Republic v Law Society of Kenya & another; Irungu (Exparte Applicant); Wyne & 2 others (Interested Parties) (Judicial Review Application 028 of 2024) [2024] KEHC 1489 (KLR) (Judicial Review) (19 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1489 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION 028 OF 2024

JM CHIGITI, J

FEBRUARY 19, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

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

THE LAW SOCIETY OF KENYA ELECTIONS BOARD 2024 - 2026ELECTIONS BOARD 2024 – 2026 ..... 2ND RESPONDENT

AND

GATHII IRUNGU ..... EXPARTE APPLICANT

AND

MUTUMA KENNETH WYNE ..... INTERESTED PARTY

MWANYUMBA EDDAH MAJALA ..... INTERESTED PARTY

ODIYA JANE NYABIAGE ..... INTERESTED PARTY

JUDGMENT

1. Pursuant to orders of 7th February, 2024 and the same reviewed on 9th February, 2024 this court granted leave to filing of the substantive Application. The Applicant by a Notice of Motion dated 8th February, 2024 – said to be brought under Order 53 Rule 1 (1) (2) and (4) of the Civil Procedure Rules – seeks for orders:

1. That the Honourable Court be and is hereby pleased to grant an order of certiorari in the High Court to remove and quash the 2nd Respondent's decision dated 2nd February, 2024 affirming its decision dated 16th January 2024 that the Ex – Parte Applicant was not validly nominated to contest for the position of Member of the Advocates Disciplinary Tribunal.

2. That the Honourable Court be and is hereby pleased to grant an order of certiorari in the High Court to remove and quash the 2nd Respondent's decision dated 18th January, 2024 declaring the Interested Parties as the elected members of the Advocates Disciplinary Tribunal.

3. That the Honourable Court be and is hereby pleased to grant an Order of prohibition to prohibit the 1st Respondent from acting on the decision of the 2nd Respondent dated 18th January, 2024 declaring the Interested Parties duly elected as members of the Advocates Disciplinary Tribunal and/or to Prohibit the Interested Parties from assuming office and if they have done so to forthwith cease discharging functions of the said office/position.

4. That the Honourable Court be and is hereby pleased to grant an order of mandamus to compel the Respondents to include the name of the Ex – Parte Applicant in the list of candidates validly nominated to contest for the position of member to the Advocates Disciplinary Tribunal and/or conduct the nomination process afresh.

5. Any other order that the Honourable Court may deem fit and expedient to grant.

Applicant's Case

2. The Application is based on the grounds in the Statutory Statement, and a Verifying Affidavit sworn by the Ex-parte Applicant – both dated 5th February, 2024.

3. It is the Applicant's case that the 2nd Respondent's decision of 2nd February, 2024 that affirmed their own decision of 16th January, 2024; and the 2nd Respondent's decision dated 18th January, 2024 are an illegality, unreasonable, irrational, ultra vires, and tainted with procedural impropriety.

4. For clarity, I shall now reproduce the grounds relied upon by the Applicant as captured in the Statutory Statement:

> " Illegality, unreasonableness and irrationality
>
> 1. The decision misinterpreted the provisions of Regulation 28 (3) of the LSK Regulations 2020 which is couched in mandatory terms, employing the use of the word shall and requiring the notice issued thereof to contain the requirements on eligibility to be elected to the vacant office.
>
> 2. The decision is unreasonable, irrational and illegal to the extent that it concluded that the notice dated 5th December 2024 and issued pursuant to Regulation 28 of the LSK Regulations 2020 is meant to only notify of vacancies and deal with general issues relating to eligibility when Regulation 28 (3) is clear that it MUST contain the requirements on eligibility to be elected to that the vacant office.
>
> 3. The decision is unreasonable, irrational and tainted with illegality to the extent that it declared the Ex – Parte Applicant unfit to contest when he had met all the requirements contained in the notice dated 5th December 2024 and issued pursuant to Regulation 28.

4. The decision is unreasonable, irrational and tainted with illegality to the extent that it concluded that the LSK Elections Board has jurisdiction to import Part iv of the LSK Regulations and apply them to the Position of the Member to the Advocates Disciplinary Tribunal which is supposed to be conducted under Part ix of the LSK Regulations 2020.

5. The decision is unreasonable, irrational and illegal to the extent that it found that the Board conducted its mandate as per the best democratic electoral processes.

6. The decisions is unreasonable and irrational to the extent that it ignored Precedent and the historical aspect of LSK elections 2022 and as well as the fact that the repealed LSK Regulations joined the elections of council and those of the Advocates Disciplinary Tribunal at the hip but the 2020 Regulations completely separated them.

Procedural Impropriety and ultra vires

7. The Elections Board wrongly imported the provisions of Part iv of the Regulations 2020 and applied them to the elections in respect of Advocates Disciplinary Tribunal. To that extent, the decision is tainted with procedural impropriety.

8. The 2nd Respondent purported to exercise delegated powers from the 1st Respondent to conduct the said election under part iv of the LSK Regulations 2020 when the said election is a preserve of Part ix of the Regulations including the notice declaring vacancies. Delegation can therefore only be exercised through parameters allowed in law.

9. The Elections Board failed to exercise best democratic process and purported to strictly interpret the provisions of regulations 27 (5) and 32 (1) to mean that scrutiny did not involve engaging candidates and seeking compliance from them, but rather to only look at what was submitted and disqualify those who had not met the criteria. The said decision is tainted by procedural impropriety given the different positions taken by the Notice of 5th December 2023, The LSK Regulations 2020, The LSK Code of Elections and Precedence in previous elections more so 2022 election in respect of the same position.

10. No party will suffer prejudice if the orders sought are granted since the term sought to be filled became vacant in March 2023, the Tribunal has stayed without the members for the entire period and therefore it would only be just and proper that the issues raised herein are handled first.

11. The LSK Regulations 2020 contemplate the election of the Member to the Advocates Disciplinary Tribunal to be conducted either at the same time with that of council or separately, therefore the scheduled elections can proceed without the impugned elections for member of the Advocates Disciplinary Tribunal which could be conducted on the floor of the 1st Respondents AGM.

12. Based on the foregoing, its only proper that this Honourable Court exercise its constitutional mandate and reviews the 2nd Respondents decision in the manner sought."

5. Additionally, the Applicant filed his Further Affidavit dated 12th February, 2024. The Applicant maintained that he complied with all the requirements as stipulated in the notice dated 5th December, 2023; and that the information requested in the documents necessitated that the Applicants be given time to respond to the queries.

6. The Applicant stated that his challenge is the manner in which the Respondent interpreted and applied the regulations; and not disputing the actual regulations. It is the Applicant's position that the nomination process was not conducted in line with the best electoral practices.

7. In response, the 1st Respondent, the 2nd Respondents, and the 3rd Interested Party filed their respective opposition to the Application.

1st Respondent's Case

8. The 1st Respondent filed a Replying Affidavit dated 11th February, 2024 and deponed by Florence Muturi, Secretary/CEO of the Law Society of Kenya. The deponent avers that upon scrutiny of the Applicant's nomination papers by the 2nd Respondent, the Applicant's nomination was found to be invalid for want of compliance with the relevant law - as the Applicant's nominators indicated in his nomination papers were: Kinyua Benson Nyaga of P.105/19901/22, and Marai Daniel Mwaura of P.105/16991/20.

9. Thereafter, that the Applicant lodged a complaint against his disqualification to participate in the impending elections to be elected in the desired office raising various issues in relation to the 2nd Respondent's decision.

10. The 1st Respondent's case is that there is no conflict between the notice dated 5th December, 2023 and the relevant provisions of the law – to wit Section 6 of the *Law Society of Kenya Act*, 2014; Regulation 27(5), 32(1), 44, and 87(7) of Law Society of Kenya (General) Regulations 2020; and Section 57 of the *Advocates Act*, Cap 16 Laws of Kenya – regarding application for nomination of candidates for elections for the position of the member of the Advocates Disciplinary Tribunal.

11. As such, to the 1st Respondent the Notice of Motion dated 8th February, 2024 is unfounded, bad in law in situ, abuse of the courts process, and threshold for grant of the prerogative orders sought are not met in the present matter. Consequently, that the Application should be dismissed with cost.

2nd Respondent's Case

12. In further opposition to the Application, the 2nd Respondent filed a Replying Affidavit dated 9th February, 2024 and sworn by Dr. Owiso Owiso, Secretary and Member of the Law Society of Kenya Elections Board (2024--2026).

13. It is contended that the 1st Respondent herein issued a notice dated 5th December 2023 declaring vacancy and inviting submissions of interested persons for the vacant position of members of the Advocates Disciplinary Tribunal.

14. That the said notice included all the requirements as specified in regulation 28(3) and was therefore sufficient, and other applicants for the position of member of the Disciplinary Tribunal complied with all the requirements.

15. They averred that on scrutinizing the nomination papers on 16th January, 2024 and in particular of the Applicant's herein, the 2nd Respondent determined that the Applicant's nominators Kinyua Benson Nyaga (P1.105/19901/22) and Marai Daniel Mwaura (P.105/16991/20) were not qualified to nominate the Applicant as they had not attained the requisite ten (10) years' post-admission experience for the position of member of Disciplinary Tribunal.

16. According to the 2nd Respondent, the process of scrutinizing nomination papers and determining applicants who qualify to contest is not envisioned as an interview or interrogation process where applicants and/or their nominators can be invited to explain themselves.

17. However, that unsuccessful applicants are allowed to file complaints with the 2nd Respondent within seven (7) days of the 2nd Respondent's determination following scrutiny of their nomination papers as submitted.

18. It is the 2nd Respondents assertions that the Applicant cannot disown subsidiary legislation prepared, drafted, and approved by members of the Society.

19. It is stated that after the 2nd Respondent's determination, the Applicant was afforded ample opportunity to be heard: he lodged a complaint on 23 January 2024; he was notified on 25th January, 2024 that a hearing had been scheduled for 31st January, 2024 and was invited to indicate whether he would make oral submissions; he indicated on 25th January, 2024 that he would make oral submissions; he was informed on 27th January, 2024 that if he wished to file further written submissions and additional documents, he should do so by 29th January, 2024.

20. That on 27th January, 2024 the 2nd Respondent responded to his request for information; he filed written submissions on 30th January, 2024; he filed a notice of appointment of advocates on 31st January, 2024; he was represented during the oral hearing on 31st January, 2024 by counsel; and further submitted a rejoinder on 31st January, 2024.

21. The 2nd Respondent maintains that the notice issued pursuant to regulation 28(1) included all the requirements as specified in regulation 28(3) and was therefore sufficient.

22. To that end, that the Application herein lacks merit and should therefore be dismissed.

3rd Interested Party's Case

23. Also, in opposing the Application, the 3rd Interested Party filed her Replying Affidavit dated 13th February, 2024. She averred that in submitting her nomination papers for the position at Advocates Disciplinary Tribunal she complied with Regulations 28(3 and 29(b) of the Law Society of Kenya (General) Regulations, 2020; and duly nominated.

24. It is contended that the Applicant having served at the Advocates Disciplinary Tribunal and being an Advocate of many years standing is deemed to be aware of the requirements of Regulation 29(b) of the Law Society of Kenya (General) Regulations, 2020.

25. As per the 3rd Interested Party, Part IX of the Law Society of Kenya (General) Regulations 2020 is for external bodies but not regarding Advocates Disciplinary Tribunal.

26. That the declaration of vacancy, nomination, and election to the Advocates Disciplinary Tribunal is governed by Part IV of the Law Society of Kenya (General) Regulations, 2020 whereof Regulation 28 and 29 fall.

Parties Submissions

27. In advancing their cases, parties filed their respective written submissions.

Applicant's Submissions

28. The Applicant filed his written submissions dated 12th February, 2024. In sum, it is his submissions that the grounds upon which he relies are exclusive within the Judicial Review purview; thus, this court is vested with jurisdiction to determine this matter. That the grounds relied on do not give rise to an appeal, but Judicial Review. Therefore, that Regulation 44(11) of the LSK Regulations does not limit aggrieved persons to only appeals which challenge the merits of the decisions, but that is only an option.

29. The notice dated 5th December, 2023 contained the first requirement drawn from Section 57 (1) (c) of the *Advocates Act*, then the rest of the requirements were drawn from Regulations 28 and 29 during scrutiny. That if the CEO of the 1st Respondent had wished to send an inconclusive notice, nothing would have been easier than to mention in the said notice as much and refer members to other eligibility requirements that will be applicable.

30. It is the Applicants position that such act [different notice requirements from the scrutiny criteria] is tainted with illegality, irrationality and unreasonableness given the provisions of Regulations 28 which requires the notice that is supposed to guide members must contain all requirements.

31. It is posited that if council was to therefore delegate [as per Section 6 of LSK Act and Regulation 16] its powers under part IX to the 2nd Respondent the function as they allegedly did, then the 2nd Respondent is only supposed to apply Regulation 87(6) and Section 57(1)(c) of the *Advocates Act* in scrutinizing Applicants then once it has a list of candidates who qualify, forward their names to the electoral body for purposes of Regulation 40 and 41.

32. Submit that under the 2020 Regulations, the elections for ADT and JSC were removed from Part IV and were placed in Part IX which essentially is meant for Constitutional, Statutory and Other Public Bodies.

33. Further, the CEO of the 1st Respondent submits that the notice dated 5th December 2023 was issued pursuant to Regulation 28. submit that, that notice then becomes illegal since it can only be issued under Part IX (Regulation 87 (1) of the Regulations and not Part IV. The said notice did not also mention Regulation 28 unlike other notices for Council Members elections.

34. The Electoral Code of conduct R 5 (3) are clear that qualifications needed for ADT is Section 57 1c and under Electoral Code of Conduct Rules 6 & 9 (2) only nominators who are entitled to vote are needed. Therefore, to the Applicant the 2nd Respondent acted ultra vires in as much as it purported to import the Requirements under Regulation 29 of the LSK Regulations and apply them to the elections of ADT as communicated in its decision dated 16th January 2024 communicated to the Applicant on 18th January 2024. Regulations 16, 27 and 87 do not bestow such powers upon the 2nd Respondent. The 2nd Respondent committed an error of law and therefore its decision is illegal.

35. It is maintained that the Complaint met the eligibility criteria as set out in the Notice dated 5th December 2023 sent by the LSK CEO declaring vacancies at the Advocates Disciplinary Tribunal.

36. The 2nd Respondent was therefore supposed to restrict itself to what was communicated to Members by the CEO of the 1st Respondent in scrutinizing the nominations papers. It would be extremely prejudicial to the membership for the Notice declaring vacancies to list requirements, candidates limit

themselves to such requirements, then upon scrutiny, the 2nd Respondent chooses to employ a new set of requirements for eligibility not contained in the notice.

37. To that end, the Applicant urges this court to allow the Application as sought.

1st Respondent's Submissions

38. The 1st Respondent filed its submissions dated 14th February, 2024. In the main, it submitted that they discharged their mandate under the relevant law relating to elections. That they sent out a notice dated 5th December, 2023 and the said notice listed all the requirements for the position of Member of Advocates Disciplinary Tribunal. Further, upon receipt of the nominations, they forwarded all the nomination papers in its custody to the 2nd Respondent for scrutiny and further processes as required by Regulations 27(5)(c) and 32(1) of the Law Society of Kenya (General) Regulations, 2020.

39. It is submitted that this Court should exercise restraint on interference with the 2nd Respondent's decision for compliance with the relevant law; as was observed in the case of Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR.

40. It is posited that the Respondents acted within their legal mandate and therefore no illegality ensues in this regard. That, the decision arrived at by the 2nd Respondent in declaring the Applicant's nomination as invalid was logical and within acceptable moral standards. Also, that the Applicant has not demonstrated to this Court any procedural impropriety in the present case. Therefore, that the Applicant has failed to establish any grounds for the court to grant the Judicial Review orders sought. Thus, that the Court ought to dismiss the instant Application.

2nd Respondent's Submissions

41. The 2nd Respondent filed its written submissions dated 11th February, 2024. It is submitted that the Applicant had the right to appeal against the impugned decision, but failed to do so; and thus the instant application is improper and should be struck out. That the Applicant, instead of appealing, has filed the judicial review application, and the court must restrict itself to the judicial review jurisdiction of the court and decline any invitation to discuss the merits of the decision.

42. That having opted to approach this Honourable Court by way of a judicial review application, the Applicant is restricted to asking the court to interrogate the procedure and not the merits of the decision. Relied on the Supreme Court in the case of Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment).

43. To the 2nd Respondent, the Applicant has not demonstrated any procedural lapses or ultra vires action of the 2nd Respondent. To this extent, and to the extent that the Applicant is challenging the merits of the impugned decision through a judicial review, that this instant application must fail.

44. It is contended that on the contention that the decision is tainted with procedural impropriety for failure to be accorded a consultative hearing during the scrutiny exercise, the process of scrutinizing nomination papers and determining applicants who qualify to contest is not envisioned as an interview or interrogation process where applicants and/or their nominators can be invited to explain themselves therefore baseless and this argument should be disregarded by the Honourable Court. This was held in the case of Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR.

45. That Section 48 of the *Interpretation and General Provisions Act* provides that where a written law confers power upon a person to do or to enforce the doing of an act or thing, all powers shall be deemed to be also conferred as are necessary to enable the person to do or to enforce the doing of the act or thing.

46. The 2nd Respondent is empowered to scrutinize all nomination applications for the various election contestations. It is therefore deemed that it has all necessary powers that enable it to exercise these powers. These necessary powers include making considerations of qualification for nomination as provided under regulation 29 of the Regulations, and doing so is not illegal, illogical or irrational. It is simply an application of the law and an exercise of the 2nd Respondent's authority.

47. The provisions are clear that for an applicant to qualify for election as member of Disciplinary Tribunal, they must, inter alia, possess ten (10) years of experience in practice as an advocate. Regulation 29(b) imposes the said requirements on each of the two (2) nominators of the applicants. This provision is express, precise, and unambiguous, and they do not lend themselves to any alternative interpretation.

48. That according to the Applicant, inconsistencies in the notices and failure to specify the full requirements of the position are grounds that the court should consider in admitting his nomination as an applicant for the position of member of Disciplinary Tribunal. However, there are no inconsistencies whatsoever in the notice of 5th December 2023 and regulations 28(3)(d) and 29(b) of the Regulations.

49. The 2nd Respondent maintains that the notice is not a substitute for the substantive law, being *the Constitution* and the Regulations. The requirements to be validly nominated are posited in law, and a notice cannot override the law. Moreover, that a person is deemed to be conversant with the law, especially the Regulations which have been available on the 1st Respondent's website since 2020. Ignorance of the provision is not an excuse to ask for differential treatment.

50. That it was not the duty of the 2nd Respondent to inform the Applicant to comply with regulation 29 by ensuring his nominator has the relevant qualifications. The Regulations are public documents and are readily available at the 1st Respondent's website.

51. On the wording of the relevant provisions, the mere use of the phrase "shall" does not translate to mandatory provision. Henry N Gichuru v The Minister for Health the Kenyatta National Hospital Board [2002] eKLR.

52. Therefore, the use of the phrase "shall" under regulation 28 is directory as there is no consequence for non-compliance. The provision requires the notice to have qualification requirements, but does not invalidate a notice which does not contain such requirement. That This argument is supported by the provision of regulation 29 which then clearly states what qualification requirement a prospective candidate is to meet. The Applicant cannot purport to feign ignorance of the qualification requirement of regulation 29.

53. Also, that the Applicant appears to be raising other grounds to challenge the decision, which grounds are not contained in the Statutory Statement. This is improper and the court should disregard other ground not contained in the Statutory Statement, as was held in Republic v Kenya Bureau of Standards Ex-parte Powerex Lubricants Limited [2016] eKLR and Republic v National Environment Management Authority & 2 Others Ex Parte Greenhills Investments Limited & 2 Others [2006] eKLR.

54. Accordingly, that the 2nd Respondent has shown that the Applicant has failed to properly invoke the jurisdiction of the Honourable Court, and the Court cannot make a determination on the merits of

the impugned decision. That the 2nd Respondent has also demonstrated that the impugned decision was made within the powers donated by the law, which is the Regulations and there was no impropriety in the making of the decision. On the other hand, that the Applicant has failed to prove that the impugned decision is riddled with any illegality, irrationality, or impropriety. Therefore, that the instant application should be dismissed.

3rd Interested Party's Submissions

55. In her filed submissions dated 15th February, 2024 the 3rd Interested Party contended that the instant Application does not meet the requirements for grant of Judicial Review remedies sought; and that the said Application is incompetent and an abuse of the process of the court; thus, be dismissed with costs.

Analysis and determination:

56. Having considered the respective cases by the parties and the attendant rival submissions in support thereof, I have concluded that the following two issues commend themselves to this court's attention in order to dispose of this suit:

    1. Does this court have jurisdiction?

    2. Is the Applicant entitled to the orders sought?

Jurisdiction of the court:

57. Judicial review jurisdiction was discussed in the Ugandan case of Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300, that:

> "In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).
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> Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....
>
> Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E".
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> Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

58. This Court has the jurisdiction under Article 165(3)(5) of *the Constitution* to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Where it is brought to the attention of the Court that certain electoral processes are being undertaken which are not in accordance with *the Constitution* and the law this court is under a duty to intervene.

Article 259 of *the Constitution* provides as hereunder:

(1) This Constitution shall be interpreted in a manner that—

a. promotes its purposes, values and principles;

b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

c. permits the development of the law; and

d. contributes to good governance.

59. Every citizen has a right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors is entrenched in Article 38(2) of *the Constitution* which falls under the Chapter on the Bill of Rights. Article 20(3) obliges the Court in applying a provision of the Bill of Rights (including the right to free, fair and regular elections) to develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. In so doing the Court is under a Constitutional obligation pursuant to Article 20(4) of *the Constitution* to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom on one hand and the spirit, purport and objects of the Bill of Rights on the other.

60. In the case of Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others Petition No. 229 of 2012, Kenyans were very clear in their intentions when they entrenched Article 81 in *the Constitution*. In my view, they were singularly desirous of cleaning up our politics, governance and electoral structures by insisting on certain minimum values and principles to be met in constitutional, legal and policy framework and therefore intended that Article 81 be enforced in the spirit in which they included it in *the Constitution*. The people of Kenya did not intend that these provisions be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations but intended that they should have substantive bite and that they will be enforced and implemented. They desired these values and principles be put into practice. I associate myself with the views of Shields, J in Marete vs. Attorney General [1987] KLR 690 that *the Constitution* of this Republic is not a toothless bulldog nor is it a collection of pious platitudes or aspirations. It has teeth.

61. In Advisory Opinion No 2 of 2012 in the matter of the Gender Representation in the National Assembly and Senate [2012] eKLR The Supreme Court acknowledged that elections are not an event but a process: a continuum. The learned Judges, when considering the jurisdiction over presidential election disputes stated thus-

81. "Thus in determining the Petition the court is enjoined to consider the conduct of the elections in terms of the principles of *the Constitution* as to free and fair elections and whether the electoral laws were upheld and adhered to, and the integrity of the election maintained and ultimately the will of the people was expressed, that is, there was substantial compliance with the law by the Third and Second Respondents. The concept of free and fair elections is expressed not only on the voting day but throughout the election process from the registration of voters, to the nomination of candidates, casting of the ballot papers and ultimate declaration

of the winner. Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament."

62. I associate myself with the decision in Khelef Khalifa & 2 Others vs. IEBC [2017] eKLR where it stated as follows:

> " It is important to mention that the word "shall" is used in Section 4 (1), (2) and (4) the act. The word "shall" in those provisions appear to me to be commanding enough to be regarded as mandatory rather than directory. The words are clear, positive and unambiguous and dictate that literal interpretation be given to them. To hold otherwise would, in my view, be for this Court to perpetuate the mischief intended by the legislators to be prevented by the enactment of that section...Statutory bodies derive their authority or jurisdiction from a legal instrument establishing them, and may only do what the law authorizes them to so. This is known as the principle of legality, which requires that administrative authorities not only refrain from breaking the law, but that all their content comply with *the Constitution* and particularly the Bill of Rights. Their decisions must conform to *the Constitution*; legislation; and the common law."

63. The 1st Respondent herein, is a Statutory Body established under Section 3 of the *Law Society of Kenya Act*, 2014 whose membership reflects the highest standards of constitutionalism and integrity. The society is bound by *the Constitution*, the electoral procedures that are set out in *Law Society of Kenya Act*, 2014 and the Regulations thereto when it comes to the issue of the nomination of the candidates who will be elected to serve at the Advocates Disciplinary Tribunal inter alia.

64. In Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR, the Court of Appeal stated;

> "Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether the in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.....The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision".

65. This court is bound by this judgment and I will not carry out a merit analysis nor seat on appeal.

66. The court has looked at the 1st Respondent's notice dated 5th December 2023, as sent out to all the members of the 1st Respondent declaring the vacancy and a call of nomination for the position of Member of Advocates Disciplinary Tribunal of the 1st Respondent.

67. The notice sets out to the following as eligibility requirements for the Candidates who wished to apply to be elected to the respective office pursuant to Section 57 of the *Advocates Act*, Cap 16 Laws of Kenya.Must be an advocate of the High Court of Kenya of not less than ten (10) years standing.Each candidate must be nominated by two (2) nominators who are members of the Society with current practicing certificates.Not been convicted of any act of professional misconduct before the Advocates Disciplinary Tribunal.Every nomination paper must be signed by both nominators and refer to one (1) candidate only, whose consent must be given in writing.It is my conclusion that this created a legitimate expectation in the minds of the Applicant that this was all that was called of him. In so finding I am guided the case of Law Society of Kenya vs. Kenya Revenue Authority & Another (2017) eKLR the learned judge stated as follows:"In construing a statutory provision the first and the foremost

rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? The Courts are bound by the mandate of the Legislature and once it has expressed its intention in words which have a clear significance and meaning, the Court is precluded from speculating. If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature. Where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external aid is admissible to construe those words. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning that the external aid may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the words in question."

69. Where the words in a Statute in their plain and ordinary meaning are unambiguous, the Courts work in interpretation is done and the Court has no further role in the interpretation of a statute.

70. In the instant suit, the eligibility requirements as set out in the 1st Respondent's notice dated 5th December 2023, as disseminated to its members are very clear.

71. In the case of Combe vs. Combe 195 1 All England Law Reports 766 at 770 by Denning LJ where it states as follows:

> "the principle as I understand it is that where one party has by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but must accept legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration, but only by his word."

72. In Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited HCMisc. Civil Application No. 359 of 2012 it was held that:

> "On the issue of legitimate expectation, the Applicant submitted that it met all the pre-requisite conditions and obtained all the documents necessary for the importation of sugar. The Applicant argued that it had received an assurance that after meeting the necessary conditions its legitimate expectation would be protected and not breached. In reply the Respondent submitted that it did not make any representation to the Applicant that it would clear its imports without imposing conditions permitted in law or release them on terms which contravene customs law or practice.
>
> "According to Harry Woolf, Jeffrey Jowell and Andrew Le Sueur at page 609 of the 6th Edition of DE SMITH'S JUDICIAL REVIEW, 'Such an expectation arises where a decision maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken)'. It follows therefore that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner. For the promise to hold, the same must be made within the confines of law. A public body cannot make a promise which goes against the express letter of the law...

73. In R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237 at [19] as follows:

> "In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself to; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

74. According to De Smith, Woolf & Jowell,"Judicial Review of Administrative Action" 6th Edn. Sweet & Maxwell page 609:

> "A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

75. However it was held in South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18] that:

> "Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled."

76. The principle of legitimate expectation was also elaborated upon in the case of Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi [2007] eKLR where the Court held that:

> "...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

77. In Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] eKLR where it was held that:

> "...legitimate expectation, however strong it may be, cannot prevail against express provisions of *the Constitution*. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that

offends *the Constitution*, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise."

78. In other words, since the doctrine of legitimate expectation is based on considerations of fairness, even where benefit claimed is not procedural, it should not be invoked to confer an unmerited or improper benefit.

79. The doctrine of legitimate expectation has found its way in their *fair administrative action act* of Kenya. Section 7(1) of the act provides as follows;

> "Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to– (a) a court in accordance with section 8; or (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law."

80. Under Section 7(2) (m) A court or tribunal under subsection (1) may review an administrative action or decision, if the administrative action or decision violates the legitimate expectations of the person to whom it relates.

81. I have looked at the notice dated 5th February 2024 by the 1st Respondent and I am satisfied that the same created a legitimate expectation in the mind of the Applicant that he met all the eligibility requirements in relation to his nomination and that there were no other requirements other than the one expressly provided for in the said notice.

82. The legal consequences of the failure to include all the eligibility requirements in the notice dated 5th February 2024 by the 1st Respondent must not be visited upon the Applicant.

83. The introduction of any additional requirement outside the requirements expressed in the Notice amounts to an unfair roadblock in the nomination process which does not accord with fair Administrative Action right under Article 47(1) of *the Constitution* which guarantees that Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It is my finding that the impugned action amounts to procedural impropriety and an illegality which the judicial review court must interfere with.

84. This offends Article 27 (1) of *the Constitution* which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

85. There is an argument that the other candidates complied with the impugned requirements by the 3rd interested party. This cannot cure a glaring illegality or a procedural lapse in the nominations phase. Procedural impropriety presents one of the reasons why judicial review orders are issued by the court.

86. In the case of East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board and Another [2007] eKLR where the Court of Appeal set out principle of public interest:

> "We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable."

87. With respect to efficaciousness of the remedy in the exercise of discretion, it is not in doubt that the decision whether or not to grant judicial review reliefs is an exercise of discretion which must however be exercised judicially. As is stated in Halsbury's Laws of England 4th Edn. Vol. 1(1) para 12 page 270:

> "The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders." [Emphasis added]

88. Regulations 28(1) of The Law Society Of Kenya (general) Regulations, 2020 provides that at least three months before the 15th day of March in the year when election of the Council is scheduled to be held, the secretary shall issue notice of the vacancies in the Council— (a) to each member of the Society; or (b) by publishing the notice in a newspaper of national circulation. Notice of vacancies in the Council. (2) The notice shall invite interested qualified members to submit nomination papers for election to the relevant offices. (3) The notice shall be issued pursuant to this regulation and shall— (a) specify the office that is vacant on the given date; (b) contain the requirements on eligibility to be elected to the vacant office; (c) indicate the date and the manner by which the nomination paper must be submitted to the secretary; (d) require that nomination of a candidate to be by at least two practising members of the Society. (4) The notice may specify the date and time when elections are to be conducted. (5) The secretary shall, in addition to the requirements in sub regulation (1), upload the notice to the website of the Society in such manner as to be easily accessible to members.

89. According to Regulation 29, a member may be nominated as a candidate in an election under this Part only if that member— (a) is qualified to be elected to the relevant office as at the date set for close of nominations; (b) is nominated by two members of the Society who are qualified to be elected to the office to which the nomination relates; and (c) consents in writing to serve in the office to which the member is nominated.

90. The 3rd IP contends that the Applicant having served at the Advocates Disciplinary Tribunal and being an Advocate of many years standing is deemed to be aware of the requirements of Regulation 29(b) of the Law Society of Kenya (General) Regulations, 2020.

91. It is this courts position that all the eligibility requirements must be set out in the Notice so that there is an equal benefit of the law for all the candidates. This becomes more imperative if the non-compliance with a regulation is fatal like in this case.

92. With all due respect, to allow a democratic process like the one that is at the heart of this suit to be carried out on the basis of presumptions and beliefs that since the Applicant has served at the Advocates Disciplinary Tribunal and being an Advocate of many years standing he is deemed to be aware of Regulation 29 would amount to setting a dangerous sporous precedent.

93. Such a trajectory would offend the national values and principles of governance under Article 10 of *the Constitution*. Our democratic values and the rule of law will be lost if we allowed presumptions to creep into the nomination arena. The electoral process that is guided by the presumptions as invited by the 3rd interested party cannot be said to be free, fair or credible. How and who would measure such knowledge. All electoral processes including nomination of candidates for the position of member of the Advocates Disciplinary Tribunal must be clear to all the candidates.

94. The guiding law, rules regulations and Notices must be clearly set out in the Notice. The nomination process must not be predicated on conjecture.

95. The eligibility criteria or requirements must never shift nor change after the candidates have submitted their papers expressing interest in response to the Notice.

96. The Notice by the 1st Respondent expressly made reference to Section 57 (1)(c) of The *Advocates Act*, Regulation 31(1),87(7) of The Law Society of Kenya General Regulations 2020, The LSK Electoral Code of Conduct (Revised) 2019 alongside the eligibility requirements under Regulation (29) of The Law Society of Kenya General Regulations 2020.The intention and the objective behind the inclusion of the foregoing provision in the Notice cannot be gainsaid. The Respondents do not advance any plausible explanation as to why Regulation 29 of The Law Society of Kenya General Regulations 2020 was not included in the Notice. Regulation 29 B in the Notice which is a fundamental requirement going by the fact that it is the ground that led to the Applicants disqualification.

97. It becomes disturbing to note that the 2nd Respondent disqualified the Applicant from the contest using this Regulation 29 in the impugned decision which was not provided for in the Notice. This amounts to a fundamental procedural impropriety on the part of the Respondents which this court cannot countenance.

98. According to the 3rd Interested Party, Part IX of the Law Society of Kenya (General) Regulations 2020 is for external bodies but not regarding Advocates Disciplinary Tribunal.

99. According to Regulation 28 (3) of the LSK Regulations2020 the notice issued thereof must contain the requirements on eligibility to be elected to the vacant office. the adoption of the word "shall" as set out in Regulation 28 (3) of the LSK Regulations 2020 is clear that the notice MUST contain an exhaustive list of the requirements on eligibility of the nominators.

100. The impugned decision is unreasonable, irrational and tainted with illegality to the extent that it declared the Ex – Parte Applicant unfit to contest when he had met all the requirements contained in the notice dated 5th December 2024 and issued pursuant to Regulation 28.

101. The decision is unreasonable, irrational and tainted with illegality to the extent that it concluded that the LSK Elections Board has jurisdiction to import Part iv of the LSK Regulations and apply them to the Position of the Member to the Advocates Disciplinary Tribunal which is supposed to be conducted under Part ix of the LSK Regulations 2020.

Disposition:

102. The Applicant has proven that the 2nd Respondent's decision of 2nd February, 2024 that affirmed their own decision of 16th January, 2024; and the 2nd Respondent's decision dated 18th January, 2024 are an illegality, unreasonable, irrational, ultra vires, and tainted with procedural impropriety.

Order:

1. An order of certiorari is hereby issued to bring to the High Court to remove and quash the 2nd Respondent's decision dated 2nd February, 2024 affirming its decision dated 16th January 2024 that the Ex – Parte Applicant was not validly nominated to contest for the position of Member of the Advocates Disciplinary Tribunal.

2. Prayers 2 and 3 are declined.

3. An order of mandamus is hereby issued compelling the Respondents to include the name of the Ex – Parte Applicant in the list of candidates validly nominated to contest for the position of member to the Advocates Disciplinary Tribunal forthwith.

4. Costs to the Applicant.

It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2024.

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CHIGITI. J (SC)

JUDGE