



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 41 OF 2016

REPUBLIC.....APPLICANT

VERSUS

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

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....2ND RESPONDENT

EX PARTE FRANK OCHIENG WALUKWE

JUDGEMENT

1. Section 18 of the Law Society of Kenya Act, 2014 (the Act) provides for eligibility of election as member of the Council of the 1ST Respondent, the Law Society of Kenya (the Society) as follows:

“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 [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.”

2. The Society which is established by Section 3 of the Act is set to elect its Council members on 25th February, 2016. It has appointed the 2nd Respondent, the Independent Electoral and Boundaries Commission (IEBC) to conduct the elections on its behalf.

3. The ex-parte Applicant (the Applicant), Frank Ochieng' Walukwe being desirous of contesting as a member of the Council submitted his candidature to the Society by 20th November, 2015, the deadline for submission of nomination papers.

4. On 21st January, 2016 the Applicant received the Society's letter dated 19th December, 2015 stating as follows:

“Dear Sir,

RE: NOMINATION FOR LSK COUNCIL

We have noted that you were admitted to the bar on 23rd January 2014. Therefore as at the time of close of the nomination exercise you were not qualified to vie for the position of Council of the Law Society of Kenya in view of the provisions of Section 18(2)(b) of the Law Society of Kenya Act 2014.

We shall consult with the Independent Electoral and Boundaries Commission on your candidature whereafter a final decision shall be communicated.”

4. The letter is signed by the President of the Society.

5. The Applicant wrote back to the President on 26th January, 2016 confirming that he was indeed admitted to the bar on 23rd January, 2014. He, however, pointed out that since the elections were to be held on 25th February, 2016 he became eligible on 23rd January, 2016.

6. On 1st February, 2016 the President of the Society issued a notice to the membership of the Society thus:

“NOTICE-LSK ELECTION

TAKE NOTICE that all the candidates whose nomination papers were received at the Secretariat will have their names appear in the ballot paper apart from Walukwe Frank Ochieng, Advocate (whose candidature did not meet the statutory requirements).

Note further, that the candidates who had not provided the requisite documents were subsequently given an opportunity to comply.”

7. Through a letter dated 2nd February, 2016 the Applicant was informed that the election process starts from the nomination exercise. The letter was in response to the Applicant's letter dated 26th January, 2016.

8. The Applicant being dissatisfied with this state of affairs moved the Court on 3rd February, 2016 and obtained leave to commence these judicial review proceedings. Through the notice of motion application dated 4th February, 2016, the Applicant seeks orders as follows:

“a) AN ORDER OF CERTIORARI to remove to this Honourable Court to be quashed the decision of the Law Society of Kenya, the 1st Respondent herein, dated 1st February 2016 purporting to bar the Applicant herein from contesting for elections as a National Council Member of the 1st Respondent on grounds that he is not eligible.

b. **AN ORDER OF PROHIBITION prohibiting the Respondents herein by themselves, their agents/and or assigns acting jointly and/or severally from proceeding with the Law Society of Kenya's elections slated for the 25th day of February 2016 devoid of the Applicant's inclusion in the said ballot papers and/or elections.**

- c. **AN ORDER OF MANDAMUS compelling the Respondents to include the Applicants' name in the ballot papers purposefully printed for the Law Society of Kenya elections slated for the 25th day of February 2016.**
- d. **The costs of this application be provided for."**

9. From the papers filed in court, the Applicant starts his case by stating that the Secretary/Chief Executive Officer of the Society had through a notice dated the 24th November, 2015 issued a list of the candidates who had submitted their nomination papers for various posts in the Society. His name being on the list he immediately started campaigns for the post of Council member.

10. The Applicant averred that he had met the eligibility test set down by Section 18(2)(b) of the Act as he was admitted on 23rd January, 2014 and was thus qualified by 23rd January, 2016. The Applicant therefore holds the view that the Society's decision to disqualify him was *ultra vires* the Act.

11. The Applicant also deposed that the decision to exclude him from the elections was made by fellow contestants vying for the same seat and the likelihood of bias was there from the beginning. Further, that he was not given an opportunity to be heard. It is his case that the Society by giving him the green light to campaign for the post of Council member and then withdrawing the same less than three weeks before the elections without informing him intended to disparage his campaigns.

12. The Applicant averred that the action of the Society was discriminatory, as the other candidates who were not eligible were given a chance to comply as indicated in the notice of 1st February, 2016. His view is that the decision of the 1st Respondent was actuated by bias, malice and fear of his popularity among the young advocates.

13. The Applicant's disposition is that it was malicious of the Society to inform him of his ineligibility through the letter dated the 19th December, 2015 which he received a month later. It is therefore his case that the delay in communicating the decision had breached his right to fair administrative action which is protected by Article 47 of the Constitution.

14. The Applicant also averred that the Society's decision to consult the 2nd Respondent was unlawful as the 2nd Respondent did not have jurisdiction to engage in the activities of the Society.

15. According to the Applicant, Section 18(2)(b) is in any case unconstitutional as it discriminates on the ground of age which is contrary to Article 27 of the Constitution.

16. It is the Applicant's case that despite the express provisions of Section 41(h) of the Act, the Society had formulated the Electoral Code of Conduct, 2015 (the Code) which was used to determine the manner in which the impending elections were to be carried out thus thwarting his legitimate expectation to appear on the ballot paper.

17. The Society opposed the application through the replying affidavit sworn by its President, Erick Mutua on 9th February, 2016.

18. The President of the Society averred that his term together with that of other Council members is set to expire at the general meeting scheduled for 26th March, 2016 when newly elected officials are due to assume office. In that regard, the election process began on 21st September, 2015 when the Society issued notices to all its members, inviting applications for nominations from interested candidates. In the notice, the prerequisite qualifications for candidates were set out for various seats. One of the requirements as stipulated in Section 18(2) of the Act is that for one to be elected to the Council he/she must have had two years post admission experience.

19. The President deposed that the notice dated 21st September, 2015 was accompanied by

nomination forms for various seats which the candidates were required to complete and then submit for verification and processing. It was the President's averment that after the candidates had submitted their nomination forms, the Secretary of the Society had issued a notice dated 24th November, 2015 indicating that the forms would be verified.

20. It is the Society's position that the notice issued on 24th November, 2015 was not a shortlist of the cleared candidates and the Applicant cannot be heard to say that he had started his campaigns on the strength of that notice.

21. The President averred that the decision to consult the 2nd Respondent was aimed at ensuring fairness and neutrality in the electoral process. It was his disposition that since the Applicant was admitted as an advocate on 23rd January, 2014, he had not attained the mandatory two years post admission experience required by the law.

22. The President of the Society admitted that the letter dated 19th December, 2015 was indeed received by the Applicant on 21st January, 2016. It is the President's case that after consultations with the vice president, the Secretary and the 2nd Respondent it was decided that the election process began from the nomination exercise and the Applicant was promptly informed of this decision through a letter dated 2nd February, 2016.

23. The President denied the Applicant's claim that the information about the decision of his ineligibility to contest was first leaked to the media so as to disparage his campaigns. He averred that the Society does not run media accounts and it acted in good faith in order to uphold the rule of law.

24. The President termed the allegations of discrimination and bias as baseless and not supported by evidence. On the claim of breach of the Applicant's legitimate expectation, he stated that elections require strict observance of the laws and the laws cannot be trounced by legitimate expectation.

25. The President conceded that regulations governing the conduct of elections are yet to be made but stated that the Society is permitted to use the old regulations. He, however, averred that a code of conduct for elections is a prerequisite for any elections. Further, that the Society is enjoined to uphold the provisions of Chapter Six of the Constitution. Therefore according to the Society, the 2nd Respondent's involvement in the elections and the use of the Code are in conformity with the Constitution and the Act.

26. The IEBC opposed the application through grounds of opposition dated 10th February, 2016. According to the 2nd Respondent, the application lacks basis in law and is an abuse of the court process. Further, that it is wrongly joined to these proceedings and the orders sought cannot therefore issue.

27. I will start by briefly considering the law applicable to this matter. Section 18 of the Act cannot be read in isolation. It must be read together with Section 41(h) which provides that:

“The Council may, subject to the provisions of this Act and with the approval by a resolution of members, make regulations, which shall be binding on all members of the Society, prescribing any of the following matters-

(h) manner of election, removal and replacement of the president, the vice-president and the other members of the Council, and of representatives of the Society on the Disciplinary Committee;”

28. Although there is the Code under which the impending election will be conducted, the parties are agreed that the said Code has not be subjected to approval of the members so as to be treated as

the regulations contemplated by Section 43 (h) of the Act. In any case, it was conceded by the Applicant that the regulations to govern elections have not been prepared and tabled before the members for approval.

29. In the prevailing circumstances the court will have to fall back on the regulations made under the repealed Law Society of Kenya Act, Cap 18. This is allowed by Section 43(3) of the Act which states that:

“Any rule or regulation made, order or directive issued, notification given or any administrative act undertaken under the repealed Act, shall be deemed to have been made, issued given or undertaken under this Act and shall continue in force and have effect as if it had been so made, issued, given or undertaken under this Act.”

30. The applicable regulations are the Law Society of Kenya (General) Regulations, 1962 made pursuant to Section 27 of the repealed Law Society of Kenya Act, Cap 18. Part IV of those Regulations provides for Election to Council and Disciplinary Committee. A perusal of the said rules reveals that they were made for a situation where voting was done by post. They are therefore not helpful in the circumstances of this case where the voting is to be done at a polling station. The only conclusion therefore is that the impending election will be guided by the Code.

32. Looking at the Code, it is clear that nominations commence at the time the Society announces vacancies and invites nominations. The closing date presumably would be on the date the members are notified of the successfully nominated candidates. That is thirty one days prior to the voting date. In this case, notice informing members of the names of the nominees for the Council should have been issued on or before 24th January, 2016. This requirement was not complied with as the notice was issued on 1st February, 2016.

33. However, as earlier noted, the Code is not the regulations envisaged by Section 41(3) of the Act. That may explain why the notice of those who had been successfully nominated was issued on 1st February, 2016.

34. Counsel for the Applicant submitted that Section 18 of the Act should be read to mean that eligibility is as at the date of the elections. The respondents asserted that such an argument would result in absurdities as there would be no room for preparations for the elections. They submitted that an election is a process and not an event.

35. It is indeed a correct statement of the law that an election is a process and not an event. This legal truism was stated by the Supreme Court at paragraph 100 of its advisory opinion (**Advisory Opinion No. 2 of 2012**) in the case of **In The Matter of the Principle of Gender Representation in the National Assembly and Senate [2012] eKLR** as follows:

“It is clear to us, in unanimity, that there are potential disputes from Presidential elections *other than* those expressly mentioned in Article 140 of the Constitution. A Presidential election, much like other elected-assembly elections, is not lodged in a *single event*; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for “qualifications and disqualifications for election as President” – and this touches on the tasks of agencies such as *political parties* which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of *the Presidential election*.”

36. Eligibility, as correctly pointed out by counsel for the 2nd Respondent is at the time of nomination. But as was pointed by counsel for the Applicant, the timelines in respect of the presidential, parliamentary and county elections are either provided in the Constitution or electoral

laws. There is therefore need for caution in applying decisions arising from disputes in such elections to disputes concerning the elections of societies such as the Law Society of Kenya. The caution becomes pronounced when there are no regulations in place to guide the process leading to the elections.

37. One may take a dim view of the Applicant and wonder why he presented himself for nomination knowing well that he was not eligible as he had not been in practice for at least two years from the date of admission. As will shortly emerge this strategy was not the preserve of the Applicant alone. Other candidates submitted their nomination papers without meeting the requirements of Section 18(2) of the Act.

38. The Society's counsel urged this court to adopt the position that was adopted in **Constantine Mwikamba Mghenyi v Institute of Certified Accounts, Nairobi High Court Petition No. 225 of 2014**. In that case, the Petitioner's case was dismissed on the ground that the proposer was not a person of good standing having failed to pay her subscription on the due date. With respect to the Society's counsel, I must state that this matter is different from that case as in that case there were regulations in place. This court is confronted with a situation where elections are being held without any regulations in place.

39. In order to determine whether the Applicant was unfairly locked out of the contest, the Court will have to consider whether the Society's decision was *ultra vires*, unreasonable or made in breach of the rules of natural justice. These are the grounds for grant of judicial review orders—see **Council of Civil Service Union v Minister for the Civil Service [1985] AC 2**; and **Municipal Council of Mombasa v Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001; [2002] eKLR**.

40. The Applicant made a litany of allegations against the Society. He claimed that he was knocked out by a body that included three Council members who were going to face him at the ballot box had he been cleared. He did not provide evidence to show that his potential opponents were involved in the decision to bar him from contesting. In any case, the decision was based on a statutory provision.

41. Another allegation by the Applicant is that the decision to bar him was made by the 2nd Respondent which has no role to play in the affairs of the Society. He did not provide any evidence to support this assertion. The Society explained that the opinion of the 2nd Respondent was sought on the grounds that it is an expert on election matters. That the Applicant does not know the maker of the decision that torpedoed his leadership ambitions is demonstrated by the fact that on one hand he attributes his woes to members of the Council and on the other hand he states that the 2nd Respondent made the impugned decision.

42. In my view, this matter boils down to whether the Applicant was treated differently from the other candidates. In his further affidavit titled "supporting affidavit" sworn on 10th February, 2016, the Applicant averred that he was aware that a verification exercise was conducted by the Chief Executive Officer of the Society who concluded that some of the candidates who had submitted their nomination papers had not complied with provisions of the law and were thus not qualified to contest the elections slated for the 25th February, 2016. In support of this assertion, the Applicant exhibited a document marked "FOW 1". The said document which is undated discloses names of candidates for various positions. Ten candidates are indicated not to have complied with the requirements. The main reasons for non-compliance being failure to provide HELB clearance certificate and KRA tax compliance certificate.

43. Failure by a candidate to provide HELB clearance certificate and KRA tax compliance certificate would indeed raise questions as to whether such a candidate has complied with the requirements of Chapter Six of the Constitution. Non-compliance with Chapter Six of the Constitution is a ground for disqualification of a candidate under Section 18(2) of the Act.

However, the notice dated 1st February, 2016 indicated that all the candidates who had submitted their nomination papers had qualified except the Applicant. The notice also disclosed that some candidates who had initially been found not eligible to contest had been given an opportunity to submit the necessary documents.

44. The opportunity extended to these candidates could have only occurred between 24th November, 2015 when the list of the candidates who had submitted nomination papers was published and 1st February, 2016 when the notice, indicating that all candidates, apart from the Applicant, had been cleared to contest, was issued.

45. The date for verification of the nomination papers has not been disclosed by any of the parties. Verification could therefore have been done any time between 24th November, 2015 and 1st February, 2016. From 23rd January, 2016, the Applicant was eligible to contest and had he been treated like the other candidates he should have been allowed to contest. The other ten candidates should not have been allowed to contest had they been treated like the Applicant.

46. The President's averment that the decision to bar the Applicant was an act done in good faith in fidelity to the law suffers a massive blow when one considers that adherence to non-existent regulations was only applied in the Applicant's case. Double standards were employed in this matter. When a public authority decides to exercise discretion, the discretion must be exercised in the same manner to all those who are to benefit from such action. In this case, the Society exercised its discretion by opening the door for certain candidates to qualify. The same door was firmly shut in the case of the Applicant. This was unfair and the Applicant is correct when he says he was discriminated against.

47. As long as the ballot papers had not been printed, and there being no regulations governing the election process, the Society cannot be faulted for giving the other candidates an opportunity to comply. The only issue is that the same opportunity was not extended to the Applicant who became eligible one month to the election date.

48. This case is not about the popularity of the Applicant or otherwise. It is about the right to equal protection and equal benefit of the law – see Article 27(1) of the Constitution. The members of the Society must be given an opportunity to elect Council members from all those who are qualified to contest. The Applicant herein is qualified to contest the election slated for 25th February, 2016 and there is no law or regulation that bars him from doing so.

49. This application clearly points to the need for the Council to urgently make regulations under Section 43(h) of the Act. The Code governs behavior during elections and is necessary in ensuring the integrity of the elections but cannot take the place of regulations which are meant to establish the procedures governing the elections.

50. I have not considered the question as to whether Section 18(2) of the Act is unconstitutional as the Applicant did not pursue his argument that the said Section contravenes Article 27 of the Constitution.

51. The Applicant's case succeeds on the basis that there are no regulations in place governing the Society's elections and the Society cannot be allowed to claim that the election process commence with the nomination exercise. The verification and shortlisting of eligible candidates could only have occurred between 24th November, 2015 and 1st February, 2016. At the time of the expiry of this period, the Applicant was already eligible to contest for Council membership.

52. The application also succeeds in that the Applicant was treated differently from other candidates who had not met the eligibility criteria at the time of the lodging of the nomination papers. Again, the Society by allowing other candidates to rectify their papers on unknown dates between 24th November, 2015 and 1st February, 2016 cannot be allowed to claim that the election process

commenced at the time the candidates submitted their nomination papers.

53. Ordinarily, the appropriate order would have been to remit the matter to the Society for reconsideration of the decision in light of what I have already stated. However, owing to the short period between the time of the delivery of this judgment and the elections, and considering that the Applicant is indeed eligible to contest for the post of Council member of the Society, I issue orders as follows:

- a. The decision by the Society to bar the Applicant from contesting the election as a member of the Council of the Society is removed into this court and quashed;
- b. An order of mandamus is issued compelling respondents jointly and severally to include the name of the Applicant on the ballot papers to be printed for the post of Council members; and
- c. In light of the fact that the Applicant will remain a member of the Society, I direct each party to meet own costs of these proceedings.

Dated, signed and delivered at Nairobi this 16th day of Feb., 2016

W. KORIR,

JUDGE OF THE HIGH COURT