills by the Council, he deposed that there had been delays in receiving Practising Certificates in the branches due to non-payment of postage services. He deposed that the lack of internet has also adversely affected the ability of Advocates to practice.
365. He further deposed that the Branches had experienced challenges in having devolution funds transmitted from National Office to the Branches which eventually compelled branches to approach court for release of the funds.
366. He also deposed that the creation of a parallel Secretariat and a Caretaker Council are matters that possess grave danger to the operations of the Society and the Branches' effort to resolve the impasse has borne no fruit.
367. He deposed that the affidavit he filed was not in opposition or support of the petition but to portray to the Court the difficulties faced by members of the Society and to the leadership of the branches.
368. The 1<sup>st</sup> to 8<sup>th</sup> interested parties filed written submissions dated 15<sup>th</sup> November, 2021.
369. In the submissions, they referred the court to a myriad of decisions that have revolved around the leadership wrangles at the LSK. They include *Law Society of Kenya v Standard Chartered Bank Kenya Limited* (2021) eKLR where it was observed that the Council as the engine of the Society should find a sensible way of dealing with the mouse in its midst than bring down the Society; Petition No E025 of 2021 *Adriano Kamotho Njenga v Law Society of Kenya & others* and *Republic v Nelson Andayi Havi*



*Ēamp; others ex-parte Lempaa Suyinka Ē others* where it was observed that the squabbles at the Society threaten to tear it down in the middle.

370. Upon referring the court to section 17 of the LSK Act on the composition of the Council and to section 22 of the LSK Act on the process of removal of Council members, it was submitted that the resolutions arrived at on the June SGM did not comply with mandatory statutory requirements.

371. It was further submitted that the so-called Caretaker Council was an unknown entity in law. With respect to the proceedings undertaken by the Caretaker Council, the court was referred to *McFoy v United Africa Co Ltd* (1961) 3 All ER 1169 where it was observed that: -

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, although it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably defective. You cannot out something on nothing and expect it to stay there. It will collapse.

372. From the foregoing, it was submitted that the Society faced the real possibility of breakdown. That, under regulation 20 of the LSK Regulations, there can only be one Council of the LSK and the decision of the Council are made by a majority of members present through voting except for decision that require special resolutions.

373. And, with the above, this court comes to the end of the respective parties' cases.

#### **Issues for Determination:**

374. From my reading of the court documents filed and consideration of the submissions of the parties, this court has identified the following seven issues for determination. In delineating these issues I have noted that some of the issues raised and remedies sought overlapped and in some instances cited procedural articles of the Constitution in an "omnibus" fashion. The issues are as follows: -

- (a) Preliminary issues.
- (b) Whether the President is the Spokesperson of the Society and whether the Council of the LSK is duly constituted in the absence of the President and the Vice-President.
- (c) Whether the Chief Executive Officer and the Secretary of the Society can lawfully countermand the resolutions and instructions of the Society, Council, the President of the LSK.
- (d) The requisitioning, holding and the resolutions of the General meetings of the Society;
- (e) Whether the January SGM, the June SGM and the September SGM were validly requisitioned and convened and whether the resolutions thereof are valid;
- (f) Whether the 2<sup>nd</sup> to 13<sup>th</sup> respondents in Petition No E260 of 2021 have jointly and severally contravened the Constitution and as such they are unfit to hold office within the Society and any other public office;



(g) What remedies, if any, should issue?

375. I will now address each of the identified issues in seriatim.

(i) Preliminary issues:

376. There are four sub-issues raised by the parties which are preliminary in nature. Those ought to be resolved in the first instance so as to determine whether there will be need to deal with the rest of the issues enumerated above.

377. The sub-issues are as follows: -

Whether this court has jurisdiction in view of the provisions of Regulations 95 and 96 of the LSK Regulations on alternative dispute resolution mechanisms.

Whether there are any constitutional issues raised in the Petitions.

Whether Petition No E379 of 2021 is res-judicata Milimani High Court Judicial Review No E1146 of 2020 and whether Petition No 22 of 2021 is sub-judice High Court Petition No E260 of 2021.

Whether the petitions herein are proxy Petitions and, if so, whether they should be struck out.

378. This court dealt with the first and second sub-issues in Petition No E260 of 2021. Since I have not changed my mind on the sub-issues even after reconsideration of the further submissions made in this matter, I will extend that finding into the other two Petitions herein. For ease of reference and for the completeness of the record, I will reiterate what I stated in Petition No E260 of 2021 on the first two sub-issues.

379. This is what I rendered: -

22. The parties have tendered their respective submissions on the applicability of the doctrine of exhaustion in this matter. Mr Nelson Andayi Havi, Miss Caroline Kamende Daudi, Miss Herine Akoth Kabita and Miss Esther Ang'awa posit that this court has no jurisdiction as the parties have not exhausted the alternative dispute resolution mechanism provided for under regulations 95 and 96 of The Law Society of Kenya (General) Regulations, 2020 (I will hereinafter refer to The Law Society of Kenya (General) Regulations, 2020 as 'the Regulations').

23. The foregoing position is diametrically opposed by the rest of the parties. The proponents of the opposition contend that the matter falls within the exceptions to the doctrine of exhaustion and hence cannot be referred for arbitration.

24. There is, therefore, the need to look at the doctrine of exhaustion and its applicability in this matter. The starting point is a discussion on the nature and the intention of the doctrine.

25. The doctrine of exhaustion in Kenya 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.

26. Clause 3 is on traditional dispute resolution mechanisms.

27. 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 v Independent Electoral and Boundaries Commission (IEBC) 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 v 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.

28. 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 v Independent Electoral and Boundaries Commission (IEBC) & 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 & 9 Others v Aelous (K) Ltd & 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.

29. The above decision was appealed against by the respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa



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 v 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.

30. Further, in Civil Appeal 158 of 2017, *Fleur Investments Limited v 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 v 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.



31. 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 v Attorney General & 6 others* (2015) eKLR among others).
32. Returning back to the case at hand, 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.
33. Regulations 95 and 96 provide in certain terms the procedures to be followed in the event of disputes arising within the Law Society of Kenya (hereinafter referred to as either ‘the LSK’, ‘the Society’ or ‘the 1<sup>st</sup> respondent’). In this case, since the dispute involves the Council, regulation 96(7) mandates that if the parties cannot agree on an arbitrator then the arbitrator shall be appointed by the Chairperson of the Chartered Institute of Arbitrators, Kenya Chapter.
34. That is the procedure. At this point in time I must clarify that the reference of any dispute contemplated under the regulations to arbitration does not require a resolution of the Council. The regulations are simply clear. Therefore, the existence of a dispute within the Council even to an extent that the Council cannot make any resolution cannot ipso facto be a reason why a dispute cannot be referred to arbitration. The only time any dispute contemplated under the regulations will not be capable of referral to arbitration is when the exceptions to the doctrine of exhaustion applies.
35. The most current and inevitable question now is whether in the circumstances of this case the exceptions to the doctrine of exhaustion apply.



36. I have carefully considered the petition. It is brought under articles 10, 20, 21, 22, 23, 24, 25, 27, 28, 29, 35, 36, 41, 43, 46, 47, 48, 49, 50, 159, 165, 232 and 258 of the Constitution. The petition seeks to enforce the petitioners' rights to legal representation and the right of Advocates to earn a living. The petition is further premised on the Fair Administrative Actions Act, the Criminal Procedure Code, the Evidence Act among other statutes. Part D of the petition particularizes the breaches complained of against the Respondents. Part E is on the remedies sought.
37. Among the remedies sought include a declaration that the 2<sup>nd</sup> to 13<sup>th</sup> respondents have jointly and severally acted contrary to the Constitution and as such they are unfit to hold public office with the LSK and any other public office. There is also a request for an order for structural interdict to be supervised by the court.
38. The issues raised in the petition are of serious constitutional nature. They call for the interpretation of the Constitution, determination as to whether the Constitution is breached, whether rights and fundamental freedoms in the Bill of Rights have been violated, denied, infringed or threatened and whether the respondents ought to hold any public office. Such issues transcend the purview of an arbitrator. There is no doubt the arbitrator(s) will have no jurisdiction over the issues raised in the petition. The issues in the petition are those contemplated under article 165(3) of the Constitution to be within the exclusive jurisdiction of the High Court.
39. This court is, hence, satisfied that the petition primarily seeks to enforce fundamental rights and freedoms and it is not demonstrated that the claimed constitutional violations are mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the court.
40. The petition is, therefore, not barred by the doctrine of exhaustion.

380. The above settles the first two sub-issues.

381. The third sub-issue is based on the doctrines of *sub-judice* and *res-judicata*.

382. I will begin this discussion with a look at the doctrine of *sub-judice*. In Nairobi High Court Constitutional Petition No E406 of 2020 *Renita Choda v Kirit Kapur Rajput* (2021) eKLR this court discussed the said doctrine at length and as follows: -

48. The second limb of the issue is on whether the jurisdiction of this court is ousted by the *sub-judice* rule. The respondent contends that the pendency of the Divorce Cause and the custody case ousts the jurisdiction of this court as all issues on the cases ought to be addressed before the trial courts.
49. In answer to this limb, I will run through how the Supreme Court in Advisory Opinion Reference No 1 of 2017, *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR handled the issue of sub-judice.
50. The Supreme Court was approached by the applicant, Kenya National Commission of Human Rights. It sought the court's Advisory Opinion on



the purposive interpretation of Chapter 6 of the Constitution of Kenya specifically in the context of the affairs of political parties.

51. The applicant contended that there was lack of clarity and/or guidance in High Court and the Court of Appeal decisions on the place of chapter 6 of the Constitution, especially in respect of leadership and integrity qualifications of persons offering themselves to be elected or appointed to public service.
52. Before the matter could proceed, one of the interested parties filed a preliminary objection claiming that the application before the court was *sub-judice* two other cases before the High Court namely; Constitutional Petition No 142 of 2017 and Constitutional Petition No 68 of 2017. It asserted that the application was an abuse of the Supreme Court's advisory opinion jurisdiction.
53. Upon considering the parties' arguments and counterarguments, the apex court comprehensively addressed the often raised jurisdictional challenge of *sub-judice*. It first defined the term, outlined its purpose and then set the threshold for its operation. The court observed as follows: -
  - (67) The term '*sub-judice*' is defined in Black's Law Dictionary 9<sup>th</sup> Edition as: "Before the court or Judge for determination." The purpose of the *sub-judice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.
54. Upon setting the above foundation for the operation of the doctrine, the Learned Judges then pitched the issues emanating from the two High Court cases against the ones raised by application before them. They went ahead and observed as follows: -
  - (68) In the above context, it cannot be denied that the issues and prayers sought by the petitioner in the two constitutional petitions generally call for the interpretation and application of provisions of Chapter Six of the Constitution. The issues and orders in the two constitutional petitions substantially ascend from the criteria for the implementation of the provisions of chapter six of the Constitution. For the High Court to sufficiently pronounce itself in the two constitutional petitions, it has to interpret and apply the provisions of Chapter Six of the Constitution on leadership and integrity.
  - (71) In so doing, (determining the two constitutional petitions) the High Court shall be compelled, to determine whether a constitutional test is set up in



chapter Six of the Constitution, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of the test, the implementing organs and bodies. These are substantially the same issues subject of the Advisory Opinion sought by the applicant comprised at pages 13 to 19 of the Reference before this court.

55. From the foregone, the court was of the finding that the application before it was caught up by *sub-judice* doctrine. It refused to usurp the jurisdiction of the High Court in the following terms: -

(72) We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No 68 of 2017 and Constitutional Petition No 142 of 2017. In view of article 165 of the Constitution, the High Court is the court of first instance with regard to jurisdiction for interpretation and application of the Constitution and that court has already been moved.

(73) Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under article 163(6) of the Constitution. This Reference is *sub-judice* and this Court will not usurp the High Court's jurisdiction under article 165 (3).

56. The Supreme Court, hence, declined jurisdiction because it was demonstrated that the issues before the court were the same as those before the High Court.

57. In this case, whereas the parties in the Divorce Cause and the Custody case are the same as those in the Petition before this court, the issues raised in the petition before this court are different from the issues before the other courts. The petitioner, in essence, seeks the pronouncement of this court on whether some evidence which the respondent intends to use in the other cases was illegally obtained and if so, whether such evidence offends article 50(4) of the Constitution.

58. I have carefully perused the pleadings in the Divorce Cause and the Custody case. I have found that the issue of the constitutionality of the evidence is not contained in any of the pending suits. In any event, the issue raised in the petition before this court can only be determined by the High Court courtesy of article 165(3) of the Constitution.

59. I, hence, find that the objection based on *sub-judice* doctrine fails.

383. In this matter, it is contended that Petition No 22 of 2021 is *sub-judice* Petition No E260 of 2021. I have carefully perused the two matters. Petition No 22 of 2021 mainly challenges the legality of the June SGM whereas Petition No E260 of 2021 mainly deals with the management and administration of the Society and whether the members of Council are fit to hold any office in the Society and any public office.

384. To this court, the two matters are based on different causes of action. I do not, reasonably so, see the nexus between the two matters. I, therefore, decline the invitation to find that Petition No 22 of 2021 is *sub-judice* Petition No E260 of 2021.

385. As to whether Petition No E379 of 2021 is *res-judicata* Milimani High Court Judicial Review No E1146 of 2020, this court has, as well, perused the twin matters. However, before I deal with the



applicability of the said doctrine in this matter, it is prudent to, in the first instance, look at the doctrine itself.

386. The superior courts have sufficiently expressed themselves on. The Supreme Court in Petition 14, 14A, 14B & 14C of 2014 (Consolidated) *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 others* [2014] eKLR delimited the operation of the doctrine of *res-judicata* in the following terms;

(317) The concept of *res judicata* operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on “issue estoppel”, to bar the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice? all in the cause of fairness in the settlement of disputes.

(318) This concept is incorporated in section 7 of the *Civil Procedure Act* (cap 21, Laws of Kenya) which prohibits a court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

[319] There are conditions to the application of the doctrine of *res judicata*: (i) the issue in the first suit must have been decided by a competent court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title *Karia & another v Attorney General & others*, [2005] 1 EA 83, 89.

[320] So, in the instant case, the argument concerning *res judicata* can only succeed when it is established that the issue brought before a court is essentially the same as another one already satisfactorily decided, before a competent court.

[333] We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal’s decision through the prescribed route of judicial review at the High Court, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents instituted fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of “issue estoppel” is meant to forestall. Issue estoppel “prevents a party from using an institutional



detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route” (*Workers’ Compensation Board v Figliola* [2011] 3 SCR 422, 438 (paragraph 28)).

- [334] Whatever mode the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents adopted in couching their prayers, it is plain to us, they were challenging the decision of the Tribunal, in the High Court. It is a typical case that puts the courts on guard, against litigants attempting to sidestep the doctrine of “issue estoppel”, by appending new causes of action to their grievance, while pursuing the very same case they lost previously. In *Omondi v National Bank of Kenya Ltd & others*, [2001] EA 177 the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.”
- [352] The Judicial Committee of the Privy Council, in *Thomas v Attorney-General of Trinidad and Tobago*, [1991] LRC (Const) 1001 held that “when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules.” That court relied on a case decided by the Supreme Court of India, *Daryao & others v The State of UP & others*, (1961) 1 SCR 574 to find that the existence of a constitutional remedy does not affect the application of the principle of *res judicata*. The Indian court also rejected the notion that *res judicata* could not apply to petitions seeking redress with respect to an infringement of fundamental rights. Gajendragadkar J stated:

But is the rule of *res judicata* merely a technical rule or is it based on high public policy? If the rule of *res judicata* itself embodies a principle of public policy which in turn is an essential part of the rule of law, then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now the rule of *res judicata*...has no doubt some technical aspects...but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of *res judicata* they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under article 32.

- [353] Kenya’s High Court recently pronounced itself on the issue of the applicability of *res judicata* in constitutional claims. In *Okiya Omtatah Okiiti & another v Attorney General & 6 others*, High Court Const and Human Rights Division, Petition No 593 of 2013 [2014] eKLR, Lenaola J (at paragraph 64) thus stated:

Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of *res judicata* can and should only be invoked in constitutional



matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.

[354] On the basis of such principles evolved in case law, it is plain to us that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were relitigating the denial to them of a BSD licence, and were asking the High Court to redetermine this issue.

[355] However, notwithstanding our findings based on the common law principles of estoppel and *res-judicata*, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the court and have their grievance resolved on the basis of articles 22 and 23 of the Constitution.

387. The Court of Appeal in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR also discussed the doctrine of *res judicata* at length. The court stated in part as follows: -

The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unravelling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that *res judicata* being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of *res judicata*. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.



We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being *res judicata*. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality? If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows: -

- i) The doctrine of *res judicata* is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.
- ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.
- iii) The ingredients of *res judicata* must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.

388. This court will now apply the foregoing to the twin matters. Petition No E379 of 2021 deals with the legality and the manner in which the September SGM was convened. The said meeting had been scheduled for the 24<sup>th</sup> September, 2021. This matter is pending this determination.

389. Judicial Review No E1146 of 2020 challenged the legality and the manner in which a special general meeting scheduled for the 5<sup>th</sup> December, 2020 had been convened. The matter was determined on 7<sup>th</sup> May, 2021.

390. The court made the following orders:

- i. The *ex parte* applicant's Notice of Motion application dated 7th December, 2020 is incompetently filed before this court and is hereby struck out, and the dispute herein as regards the procedure for convening of the 3rd respondent's general meetings by the 1st respondent is referred to arbitration in accordance with the provisions of regulation 96 of the Law Society of Kenya (General) Regulations.
- ii. The stay and suspension orders granted herein on 3rd December 2020 are hereby vacated.
- iii. There shall be no order as to the costs of the Notice of Motion application dated 7th December, 2020.



391. It is, hence, the position that Judicial Review No E1146 of 2020 was instead struck out for being incompetent. The issues raised therein were then referred to arbitration.
392. Going by the guidance in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* case (*supra*) and *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* case (*supra*), suffice to note that both Petition No E379 of 2021 and Judicial Review No E1146 of 2020 challenged the manner in which special general meetings of the Society were convened. However, the special general meeting in each of the matters was separately convened, hence the causes of action were different.
393. A further observation is that Judicial Review No E1146 of 2020 was instead struck out and the dispute referred to arbitration. In that case, the issues were not determined with finality by the court.
394. The upshot is, therefore, that none of two matters has been finally determined by a competent court. In that case, the doctrine of *res judicata* cannot apply to bar Petition No E379 of 2021. The contention, hence, fails.
395. I will now consider the last sub-issue. It is on whether the petitions herein ought to be struck out for being proxy petitions.
396. It was vehemently argued that the petitions are proxy petitions in that they were filed on behalf and for the benefit of the members who were removed from the Council at the June SGM and the Secretary.
397. In interrogating the issue, I will first look at the concept of litigation by proxies.
398. The *Black's Law Dictionary 11<sup>th</sup> Edition Thomson Reuters Publishers*, defines the word 'proxy' at page 1482 as follows: -
- Someone who is authorized to act as a substitute for another.
- The grant of authority by which a person is so authorized.
399. While making reference to various local and international decisions, the court in Petition 172 of 2019, *Daniel Muthama Muoki v Ministry of Health & another; Shenzhen Mindray Bio-Medical Electronics Co Ltd & 5 others (Interested Parties)* [2020] eKLR, made the following remarks on proxy litigations: -

34. It is noted that courts have observed recently that constitutional petitions are at risk of abuse through proxy litigation disguised as public interest litigation, as practice which amounts to waste of court's value time as well as an abuse of the court's process. In *Brian Asin & 2 others v Wafula W Chebukati & 9 others* [2017] eKLR this court held:

... while dealing with the question of "*bona fides*" of a petitioner, especially in the case of a person approaching the Court in the name of Public Interest Litigation, the Indian Supreme Court in the case of *Ashok Kumar Pandey v State of West Bengal* held as hereunder:

... Public interest litigation is a weapon which has to be used with great care and circumspection and the Judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens.



The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and to publicity oriented or founded on personal vendetta. As indicated above, court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or form improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs. (Emphasis added)

35. Further, where it is established that proxy litigation has been instituted for persons who can litigate themselves, then the court ought to find an ulterior motive and punish a petitioner. This was held in the case of *Republic v IEBC & 2 others ex-parte Alinoor Derow Abdullahi & others* [2017] eKLR

... However, this right to institute such (public interest) proceedings ought not to be abused in order to achieve collateral purposes such as to in effect litigate on behalf of other persons who are able to litigate on their own but for some ulterior motives do not want to be in the forefront of litigation.” (emphasis provided)

400. Upon analysing the circumstances of the case, the court in *Daniel Muthama Muoki v Ministry of Health & another* case (*supra*) found the petitioner to have abused the court process by filing numerous suits and for being used as a proxy. The court observed as follows:

36. The petitioner has averred that he is not engaged on proxy litigation urging that he has approached this court in a public interest matter under articles 22, 23 and 258 of the Constitution. He urged that under article 43 of the Constitution he is entitled to the highest attainable standard of health pointing out he is at the right forum to ventilate the issues. He further averred the petition has been brought in good faith.
37. I have considered the submissions on the issue of whether the petitioner is engaged in proxy litigation. I have considered the fact that the petitioner has filed the petition under article 258 of the Constitution. In the petition he joined the 6<sup>th</sup> interested party M/s Council of Governors. The present petition as urged relates to the same issues as those raised before court in the *International Legal Consultancy Group & another v Ministry of Health & 9 others* (2016) eKLR. The present petition follows the same path that was in the case before Hon Justice Ngugi, in that the 1<sup>st</sup> petitioner, a non-governmental organisation, lodged the petition and the Council of Governors were joined in the Petition as interested party, the Council of Governors lost in the matter. It appears in this petition; the petitioner is doing proxy litigation to circumvent



the courts decision in the earlier case. It appears therefore the petitioner has taken up the same issues on behalf of the Council of Governors in proxy litigation. I therefore find that the Petitioner herein is engaging in a proxy litigation, and this petition is a blatant abuse of the court process.

401. In Petition 58 of 2014, *Okiya Omtatah Okiiti & 2 others v Attorney General & 3 others* [2014] eKLR, Lenaola J. (as he then was) in disapproving litigation by proxies referred to the decision of Warsame J. (as he then was) and dismissed a proxy Petition upon making the following analysis: -

... While I will exercise my discretion and not penalize the Petitioners with costs, they and the public at large must be told that not anything done under the authority of the Constitution is litigious in the name and spirit of public interest. Litigants must know that this court has a duty to protect the noble motive of public interest litigation from those who file alleged public interest litigation for ulterior motives. The filing of false and frivolous public interest litigation which risk diverting the court's attention from genuine cases will not be entertained. I therefore reiterate the words of Warsame J. (as he then was) in *Truth Justice and Reconciliation Commission v Chief Justice of the Republic of Kenya & another* (2012) eKLR where he stated thus on the issue of costs;

... I think exemplary costs as a deterrent against frivolous and vexatious public interest litigations must be a mechanism which can be employed in such circumstances. It is depressing to note on account of cases like the present one initiated by fellow Commissioners, innumerable days and time are wasted, the time which otherwise could have been spent on disposal of cases by genuine litigants. Though as courts we spare no efforts in fostering and developing liberal and broadened litigation, yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to matters which is dear to them must be addressed, the meddlesome interlopers having absolutely no grievances for personal gain or as a proxy of others or for extraneous motivation break the queue by wearing a mask of public interest litigation and get into the court corridors filing vexatious and frivolous cases. This criminally wastes the valuable time of the court and as a result of which genuine litigants standing outside the court in a queue that never moves thereby creating and fomenting public anger, resentment and frustration towards the courts resulting in loss of faith in the administration of justice.

I agree and it is obvious now why this court must jealously guard its jurisdiction against abuse while ensuring that genuine litigants do not suffer unnecessarily from harsh orders on costs.

402. All the Petitions under consideration were instituted by Advocates and who are members of the Society. The petitions are pointed in that they challenge specific actions and resolutions of the organs of the Society. Each of the members of the Society is, in one way or the other, affected by the decisions of the organs of the Society. As such, any aggrieved member has the requisite locus standi to institute constitutional Petitions over the actions and resolutions of the organs of the Society.
403. This court, therefore, finds that the circumstances in the Petitions herein are different from those in the decisions I have referred to above. It will indeed be a very sad day for this court to stop an aggrieved member of the Society from fronting a bona fides challenge against decisions of the organs of the Society.



404. There is further no demonstration of bad faith in the filing of the petitions. The petitions are simply about members who are variously aggrieved by the organs of the Society. In that case, therefore, the court finds that none of the petitions herein is a proxy petition. The invitation to strike out the petitions is declined and the fourth sub-issue is answered in the negative.
405. Drawing from the foregoing, this court finds and hold that none of the preliminary issues is successful and as such the petitions, in line with the issues enumerated above, shall be considered further.
- (ii) Whether the President is the Spokesperson of the Society and whether the Council of the LSK is duly constituted in the absence of the President and the Vice-President:
406. This issue has two limbs. The first limb is on the Spokesperson of the LSK and the second limb is whether the Council is duly constituted in the absence of the President and the Vice-President.
407. I will begin this discussion with a consideration of the first limb.
408. The LSK Act and the LSK Regulations are silent on who the Spokesperson of the LSK is. It is the Law Society of Kenya Council Charter (Revised 2020) (hereinafter referred to as ‘the Council Charter’) which makes such a provision.
409. The Council Charter resulted from the resolution of the Council of the LSK (hereinafter referred to as ‘the Council’) made on 16<sup>th</sup> April, 2020.
410. In its Preamble, the Council Charter states that the LSK is committed to upholding good corporate governance in all of its business dealings in respect of its members and stakeholders. The Council Charter states its purpose to include re-emphasizing the roles and functions of the Council as provided in the law and to regulate how the Council business is transacted in accordance with the principles of good corporate governance.
411. The Council Charter also sets out the specific responsibilities to be discharged by the Council both individually and collectively.
412. The objective of the Council Charter is stated as to ensure that all Council members acting on behalf of the Society and regulating the business of the Society are aware of their duties and responsibilities as members of the Council.
413. Section 12 of the Council Charter provides for the responsibilities of the President, the Vice-President, the Treasurer and the Chief Executive Officer.
414. Section 12.1.1 of the Council Charter provides one of the functions of the President as: -  
Representing the Society and the Council to the members and other stakeholders.
415. Section 13 of the Council Charter provides for the Spokesperson of the Society. It states as follows: -  
The President shall be the spokesperson of the Society in all matters related to the Society, and shall as much as possible consult with the LSK Council and Branch Chairpersons where necessary before issuing a statement or communicating the position of the Society on any matter. Council members shall issue public statements in an objective and truthful manner. (emphasis added)
416. Under section 14, the Council Charter provides the principal duty of the Vice-President as to deputize the President in instances as determined by the President or the Council.
417. The Council Charter does not make any other provision on the issue of the Spokesperson of the LSK.



418. The position taken by the Council Charter on the Spokesperson of the Society is in line with the internationally accepted standards of good corporate governance. In a company set-up, for instance, the Chairperson of the Board of Directors is the official Spokesperson of the company especially in relation to stakeholders and the general public.
419. Therefore, it is the finding and holding of this court that the President of the LSK is the official Spokesperson of the Society and can be deputized by the Vice-President in case need arises.
420. Having so said, I will now deal with the second limb of the issue. It is whether the Council is duly constituted in the absence of the President and the Vice-President of the LSK.
421. The Council is one of the organs of the Society provided for in Section 15 of the LSK Act.
422. Under section 17(1) of the LSK Act, the Council is the governing body of the Society. It, therefore, means that without the Council then the governance of the Society is at stake.
423. The composition of the Council is provided for in section 17(2) of the LSK Act. The sub-section provides as follows: -
- (2) (2) The Council of the Society shall consist of-
- (a) the President;
  - (b) the Vice-President;
  - (c) three representatives of the general membership of the Society, one of whom shall be an advocate of at least twenty-five years' standing;
  - (d) four upcountry representatives, who shall be persons who do not ordinarily practise in Nairobi or at the coast and;
  - (e) three Nairobi representatives who shall be persons who ordinarily practise in Nairobi; and
  - (f) one coast representative, who shall be a person who ordinarily practises at the coast.
- (3) The members of the Council shall be elected by all the members of the Society in accordance with this Act.
424. The Council is, hence, comprised of the President, the Vice-President and 11 Council members thereby making a total of 13 persons.
425. The functions of the President, the Vice-President and the Council members are variously provided for in the LSK Act, the LSK Regulations and the Council Charter.
426. The LSK Act commences with the eligibility of the members of the Council. Section 18 thereof stipulates separate qualifications for the President and the Vice-President, on one part, and the qualifications of the rest of the members on the other part.
427. The qualifications for a person to be elected as a President or Vice-President of the Society are provided under section 18(1) as follows: -
- (1) A person is eligible for election as the President or Vice-President if the person-
- (a) is a member or former member of the Council: or



(b) is qualified to be a Judge of the Supreme Court.

428. On the other hand, a person is eligible for election as a member of the Council under sub-section 2 if the person: -

- (a) is a member of the Society;
- (b) has been in practise for at least two years, from the date of admission;
- (c) has not been found liable for professional misconduct by the Disciplinary Committee established by the Advocates Act (cap 16), in the three years immediately preceding the election; and
- (d) meets the requirements of Chapter Six of the Constitution.

429. A closer look at the provisions of Section 18 of the LSK Act reveal that Parliament intended to have two cadres of persons within the Council. The first cadre comprises of the President and the Vice-President and the second cadre is comprised of the Council members. That can be the logical reason as to why the two cadres have distinct qualifications for appointment into office.

430. The President and the Vice-President must, therefore, be persons who had previously or are currently serving in the Council. The effect of that requirement is to ensure that the President and the Vice-President are possessed of experience of the workings of the Council and the Society at large.

431. Such persons must also possess the requirements of a Supreme Court Judge under article 166(3) of the Constitution; to wit: -

- (a) at least fifteen years' experience as a superior court Judge; or
- (b) at least fifteen years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years.

432. The foregoing is, however, not the case with the rest of the Council members. The qualifications of the rest of the members are largely far below those of the President and the Vice-President with an exception of the Council member who shall be an Advocate of at least twenty-five years' standing.

433. As said, that distinction between the President and the Vice-President, on one part, and the rest of the members, on the other part, carries a clear intention.

434. It is on the basis of the foregoing that the LSK Act, the LSK Regulations and the Council Charter designates specific functions to the President and the Vice-President. To demonstrate such, I will reproduce some of them. In section 12 of the Council Charter the responsibilities of the President are provided as under: -

12.1 The responsibilities of the President shall include but not be limited to the following: -

12.1.1 Representing the Society and the Council to the members and other stakeholders.

12.1.2 Ensuring the integrity and effectiveness of the governance process of the Council.

12.1.3 Maintaining regular dialogue with the Chief Executive Officer over important operational Matters. In addition, the President will provide Counsel and advice to the Chief Executive



Officer where appropriate and will consult with the remainder of the Council promptly over any matter that gives him or her major cause for concern.

- 12.1.4 Act as a facilitator at meetings of the Council to ensure that appropriate discussions take place and that no member dominates the discussion and that relevant opinion amongst the Members is forthcoming.
  - 12.1.5 The President will ensure that discussions result in logical and understandable outcomes.
  - 12.1.6 Play a crucial role in ensuring that the Council is properly led.
  - 12.1.7 Be primarily responsible for the working of the Council and for ensuring that all relevant issues are on the agenda and that all available information on any issue is placed before the Council.
  - 12.1.8 Be responsible for ensuring that decisions are taken when required, consensus is reached and a resolution is formally passed.
435. Under section 16 of the LSK Act, it is the President who shall preside at any general meeting of the Society and in the absence of the President, the Vice-President shall preside. It is only in the absence of both the President and the Vice President that the Council nominates one among its members to preside over a general meeting.
436. There is also regulation 18(2) of the LSK Regulations which provide that the Secretary shall, in consultation with the President, issue notices calling for meetings of the Council. Further, under regulation 21 of the LSK Regulations the President has the sole power to convene an extra-ordinary meeting of the Council.
437. Again, under regulation 75(5) of the LSK Regulations the Secretary can only, upon consultation with the President, send out any other information or document to members for the purpose of a general meeting. It is also only the President who can adjourn a general meeting under regulation 80 of the LSK Regulations.
438. The President is also mandated under regulation 81(j) of the LSK Regulations to provide for the procedure or guideline where none is provided for under the LSK Regulations in a general meeting. Further, it is only the President who has both a deliberative and a casting vote in voting.
439. The President is also the only one who signs minutes of meetings so as to be conclusive and binding on the members of the Society.
440. The above roles of the President bring to the fore the central and crucial character of the office of the President. It is, therefore, by design that the President shall be at the centre of all the affairs of the Society.
441. I will now compare the constitutional design of the Cabinet in Kenya with the Council of the Society. The National Executive under article 130 of the Constitution is comprised of the President of the Republic of Kenya, the Deputy President and the Cabinet. Article 131 of the Constitution provides for the authority of the President while article 132 of the Constitution provides for the functions of the President. Under article 147(2) of the Constitution, the President may delegate any of his functions to the Deputy President.
442. One of the functions of the President of the Republic of Kenya is to chair Cabinet meetings. In a hypothetical scenario where the President is not able to attend a Cabinet meeting, on delegation, the Deputy President may chair that meeting. However, the Constitution does not provide the manner in which a Cabinet meeting will proceed where both the President and the Deputy President are absent.



- In that case, there is a deliberate constitutional design where the absence of the both the President and the Deputy President in a Cabinet meeting was not envisaged. The result of such a situation is that such a Cabinet meeting cannot be held.
443. Returning to this matter, the only instance where the law provides for what happens when both the President and the Vice-President of the LSK are absent in a meeting is during a general meeting under section 16(7) of the LSK Act and regulation 78 of the LSK Regulations. In that case, one of the Council members present will chair the meeting and if none is neither present nor willing to chair the meeting, the senior most member of the Society present will chair that general meeting.
444. The law is, however, silent on what happens to a meeting of the Council where both the President and the Vice-President are absent. In that case, just like in the case of a Cabinet meeting where both the President and the Deputy President are absent, the Cabinet meeting cannot be held, the same position applies to the Council in the absence of both the the President and the Vice-President. In that case no Council meeting can be held.
445. This court must emphasise that the foregoing is the deliberate design of the LSK Act and the LSK Regulations.
446. To buttress the foregoing, the Law Society of Kenya (General) Regulations, 1962 which were revoked by the LSK Regulations provided as follows in instances where both the President and the Vice-President of the LSK were absent from a Council meeting: -
24. At all meetings of the Council, the President, or in his absence the Vice-President, shall be the Chairman. In the absence of both President and Vice-President, a chairman shall be elected, from amongst, and by, the members present.
447. The above provision was revoked by the enactment of the LSK Regulations in 2020. It is, hence, clear that the drafters of the Regulations intended to ring-fence the positions of the President and the Vice-President of the LSK in such a manner that if both of them are absent from a meeting of the Council, then such a meeting cannot be held.
448. Putting it in other words, once the President and the Vice-President of the LSK are absent from a meeting of the Council, no other member of the Council can constitute himself or herself to preside over that meeting.
449. It is, therefore, the finding and holding of this court that the Council of the LSK cannot be duly constituted in the absence of the President and the Vice-President of the Society.
- (iii) Whether the Chief Executive Officer and the Secretary of the Society can lawfully countermand the resolutions and instructions of the Society, Council and the President of the LSK:
450. The position of the Chief Executive Officer of the Society and the Secretary of the Council is established in section 26 of the LSK Act.
451. Among the duties of the Secretary include being responsible to the Council for the day-to-day administration and management of the Secretariat and the affairs and functions of the Society as the Council shall determine. The Secretary heads the Secretariat.
452. As it has been demonstrated in the preceding issue, the Secretary always consults with the President in the discharge of the duties of the office. It is the Secretary and the Secretariat who executes the resolutions of the Council and the Society.
453. The Society is established under section 3 of the LSK Act. It is a body corporate with perpetual succession and a common seal. Its functions and objects are provided for in section 4 thereof.



454. The functions and objects of the Society are to: -

- (a) (a) assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya;
- (b) uphold the Constitution of Kenya and advance the rule of law and the administration of justice;
- (c) ensure that all persons who practise law in Kenya or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide;
- (d) protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law;
- (e) set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya;
- (f) determine, maintain and enhance the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya;
- (g) facilitate the acquisition of legal knowledge by members of the Society and ancillary service providers, including paralegals through promotion of high standards of legal education and training;
- (h) represent, protect and assist members of the legal profession in Kenya in matters relating to the conditions of practice and welfare;
  - (i) formulate policies that promote the restructuring of the legal profession in Kenya to embrace the spirit, principles, values and objects the Constitution of Kenya;
- (j) facilitate the realization of a transformed legal profession that is cohesive, accountable, efficient and independent;
- (k) establish mechanisms necessary for the provision of equal opportunities for all legal practitioners in Kenya;
- (l) protect and promote the interests of consumers of legal services and the public interest generally, by providing a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners;
- (m) develop and facilitate adequate training programmes for legal practitioners; and
- (n) do all such other things as are incidental or to the foregoing functions.

455. In discharging its said functions and objects, section 5 of the LSK Act empowers the Society to do all things necessary for the proper and effective achievement of its objects and the performance of its functions.

456. In carrying out its functions and in the exercise of its powers, the Society is guided by the following principles: -

- (a) the maintenance and advancement of constitutionalism, justice and the rule of law;
- (b) the facilitation of access to justice;



- (c) the protection of public interest;
- (d) the maintenance of integrity and professionalism; and
- (e) the promotion of cross border legal practice, inclusivity and equity.

457. The Society, therefore, despite being constituted by Advocates, principally discharges public duties including the maintenance and advancement of constitutionalism, justice and the rule of law, the protection of public interest, maintenance of integrity and professionalism among others.
458. The LSK is, hence, one of those bodies contemplated under article 10(1) of the Constitution to be bound by the national values and principles of governance. As such, LSK has a duty under article 3 of the Constitution to respect, uphold and defend the Constitution.
459. The Constitution variously provides the parameters within which public duties must be discharged. Some of them include the national values and principles of governance under article 10(2) of the Constitution, the human rights and fundamental freedoms under the Bill of Rights, the principles of public finance under article 201 of the Constitution, the values and principles of public service under article 232 of the Constitution among many others.
460. In order for the Society to align itself with the 2010 Constitution, the *Law Society of Kenya Act*, cap 18 of the Laws of Kenya was repealed by the enactment of the LSK Act in 2014.
461. That being the case, the LSK, as a caged animal, must operate, but within the confines of the Constitution and the law. That is to say, whatever the Society undertakes through its members, officers, staff or agents must be in line with the Constitution and the law.
462. Going back to the issue under consideration, suffice to say that the Society is under a constitutional duty to pass resolutions and to also give instructions to the Secretary which resolutions and instructions are within the Constitution and the law.
463. The position augurs well with section 29(1) of the LSK Act which provides for the liability of Council members, officers and employees of the Society as follows: -
- No matter or thing done by a member of the Council or by any officer, member of staff, or agent of the Council shall, if the matter or thing is done bona fide for executing the functions, powers or duties of the Council or the objects of the Society under this Act or for any neglect or default in the performance or exercise in good faith of any such duty or power render the member, officer, employee or agent or any person acting on their directions personally liable to any action, claim or demand whatsoever.
464. It, therefore, means that if a Council member, officer or an employee of the Society while discharging his/her duties does not act in good faith, then such shall be personally liable to any action, claim or demand as the case may be.
465. A determination as to whether an action was done in good faith will largely depend on the circumstances surrounding the impugned action.
466. All in all, a Council member, officer or an employee of the Society must, while discharging his/her duties, always ensure that he/she remains within the confines of the Constitution and the law.
467. This court recently dealt with a like scenario where police officers were supposed to obey the orders of the superiors. This court found that only lawful orders could be obeyed and that no officer can be



sanctioned for disobeying an unlawful order. That was in Nairobi High Court Constitutional Petition No E327 of 2020 *Law Society of Kenya v Attorney General & another* (2021) eKLR.

468. The discussion in that matter was as follows: -

120. Sub-section 8 empowers the police to issue orders and directions stopping or preventing the holding of a public meeting or a procession. It also demands that such orders and directions by the police must be obeyed. What comes out of the sub-section is a grant of blanket powers to the police. The powers which the police ought to issue must be qualified to only those which are lawful. The Police Act is very deliberate on this. It states, times without number, that any orders to be issued by the police must be lawful orders. For instance, section 49(2) and (4) of the Police Act is to the effect that any orders and directions given to a subordinate police officer by a superior one must be lawful. The provisions state as follows: -

- (2) Where any duty, power or discretion is imposed or conferred by this Act or any other law on a police officer of any specified rank or holding any specified office, the police officer, shall, in the performance of such duty or the exercise of such power or discretion, and subject to the lawful orders and directions of any police officer to whom the police officer is directly subordinate, and any senior police officer, if the occasion arises where it is expedient to do so, perform any such duty or exercise any such power or discretion.
- (4) A police officer who performs an official duty or exercises police powers shall perform such duty or exercise such power in a manner that is lawful.

121. Section 51(1)(a) and (b) of the Police Act further provides that: -

- (1) A police officer shall –
  - (a) obey and execute all lawful orders in respect of the execution of the duties of office which he may from time to time receive from his superiors in the Service;
  - (b) obey and execute all orders and warrants lawfully issued;

122. Section 51(2) of the Police Act cushions a police officer who fails to comply with an unlawful order in the following manner: -

A police officer who fails to comply with an unlawful order shall not be subjected to disciplinary proceedings.

123. This court further takes judicial notice of the fact that even the Director of Public Prosecutions has of late been warning police officers from issuing and executing unlawful orders.

124. Sub-section 8 is, hence, a provision which can be freely used to issue unlawful orders and directions. The omission of the words ‘lawful orders and directions’ was deliberate with a view to create room for possible issuance of unlawful



orders and directions. The provision is, therefore, a threat not only to the Constitution, but also to the law. Since the provision is in contrast with the Constitution and the Police Act, then that provision must give way.

469. Back to the matter at hand, and in answer to the issue, this court finds and hold that the Chief Executive Officer of the Society and the Secretary of the Council can only execute lawful resolutions and instructions of the Society, the Council, the President and/or the Vice-President as the case may be.
470. The Secretary must, however, be careful in the manner in which he/she decides not to execute a resolution or directive on account of unconstitutionality or illegality. There are two reasons for such caution. The first reason is that the LSK Act and the LSK Regulations do not provide for such an eventuality and the second reason is that the Secretary is an employee of the Society and risks the wrath of the Society and the Council in the event the Society or the Council holds a contrary position to that held by the Secretary on the resolution or directive.
471. Keeping hope alive that the matter will at one point in the future be dealt with in legislation, suffice to say that for the time being whenever a Secretary finds himself or herself in a situation where he/she genuinely holds the view that a resolution or directive required to be executed is either unconstitutional or unlawful, such a Secretary must without delay, and with comity and decorum, and in the spirit of co-operation and consultation reach out to the President of the Society over the issue. If need be, the Secretary may do a written memorandum on the matter to the President.
472. What the Secretary cannot do is to publicly show his/her disapproval of the impugned resolution or directive. Firmly put, the Secretary cannot speak on behalf of the Society unless expressly so lawfully authorized.
473. With the above finding, the third issue is, hence, answered.
- (iv) The requisitioning, convening, holding and the resolutions of the General meetings of the LSK:
474. Part IV of the LSK Act and Part VIII of the Regulations provide for the General meetings of the Society.
475. The law recognises two types of general meetings. They are Ordinary General Meetings and Special General Meetings.
476. Since this matter is mainly on the legality of special general meetings, I will restrict the discussion to the requisitioning, holding and the resolutions of a special general meeting.
477. Section 31 of the LSK Act provides for the requisitioning for a special general meeting. It provides as follows: -
- (1) A special general meeting shall be convened at any time-
- (a) if requisitioned by at least five percent of the members from each branch; or
- (b) by the Council on its own motion after giving a thirty days' notice.
- (2) The notice requisitioning a special general meeting under subsection (1)(a) shall-
- (a) be in writing;



- (b) be signed by the members from all the branches as specified in subsection (1);
  - (c) specify the object of the proposed meeting;
  - (d) be submitted to the secretary to the Society.
- (3) The Council shall, within fourteen days of receiving a requisition submitted under sub section (2), convene a special general meeting of the Society.
- (4) If the Council fails, within fourteen days after the requisition, to convene a general meeting in accordance with the requisition, and specifying that it shall be held within thirty days, the members may themselves convene that general meeting to be held at any time within two months after such requisition.
478. Regulation 77 of the LSK Regulations requires that the notice requisitioning a special general meeting under section 31(2) of the LSK Act shall be in Form LSK-15 in the First Schedule and shall be submitted to the Secretary.
479. Once the special general meeting is properly requisitioned, the meeting must be convened as directed by the Council or by the members as the case may be.
480. Under regulation 75(1), (2) and (3) of the LSK Regulations, the Secretary must issue a Notice convening the meeting. The provision states as follows:
- (1) The secretary shall send notice of a general meeting to members of the Society at least 28 days before the date set for the meeting, setting out the date, time and venue of the meeting.
  - (2) A notice for a general meeting may be given to a member—
    - (a) by sending an electronic version through the e-mail address given by the member in the member’s application for practising certificate or the latest particulars given by the member;
    - (b) by sending it by post to the member;
    - (c) by delivering the notice to the member’s usual or last known business address; or
    - (d) by personal delivery.
  - (3) The secretary may publish in a newspaper of national circulation an advance notice of a scheduled general meeting.
481. Once the notice of the meeting is duly issued, the Secretary pursuant to regulation 75(4) of the LSK Regulations shall then issue the agenda of the meeting. The agenda shall be sent to the members not later than 14 days before scheduled meeting. The Secretary may, in consultation with the President, send any other information or document to members for the purpose of the meeting.
482. Regulation 75(6) of the LSK Regulations is to the effect that any accidental omission to give notice of a meeting to a member or the non-receipt of the notice by a member, or non-receipt of a matter under sub-regulation (4) or (5) shall not invalidate the proceedings or a resolution made at the general meeting.



483. The special general meeting shall then be held once it is properly requisitioned and convened that is by the issuance of the notice and the agenda.
484. The first business of the day at the special general meeting is to ascertain the presence of the presiding officer. Section 16(6) and (7) of the LSK Act and regulation 78 of the LSK Regulations provide that it is the President and in the absence the Vice-President of the Society who shall preside over the general meeting.
485. In the absence of both the President and the Vice-President, the Council shall nominate one of its members present to preside. If it occurs that no member of the Council is present or none of the members of the Council present are willing to preside over the meeting, the members of the Society present shall then nominate and appoint the senior most member to preside over the meeting.
486. In case the meeting will be presided over by any other person than the President, regulation 78(2) of the LSK Regulations gives that person the power or discretion conferred upon the President regarding the conduct of a general meeting.
487. Upon settlement of the presiding officer, the next issue is the ascertainment of the quorum of the meeting.
488. Section 16(5) of the LSK Act sets the quorum for a general meeting to be at least five percent of all the members of the Society.
489. In the event the presiding officer of the meeting ascertains that the meeting has the requisite quorum, then the officer steers the meeting in line with the rules of debate in the LSK Act and the LSK Regulations.
490. If the presiding officer ascertains that the requisite quorum for the meeting is not met, then the provisions of regulation 79(2) and (3) of the LSK Regulations shall come to play. The provisions state as follows: -
- (2) If within fifteen minutes from the time appointed for the meeting a quorum of members is not present, the meeting-
    - (a) if convened on the requisition of members, shall be dissolved; and
    - (b) in any other case, shall stand adjourned to the same day in the following week, at the same time and place.
  - (3) If at the adjourned meeting a quorum of members is not present within fifteen minutes from the time appointed for the meeting, the members then present shall constitute a quorum.
491. It is instructive to note that in a special general meeting, no other item except the ones in the agenda can be discussed. The rationale thereof is that special general meetings are requisitioned and convened for specific reasons and they are not open for any other business not in the agenda. In other words, the agenda of a special general meeting cannot be amended to include any new items.
492. The only instance where other items not in the agenda may be dealt with at a general meeting is during an ordinary general meeting. That is so provided for in regulation 76(1) of the LSK Regulations where a member may in appropriate instances move a Notice of Motion.
493. The deliberations of the agenda items eventually yield the resolutions of the meeting.



494. Discussions on the agenda items are usually conducted in a manner that any matter requiring a decision to be made will, in the first instance, be by show of hands. In the event a poll is to be made, regulations 82 and 83 of the LSK Regulations take effect unless such a demand for the poll is withdrawn. Voting will be undertaken thereby resulting to resolutions. In the course of voting, the threshold is usually simple majority unless where a special resolution is to be passed under section 33(2) of the LSK Act.
495. Every member present at a general meeting of the Society has only one vote except the President or the Presiding officer who will have both a deliberative and a casting vote.
496. The Secretary is, thereafter, required under the law to maintain a register of all resolutions made in general meetings and all minutes of a previous general meeting must be signed by the President in order to be conclusive and binding on members of the Society.
497. Once a resolution is made at a general meeting, regulation 36 of the LSK Regulations provide as follows on its alteration: -
- A resolution of the Society in a general meeting shall not be altered or rescinded within nine months after the passage of the resolution without a special resolution of the Society.
498. There is, however, a qualification to the above provision. For such a resolution to assume the intended indefeasible nature, the meeting that resulted to such a resolution must, in the first instance, have been requisitioned and convened within the law otherwise the resolution shall not be binding on the Society and/or its members.
499. The foregoing discussion on the manner in which special general meetings are to be requisitioned, convened, held and resolutions made shall guide the Court in dealing with the subsequent issues.
- (v) Whether the January SGM, the June SGM and the September SGM were validly requisitioned, convened, held and whether the resolutions thereof are valid:
500. In this issue, I will deal with the three special general meetings separately.
- The January SGM:
501. The January SGM was challenged in Nairobi High Court Constitutional Petition No E025 of 2021 *Adrian Kamotho v LSK & 12 others* case (*supra*). Orders staying the implementation of the resolutions passed at that meriting were granted. Those dissatisfied with the orders appealed against them and the matter is pending before the Court of Appeal.
502. The January SGM is, hence, not subject of these petitions.

### **The June SGM:**

503. From the record, the June SGM was initially requisitioned by members of the Society. The meeting had been scheduled to be held on the 5<sup>th</sup> December, 2020. That is the meeting referred to as the December SGM in this matter.
504. Before the scheduled date, Judicial Review No E1146 of 2020 *R v Nelson Andayi Havi & others ex parte Gad Aguko* was filed.
505. On 3<sup>rd</sup> December, 2020, the High Court issued orders staying and suspending the holding of the special general meeting until the hearing and determination of the substantive judicial review application.
506. The matter was fully heard and judgment rendered on 7<sup>th</sup> May, 2021. The court gave the following final orders: -



- i. The *ex parte* applicant's Notice of Motion application dated 7th December, 2020 is incompetently filed before this court and is hereby struck out, and the dispute herein as regards the procedure for convening of the 3rd respondent's general meetings by the 1st respondent is referred to arbitration in accordance with the provisions of regulation 96 of the Law Society of Kenya (General) Regulations.
  - ii. The stay and suspension orders granted herein on 3rd December 2020 are hereby vacated.
  - iii. There shall be no order as to the costs of the Notice of Motion application dated 7th December, 2020.
507. The court made it clear that the procedure for convening the Society's special general meetings by the President be referred to arbitration in accordance with the provisions of regulation 96 of the LSK Regulations. The record has no evidence that the order of the court was either stayed or set aside.
508. The matter was, however, not referred to arbitration as ordered. Instead, some members of the Society issued a Notice reconvening the December SGM into the June SGM. The Notice was signed by 15 members including Akusala Borniface Apamo, the 1<sup>st</sup> petitioner in Petition No E260 of 2021.
509. The Notice partly stated as follows: -
- On 3<sup>rd</sup> December, 2020, Hon Lady Justice Pauline Nyamweya (as she then was) in HCJRe1146 OF 2020 *R V Nelson Andayi Havi & others Ex-parte Gad Aguko* issued stay orders suspending the holding of the Special General meeting until the hearing and determination of the substantive Judicial Review Application.
- In a judgment delivered on 7<sup>th</sup> May, 2021 the learned Judge struck out the JR Application as incompetent and vacated the stay orders of 3<sup>rd</sup> December, 2020. No appeal has been proffered so far by any of the parties in the matter.
- Therefore, pursuant to Section 32(4) of the *Law Society of Kenya Act*, No 21 of 2014, the Special General Meeting scheduled for 5<sup>th</sup> December, 2020 will now be held physically on 26<sup>th</sup> June, 2021 at Law Society of Kenya Offices, Gitanga Road at 11.00 am.
- Signed and Dated 14<sup>th</sup> June, 2021.
510. The June SGM was thereafter held on the basis of the above notice dated 14<sup>th</sup> June, 2021 and without the benefit of the arbitral process. It is clear that in issuing the Notice the members intentionally avoided to capture the part of the order of the court referring the matter to arbitration. There is no evidence that any attempts were made to initiate the arbitral proceedings as ordered or at all. Simply put, the orders of the court were outrightly ignored.
511. It is, therefore, the position that the June SGM was held in contravention of the order of the court made in Judicial Review No E1146 of 2020 *R v Nelson Andayi Havi & others exparte Gad Aguko*.
512. The rule of law is one of the national values and principles of governance in article 10(2)(a) of the Constitution. At its most basic level, the rule of law is the concept that both the Government and citizens know the law and obey it. It implies that every entity and person is subject to the law. In a wider perspective, the rule of law requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the



law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

513. Adherence to the rule of law is so fundamental in the administration of justice. It commands the proper functioning of the society and enhances order and certainty in the general affairs of a country. The converse leads to anarchy and lawlessness.

514. In *Teachers Service Commission v Kenya National Union of Teachers & 2 others* (2013) eKLR the court had the following to say on the rule of law in the context of contempt of court: -

38. The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with integrity of the Judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law.

515. On one hand, obedience of court orders is a way of upholding the rule of law. On the other hand, disobedience of court orders is an affront to articles 2(1), 3 and 10(2)(a) of the Constitution.

516. In this matter, apart from contravening articles 2(1), 3 and 10(2)(a) of the Constitution, the refusal to obey the order in Judicial Review No E1146 of 2020 *R v Nelson Andayi Havi & others ex parte Gad Aguko* to refer the matter to arbitration further contravened article 159(2)(c) of the Constitution. It, therefore, means that all actions taken on the basis of the said disobedience remain unconstitutional.

517. As the June SGM was convened in disobedience of the orders of the court then the meeting did not yield any lawful and/or binding resolutions or at all. It was a nullity.

518. A like position was reiterated by the Privy Court in Appeal No 67 of 1960 *Benjamin Leonard Macfoy v United Africa Company Ltd* where the court held as follows: -

.....If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, although it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.....

519. What perturbs this court more in this case is the fact that more than 15 members of the Society including Akusala Borniface, the 1<sup>st</sup> petitioner in Petition No E260 of 2021, decided to and deliberately ignored and disobeyed an order of this court and then rushed to the very court they had disobeyed for further judicial intervention.

520. This court takes note that the disobedience was by Advocates who are officers of this court. It is tantamount to a mockery of the legal profession when members 'preach water, but instead drink wine'. As officers of the court, Advocates are expected to be the first port of call in obeying court orders. If the very Advocates disobey orders of the court in matters which involve them, do they expect other people to obey any orders of the court in any other matter? I leave that question to the legal profession to ponder over it.

521. As the 26<sup>th</sup> President of the United States of America, one Theodore Roosevelt, once said: -

No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour.



522. In *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR the Court of Appeal stated as follows: -

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy. We think we have said enough to send this important message across.

523. Drawing from the foregoing, it is the finding and holding of this court that the June SGM was convened contrary to the orders of the court in Judicial Review No E1146 of 2020 *R v Nelson Andayi Havi & Others ex parte Gad Aguko* and that was in contravention of articles 2(1), 3, 10(2)(a) and 159(2)(c) of the Constitution and rule 3(6)(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

524. The result of holding such a meeting is that none of the 14 resolutions which resulted therefrom is lawful and binding resolutions of the Society or at all.

### **The September SGM:**

525. The September SGM was requisitioned by the Council. A communication was sent by an Acting Secretary/ Chief Executive Officer of the Society on 25<sup>th</sup> August, 2021 scheduling the meeting on 24<sup>th</sup> September, 2021.

526. By the time the said notice was issued, there was a deeply divided Council. Infact, they were two parallel Councils, so to say. There was the 'Council' which constituted the 8 members who had been removed from the Council at the June SGM *vide* resolution No 10 thereof. They were Bernhard Ng'etich, George Omwansa, Carolyne Mutheu, Aluso Ingati, Faith Odhiambo, Beth Michoma, Ndinda Kinyili and Riziki Emukhule. This group also included Mercy Kalondu Wambua who had been sent on compulsory leave *vide* resolution No 6 and under resolution No 7 a recruitment of the Secretary was to be undertaken within 45 days thereof.

527. The 'other Council' was constituted as a Caretaker Council under Resolution No 11 of the June SGM. It included the President, the Vice-President, Herine Akoth Kabita, Esther Ang'awa, Dr Maxwel Miyawa, Jane Odiya, George Kamau, Bonbegi Gesicho, Clarise Mmbone, Emmanuel Kyobika, Jamlick Muriithi and Levi Munyeri.

528. It is the Caretaker Council which requisitioned for and issued the notice for the September SGM. The other wing of the Council opposed the meeting as well as the petitioner in Petition No E379 of 2021.

529. Given that the Caretaker Council was a product of the impugned June SGM, being a fruit of a poisoned tree, suffice to say that no lawful resolutions could be made by the said Caretaker Council. Likewise, given that the President and the Vice-President of the Society were not part of the other wing of the Council, that wing of the Council could also not yield any lawful resolutions or at all.

530. The upshot is that there has been no functional Council of the Society since the 26<sup>th</sup> June, 2021 when the June SGM was held.

531. In the end, this court finds and hold that the requisitioning and convening of the September SGM was a nullity.



- (vi) Whether the 2<sup>nd</sup> to 13<sup>th</sup> respondents in Petition No E260 of 2021 have jointly and severally contravened the Constitution and as such they are unfit to hold office within the Society and any other public office:
532. The starting point in dealing with this issue is the reminder that Petition No E260 of 2021 was instituted by two petitioners one of whom is Akusala A Borniface who took part in disobeying the court order issued in Judicial Review No E1146 of 2020 *R v Nelson Andayi Havi & others ex parte Gad Aguko*.
533. The respective parties' positions in Petition No E260 of 2021 have already been comprehensively captured in this judgment. The petition is mainly centred in the manner in which the Secretariat of the Society has been unable to provide services to the members of the Society and the public at large as a result of the wrangles within the Council.
534. In the main, the petitioners argued that the members' rights under article 35 of the Constitution (right to information), the right to practise law is wrongly limited under article 24 of the Constitution, right to fair administrative actions under article 47 of the Constitution, rights of the Advocates to earn a living continue to be violated in contravention of socio-economic right, consumer rights under articles 43 and 46 of the Constitution respectively continue to be infringed.
535. It is further contended that the state of affairs of the Council is an affront to the rule of law, constitutionalism and the pursuit and defence of justice by citizens of Kenya, especially Advocates who are being legally recognized as essential service providers.
536. The petitioners further claimed violation of the right to equal protection of the law, the Advocates' right to dignity under article 28 of the Constitution and the right of association under article 36 of the Constitution and that the conduct of the respondents has resulted in violation of the rights of arrested persons and right to fair trial under article 49 and 50 of the Constitution respectively.
537. It is on the basis of the foregoing that the petitioners sought several declarations and orders including a declaration that the 2<sup>nd</sup> to 13<sup>th</sup> respondents have jointly and severally acted contrary to the Constitution and as such they are unfit to hold office within the Society and any public office.
538. Perhaps it is important to, in the first instance, deal with the submission that the totality of the actions of the respondents impugne the Advocates' right to practise law.
539. Is there a right to practise law in the 2010 Constitution? Before this court answers that question I will make reference to 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 where the court dealt with the question as to whether 'a right to choose' existed in our Constitution.
540. The court stated as follows: -

81. It is true that our Constitution's Bill of Rights has a general underlying value of freedom which is a right to be afforded an opportunity to choose from a range of options voluntarily. As the South African Constitutional Court has remarked of the similarly-structured South African Constitution, in MEC for Education: *Kwazulu-Natal & others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC)



A necessary element of freedom and of dignity of any individual is an “entitlement to respect for the unique set of ends that the individual pursues.”.... we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.

82. However, while our Constitution puts a premium on the value of freedom, it has not inscribed “liberty of contract” as a fundamental right in our Bill of Rights. Our Constitution protects and ring-fences a number of enumerated rights and freedoms. These are rights and freedoms respecting which each individual is guaranteed including the right to be afforded an opportunity to choose from a range of options. However, the ring-fenced enumerated rights and freedoms do not include the right to make certain economic choices which may trammel the State’s “Police” powers to direct health, security and economic activities.
541. A scrutiny of the Bill of Rights shows that the 2010 Constitution has not inscribed “the right to practise law” as a right or a fundamental freedom in our Bill of Rights. Therefore, whereas the actions complained of against the respondents may have affected the manner in which the Advocates practise law, it cannot be the position that an Advocate can contend that his/her right to practise law under the Bill of Rights has been or is threatened with infringement. As such, the petitioners cannot argue that the Advocates’ right to practise law has been limited in contravention of article 24 of the Constitution since no such right is part of the Bill of Rights.
542. Having said so, I will now look at what plunged the Council into its current state. As severally pleaded and submitted by the parties, what seems to have broken the Council’s back are the resolutions passed at the June SGM. In saying so, this court remains alive to the fact that even before the June SGM the Council still had some disagreements. However, the apex of the divergences arose pursuant to the resolutions passed at the June SGM.
543. As a result of the said resolutions, parallel Councils, so to say, emerged. Each ‘Council’ held meetings and passed resolutions. Further, the ‘Councils’ either effected their respective resolutions or variously attempted to do so. The result of the competing ‘Councils’ led to the current state of affairs of the Council contemplated under the LSK Act and the LSK Regulations.
544. The ‘two Councils’ did not, however, constitute themselves as such. The Caretaker Council was constituted at the June SGM by the members who attended. The other ‘Council’ was comprised of the members of the Council who had been removed from the Council at the June SGM, but the resolutions thereof stayed and suspended by the High Court.
545. For reasons given elsewhere above, none of the ‘Councils’ could lawfully operate as the Council of the LSK.
546. It is a fact that each of the ‘Council’ was supported and opposed by some members of the Society in some measure. Further, none of the members of the Society took the initiative of complying with the orders of the court by referring the dispute on the procedure for holding a general meeting for arbitration as ordered by the court. Infact, no such initiative was undertaken by any of the members or organs of the Society or at all.
547. The upshot is that there was some degree of indolence on the part of the general membership of the Society in dealing with the affairs of the Council and the Society at large. That was either by way of action or inaction. As such, it will be imprudent for this court to lay blame on the 2<sup>nd</sup> to 13<sup>th</sup> respondents who are only but a few of the members of the Society. At the risk of repetition, whereas



the 2<sup>nd</sup> to 13<sup>th</sup> respondents were at the governance seat of the Society, which is the Council, the current situation could have been mitigated had the general membership or the organs of the Society at least taken the liberty to initiate the arbitration processes or bring the inability thereof to the court for further intervention.

548. Given the myriad of actions and inactions on the part of the organs and the general membership of the Society, this court finds it a tall order to declare that the 2<sup>nd</sup> to 13<sup>th</sup> respondents singularly contravened the Constitution or that each or any of them is unfit to hold office within the Society and any other public office.

549. The issue is, hence, is hence, answered in the negative.

(vii) What remedies, if any, should issue?

550. There is no doubt that the prevailing state of the Council is pathetic. The Society has had no functional Council since June 2021. However, the competing ‘Councils’ have been in office. As said, they have been making resolutions and executing some of them.

551. This matter, therefore, calls upon this court to carefully consider what has transpired to the Society since the June SGM. It is possible that the ‘Councils’ even entered into contractual obligations with third parties which may be binding on the Society. It may also be the case that some of the resolutions made by the ‘Councils’ remain beneficial to the membership and the Society. Such are some of the considerations which the Council and the general meetings of the Society should take into account in their deliberations.

552. This court is, hence, called upon to consider appropriate remedies. Courts have severally rendered on the subject. The Court of Appeal in *Total Kenya Limited v Kenya Revenue Authority* (2013) eKLR held that even in instances where there are express provisions on specific reliefs a court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties. The High Court in *Simeon Kioko Kitbeka & 18 others v County Government of Machakos & 2 others* (2018) eKLR held that article 23 of the Constitution does not expressly bar the court from granting conservatory orders where a challenge is taken on the constitutionality of legislation.

553. In *Republic ex parte Chudasama v Chief Magistrate’s Court, Nairobi & another* Nairobi HCCC No 473 of 2006, [2008] 2 EA 311, Rawal, J (as she then was) stated that:

While protecting fundamental rights, the court has power to fashion new remedies as there is no limitation on what the court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. See *Gaily v Attorney-General* [2001] 2 RC 671; *Ramanoop v Attorney General* [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); *Wanjuguna v Republic* [2004] KLR 520...The court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court. See *The Judicial Review Handbook* (3<sup>rd</sup> Edn) by Michael Fordham at 361.



554. The Constitutional Court of South Africa in *Fose v Minister of Safety & Security* [1977] ZACC 6 emphasized the foregoing as follows: -

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.

555. Given that none of the twin ‘Councils’ assumed any legality, the composition of the Council must then revert back to how it was before the wrangles set in. Even by taking such a position, this court remains alive to the deeply-rooted divisions among the members of the Council currently lawfully in office.

556. It is, therefore, this court’s humble calling that the members of the Council should endeavour to work together for the remainder of its term more so for the benefit of the general membership, the Society and the public given the role played by the Society. This court firmly believes that there can be no differences which are irreconcilable even in any worst imagined scenario.

557. Members of the Council owe a fiduciary duty to the Society. The Council must stand up to that calling and demonstrate leadership. Good leadership demands servant leadership. The interests of the general membership, the Society and the public must supersede any individual interests of the Council members. The Law Society of Kenya is a key stakeholder in the justice chain in Kenya and it ought not remain in the state it is in even a day more.

558. It is my hope that the Council will demonstrate to Kenyans and the world over that it is a forerunner in promoting article 159(2)(c) of the Constitution. This is a defining moment for the members of Council to demonstrate that indeed they can be trusted with the affairs of the Society, and by large, those of the rest of the Kenyans.

559. What if the members of the Council choose not to heed to the court’s calling and continue to maintain their respective counter positions to the extent that the Council remains dysfunctional?

560. In the event such an unfortunate situation persists, still this court must endeavour to enable the Society move forward, at least for the remainder of the term of the Council. In that case, the Branches of the Society, being an organ of the Society, must come on board and take stewardship and governance of the Society. For clarity, that will be through the Branch Chairs Caucus.

561. If the affairs of the Council are taken over by the Branch Chairs Caucus, the Caucus shall forthwith convene meetings including general meeting or meetings, as the case may be, with a view of discussing the manner in which the mandate of the Council will be discharged for the remainder of the term of the Council. For avoidance of doubt, the Chairperson of the Caucus shall also preside over the general meetings and, while so doing, shall assume the powers of the President of the Society.

562. The Caucus shall while convening the general meetings adopt the procedure as provided for in the LSK Act and the LSK Regulations. Given the amount of time so far lost in the wrangles, the Caucus while convening the general meetings, and only for the remainder of the term of the current Council, may resolve to reduce the timelines provided for under the LSK Act and the LSK Regulations.

563. It remains the conviction of this court that the Council or Branch Chairs Caucus, as the case may be, will be able to resolve the impasse. If that does not happen, this court will consider the matter further.



564. In the end, this court finds that the Petitions have partly succeeded. As a result, the court makes the following findings: -

- (i) This court's jurisdiction to deal with the Petitions is not ousted by the doctrine of exhaustion on the basis of Regulations 95 and 96 of the LSK Regulations.
- (ii) Petition No. E379 of 2021 is not *res-judicata* Milimani High Court Judicial Review No E1146 of 2020.
- (iii) Petition No 22 of 2021 is not *sub-judice* High Court Petition No E260 of 2021.
- (iv) The Petitions herein are not proxy petitions.
- (v) The President is the Spokesperson of the Society.
- (vi) The Council of the LSK cannot be lawfully constituted in the absence of the President and the Vice-President of the Society.
- (vii) The main role of the Chief Executive Officer and the Secretary of the Society is to diligently execute all lawful resolutions and instructions of the Society, the Council and the President of the Society.
- (viii) The LSK Act and the LSK Regulations provide for the requisitioning, holding and the resolutions of the General meetings of the Society.
- (ix) The June SGM was convened and held in contravention of the orders of the court in Milimani High Court Judicial Review No E1146 of 2020 *R v Nelson Andayi Havi & others ex parte Gad Aguko*. The meeting contravened articles 2(1), 3, 10(2)(a) and 159(2)(c) of the Constitution.
- (x) All the resolutions made at the June SGM are invalid, null and void.
- (xi) The September SGM was not lawfully and properly requisitioned.
- (xii) The 2<sup>nd</sup> to 13<sup>th</sup> respondents in Petition No E260 of 2021 have not, whether jointly and/or severally, contravened the Constitution. As such, none of them is unfit to hold office within the Society and any other public office.
- (xiii) The Council of the Society is comprised of the President, the Vice-President, Herine Akoth Kabita, Esther Ang'awa Bernhard Ng'etich (The Treasurer), George Omwansa, Carolyne Mutheu, Aluso Ingati, Faith Odhiambo, Beth Michoma, Ndinda Kinyili and Riziki Emukhule.
- (xiv) Roseline Odede (Council Member representing members who are over 25 years' post-admission) resigned from the Council on 18<sup>th</sup> January, 2021.
- (xv) The Caretaker Council constituted vide resolution No 11 of the June SGM is an unknown organ or entity in the Society hence of no legal effect, null and void.
- (xvi) All the resolutions made and actions taken by both the Caretaker Council and the other parallel Council since the June SGM are illegal and have no legal effect. They are null and void.
- (xvii) The Caretaker Council and the other parallel Council shall forthwith desist from running the affairs, making any resolutions or actions or in any way representing or acting on behalf of the Council of the Society.
- (xviii) Mercy Kalondu Wambua is the Chief Executive Officer/Secretary of the Society.



## Disposition:

565. Flowing from the findings and holding the petitions herein are determined as follows: -

- (a) A declaration be and hereby issue that the President of, is the Spokesperson of the Law Society of Kenya.
- (b) A declaration be and hereby issue that the Council of the Law Society of Kenya cannot be lawfully constituted in the absence of the President and the Vice-President of the Society.
- (c) A declaration be and hereby issue that main role of the Chief Executive Officer and the Secretary of the Society is to diligently execute all lawful resolutions and instructions of the Society, Council and the President of the Law Society of Kenya.
- (d) A declaration be and hereby issue that the Special General Meeting of the Law Society of Kenya convened and held on the 26<sup>th</sup> June, 2021 was in contravention of the orders of the court in Milimani High Court Judicial Review No E1146 of 2020 *R v Nelson Andayi Havi & Others ex parte Gad Aguko*. The meeting contravened articles 2(1), 3, 10(2)(a) and 159(2)(c) of *the Constitution* and rule 3(6)(b) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. All the resolutions made at the said meeting are invalid, null and void. They are hereby quashed.
- (e) A declaration be and hereby issue that the Caretaker Council constituted *vide* Resolution No 11 of the Special General Meeting of the Law Society of Kenya convened and held on the 26<sup>th</sup> June, 2021 is an unknown organ or entity of the Law Society of Kenya hence of no legal effect, null and void. It is hereby quashed.
- (f) A declaration be and hereby issue that the Special General Meeting of the Law Society of Kenya which was scheduled for 24<sup>th</sup> September, 2021 was not lawfully and properly requisitioned. The Notice of the said meeting is hereby quashed.
- (g) A declaration be and hereby issue that the current membership of the Council of the Law Society of Kenya is comprised of the President, the Vice-President, Herine Akoth Kabita, Esther Ang'awa, Bernhard Ng'etich (The Treasurer), George Omwansa, Carolyne Mutheu, Aluso Ingati, Faith Odhiambo, Beth Michoma, Ndinda Kinyili and Riziki Emukhule.
- (h) A declaration be and hereby issue that the members of the Council comprising of the President, the Vice-President, Herine Akoth Kabita, Esther Ang'awa, Bernhard Ng'etich (The Treasurer), George Omwansa, Carolyne Mutheu, Aluso Ingati, Faith Odhiambo, Beth Michoma, Ndinda Kinyili and Riziki Emukhule have not, whether jointly and/or severally, contravened the Constitution. As such, they are fit to hold office within the Society and any other public office.



- (i) Mercy Kalondu Wambua is the Chief Executive Officer/Secretary of the Law Society of Kenya.
- (j) The Council of the Law Society of Kenya shall within 21 days hereof convene and hold its meeting, (whether an ordinary or an extra-ordinary meeting either in person and/or virtually), with a view of attending to the affairs of the Law Society of Kenya.
- (k) In the event the Council is unable to either convene or hold the meeting as ordered above, the Branch Chairs Caucus shall forthwith take charge of the role of the Council for the remainder of the term of the Council.
- (l) The Branch Chairs Caucus shall convene and hold meetings including general meetings in attending to the affairs of the Law Society of Kenya.
- (m) All resolutions and decisions which the Branch Chairs Caucus will make shall be subject to ratification by the general meetings of the Law Society of Kenya.
- (n) Once the Branch Chairs Caucus takes over the role of the Council aforesaid, none of the current members of the Council, including the Mercy Kalondu Wambua (the Secretary) shall in any manner whatsoever deal with any of the affairs of the Law Society of Kenya in their respective capacities as members of the Council and/or the Secretary, as the case may be. For avoidance of doubt, the Secretary shall nevertheless continue to be an employee of the Society.
- (o) Further, if the Branch Chairs Caucus takes over the role of the Council, the Chairperson thereof shall preside over all general meetings of the Society and shall exercise the powers of the President of the Law Society of Kenya including being the Spokesperson of the Society for the remainder of the term of the Council.
- (p) Each party shall bear its own costs.
- (q) Parties be at liberty to apply.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021.**

**A. C. MRIMA**

**JUDGE**

