



Wambui & another v Law Society of Kenya & 2 others (Civil Appeal E163 & 4 of 2024 (Consolidated)) [2024] KEHC 1565 (KLR) (Civ) (21 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1565 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E163 & 4 OF 2024 (CONSOLIDATED)
DAS MAJANJA, J
FEBRUARY 21, 2024**

BETWEEN

SHADRACK KINYANJUI WAMBUI APPELLANT

AND

LAW SOCIETY OF KENYA 1ST RESPONDENT

**LAW SOCIETY OF KENYA AD HOC ELECTIONS BOARD
2024 2ND RESPONDENT**

**AS CONSOLIDATED WITH
CIVIL APPEAL 4 OF 2024**

BETWEEN

MULINDI VICTOR KHAYESI APPELLANT

AND

LAW SOCIETY OF KENYA 1ST RESPONDENT

**LAW SOCIETY OF KENYA AD HOC ELECTIONS BOARD
2024 2ND RESPONDENT**

(Being appeals against the decisions of the Law Society of Kenya Elections Board 2024-2026 at Nairobi dated 1st February 2024 and 2nd February 2024 in complaints against the determination of the Board declaring the nomination of Shadrack Kinyanjui Wambui and Victor Khayesi Mulindi to contest for the positions of members of council of the Law Society of Kenya (Nairobi Representative) invalid)



JUDGMENT

Introduction and Background

1. The appeals subject of this judgment arise from decisions of the Law Society of Kenya Elections Board 2024-2026. As they raise similar issues, I have decided to consolidate them for convenience.
2. On 05.12.2023, the 1st Respondent (LSK) sent a notice of even date via email to its members declaring vacancies and calling for nominations for the positions of President, Vice President and Council Members of LSK for the years 2024 to 2026. The notice required Candidates offering themselves for elections to sign and return certain documents being LSK's Candidates' Declaration of Compliance Form in the Schedule to the LSK Electoral Code of Conduct ("the Code") together with the nomination papers.
3. On 10.01.2024 and 11.01.2024, the Appellants submitted their nomination papers and the executed Declaration of Compliance seeking to be elected to the Council for the positions of Nairobi Representatives in the 2024 LSK Council Elections. The 2nd Respondent ("the Board") claimed that upon scrutiny of the Appellants' nomination papers as by law required, it was discovered that their nominations were in contravention with section 17(2) and 18(2)(b) of the *Law Society of Kenya Act, 2014* ("the Act") as read with Regulation 29(b) of the Law Society of Kenya (General) Regulations 2020 ("the Regulations"). Consequently, through its Secretary, the Board sent letters, all dated 18.01.2024 via email to the Appellants communicating the decision that found the Appellants were not validly nominated to contest the positions of Nairobi Representative in the 2024 LSK Council Elections.
4. For Shadrack Kinyanjui Wambui (Shadrack), the Board observed that his nominator, Muniyithya Justus Maithya ordinarily practises in Mombasa as indicated in his most recent and relevant declaration made to LSK's portal. That section 17(2) of the Act provides that the Nairobi representatives shall be persons who ordinarily practise in Nairobi and that Regulation 29 provides that the two nominating members must be qualified to be elected to the office to which the nomination relates. Thus, the Board determined that since the said nominator Mr. Muniyithya ordinarily practises in Mombasa, he is not qualified to be elected to the position of Nairobi Representative as required by the aforesaid provisions of the Act and the Regulations.
5. As for Mulindi Victor Khayesi(Victor), the Board found that both his nominators had not practised for at least two years from the date of admission, contrary to section 18(2)(b) of the Act and Regulation 29(b) of the Regulations and as such, they were not qualified to be elected for the position of Nairobi Representative and therefore not qualified to nominate Victor for the same position.
6. The Appellants filed appeals seeking review of these decisions of the Board. According to Shadrack, the decision was made without regard to the Code and material facts which either looked at independently or together with the Code had the effect of rendering the decision unfair, unjust and unreasonable. He averred that the provisions of the Code were fundamental in the determination whether his nomination was valid. That Mr Muniyithya as a respected member of LSK and entitled to vote at the election under para. 9(2) and (3) of the Code was a qualified and competent nominator hence his nomination was valid. Shadrack stated that on 17.01.2024, before the decision of 18.01.2024, LSK's Secretary/CEO sent an email to members imploring them to change their polling centers thus prompting Mr. Muniyithya's decision to change his initial polling center from Mombasa to Nairobi. He claimed that the reason for Mr. Muniyithya's decision to change his polling center was informed by



his employment as a full time lecturer at the Kenya School of Law and also because he has his active practice at Agip House with the Nairobi CBD. Shadrack contended that, an honest assessment of the facts before the communication of the Board's decision demonstrates that Mr. Munyithya is an advocate who ordinarily practises in Nairobi to qualify him for election as a Nairobi Representative.

7. Shadrack further stated that on 18.01.2024, the Board released a list of validly nominated candidates for the 2024 LSK elections and further proceeded to officially commence the official campaigns in line with para. 15(3) of the Code. He urged that since the Board had been making reference to the Regulations together with the Code in appropriate cases for the effective management of the electoral process, it should not cherry pick provisions of the Regulations and the Code when there is a conflict between the two governing documents. He argued that any conflict between the two documents ought to be interpreted in his favor in order to give him the opportunity to contest the position of Nairobi Representative. He stated that had the LSK Secretary confirmed to him the position of him nominator when he submitted his nomination on 10.01.2024, he would have rectified the anomaly.
8. Shadrack urged the Board to review its decision invalidating his nomination and instead declare his nomination by Mr. Munyithya valid pursuant to para. 9 of the Code. In the alternative, he prayed that the Board afford him an opportunity to substitute his nominator with any other nominee in compliance with the Board's recommendation and in line with the decision in *Republic v Law Society of Kenya & another Ex parte Frank Ochieng Walukwe* [2016] eKLR.
9. On his part, Victor stated that the decision to invalidate his nomination was made without consideration of the Code and material facts which either looked at independently or together with the Code thus rendering the decision unfair, unjust, and unreasonable. That the reason provided for the invalidation of his nomination was abhorrent and repugnantly selective and that he was aware that there is a member if not members who currently serve in the Council having been nominated by advocates who had practiced for less than 2 years since their admission immediately preceding the 2022 LSK elections. Victor claimed that the previous decision or action to allow a candidate nominated by an advocate who had not practised for a period of two years has established a precedent that must be followed in similar future situations. That the Board was therefore expected to make decisions consistent with the established precedent.
10. Victor stated that under para. 9 of the Code, he was required to furnish two nominators who must be members of LSK and entitled to vote at the elections and that both his nominators are respected members of LSK with current active practicing Certificates hence his nomination was valid. He averred that it is evidently clear that the Board has been making reference to the Regulations together with the Code in appropriate cases for the effective management of the electoral process and that there is no doubt going by the provisions of the Code that all that is required from the nominator is that he or she must be qualified to vote in the elections. Victor further stated that he is also aware of the provisions of Regulations over this matter and it is in black and white that the two Regulations are in conflict because the same provide that the nominator must be also qualified to run for the position the nominee is nominated to run over and above the requirement of being just qualified to vote. That the Board only considered the provisions of the Regulations and ignored the provisions of the Code when at all times the LSK, in preparation for the nomination process has referred to and applied both documents. That turning a blind eye to the relevance of one of the documents at the nomination stage could only mean that the Regulations repealed the Code which is not the case.
11. Victor urged the Board to consider the Regulations as a whole as the election is a process he and the other candidates would be prejudiced by selective application of its provisions particularly where there is a conflict with the Code. That to the best of his knowledge, there is no clarification that has been made by the LSK over the ambiguity that has been created by the two Regulations and as



- such he urged the Board to apply the contra proferentem rule and revise the decision invalidating his nomination. Victor claimed that if the Secretary of LSK would have detected this anomaly at the time he was submitting his nomination papers, he would have had time to correct the alleged anomaly in accordance to Article 47 of *the Constitution* which provides for the right to fair administrative action.
12. Victor urged the Board to review its earlier decision and instead declare his nomination by his nominators valid pursuant to para. 9 of the Code. In the alternative, he prayed that the Board afford him an opportunity to substitute his nominators with any other nominee in compliance with the recommendation of the Board in line with the Article 47 of *the Constitution* and the decision in *R v Law Society of Kenya & another Ex parte Frank Ochieng Walukwe* (Supra).
 13. The Board rendered its decisions on 01.02.2024 and 02.02.2024 wherein it affirmed its earlier decisions declining the Appellants' nominations ("the Decisions"). In respect of Shadrack's complaint, the Board identified two issues for determination; whether he was validly nominated to contest the position of member of the LSK Council (2024-2026), Nairobi Representative and whether he was entitled to the reliefs sought. On his eligibility, the Board held that section 17(2)(e) of the Act as read together with Regulation 29(b) of the Regulations requires both the candidate for the position of Nairobi Representative and their nominators to be Advocates ordinarily practising in Nairobi. That to interpret the express and clear language of these provisions so as to approve a candidate for the position of Nairobi Representative whose nominator does not ordinarily practise in Nairobi would "amount to unduly straining the language of the of the provision" as the court warned in *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018]eKLR which would defeat the very purpose of the Regulations on effective and efficient management of the LSK electoral process.
 14. On the place where a person ordinarily practises, the Board noted that the word "ordinarily" means "customarily or principally or habitually or normally or usually" and that the requirement of section 17(2)(e) of the Act and Regulation 29 is not a technical issue of form and procedure but a substantive one that speaks to qualification and eligibility. That in determining the "ordinary place of practice" of members vying for positions in the Council that area specific including Nairobi, the Board relied on the declared place of work by the aspirants and their nominators to the LSK secretariat when renewing their Practising Certificates. The Board noted that Mr. Munyiithya's place of work as declared in his "Declaration to Accompany Application for Practising Certificate for the Year 2023" was in Mombasa and that this was also declared by him in Shadrack's nomination paper dated 10.01.2024. That even as at the close of the nomination period on 12.01.2024 and as at 16.01.2024 when the Board convened and scrutinised Shadrack's nomination papers, Mr. Munyiithya's place of practice was still Mombasa.
 15. Regarding Mr. Munyiithya's email of 17.01.2024, the Board noted that it was sent after the deadline for submitting nomination papers and that he expressed his desire to change his voting station from Mombasa to Nairobi for purposes of voting in 2024 elections and not a declaration of change of place of ordinary practice. The Board therefore maintained its earlier position that Mr. Munyiithya's ordinary place of practice was Mombasa and in light of section 17(2)(e) of the Act and Regulation 29, he was himself not qualified for the position of Nairobi Representative and consequently, could not nominate Shadrack. On alleged failure to notify Shadrack of eligibility requirements, the Board stated that *the Constitution*, the *Advocates Act*, the Act and Regulations are publicly available legal instruments of which Shadrack, as an advocate ought to have been aware and that the Board cannot be faulted for aspirants' failure to familiarize themselves with the legal framework governing the position for which they are applying, particularly in an open and democratic system where legislation is publicly and readily available.
 16. On Shadrack's contention that the LSK secretary to confirm his eligibility, the Board held that the Secretary confirmed the details when receiving Shadrack's nomination papers on 10.01.2024 and that



Shadrack met the qualification conditions under section 17 and 18(2) of the Act and Regulation 29(a) and that his two nominators were entitled to vote in the 2024 elections. That the LSK secretary is neither required under para. 9(3) of the Code or under any provision of any document to determine whether an aspirant is validly nominated and that she has no such authority. On the Code and its application, the Board held that the same primarily governs candidates' behaviour during the election process and does not enjoy similar force of law as the Act and Regulations and it cannot amend the express provisions of the substantive law. That the Regulations supersede the Code and that the former were approved and gazetted in 2020. The Board therefore concluded that that Shadrack was not entitled to any relief.

17. The Board raised five issues for determination in Victor's appeal; whether he was validly nominated to contest the position of member of the LSK Council (2024-2026), Nairobi Representative, whether the LSK Secretary/CEO failed to his eligibility, whether there is a conflict between the Regulations and the Code, whether the Board is bound by past decisions and whether the *contra proferentem* rule applies to his case.
18. The Board stated that for a candidate to qualify for election as a Nairobi Representative the in Council, he must, *inter alia*, have practised for at least two years from the date of admission. Similarly, his nominators must have practised for a period of not less than two years after admission. That this requirement of section 18(2)(b) of the Act and Regulation 29 is substantive and is neither a technical issue of form or procedure as it speaks to qualification and eligibility. That the foregoing provisions were precise, express and unambiguous and expressly stipulate that aspirants must be qualified for the positions that they are seeking and that persons nominating them must be qualified to hold the offices for which they are nominating the candidates.
19. As to whether the LSK Secretary failed to confirm Victor's eligibility, the Board stated that the LSK Secretary is not empowered by law to scrutinise an aspirant's nomination papers. That the LSK Secretary is only required under Regulation 31 to receive and register the aspirant's nomination papers and to confirm that the papers indicate the aspirant's name, office they are seeking and date and time of delivery. According to the Board, the LSK Secretary discharged this duty upon receipt of Victor's nomination papers on 10.01.2024 and both Victor and the receiving officer confirmed this by signing the register at 1253H pursuant to Regulation 31(4). That the role of scrutinising nomination papers and determining those who qualify and are validly nominated to contest is the function of the Board as provided under Regulation 32(1).
20. The Board also held there was no conflict between the Regulations and the Code. It held that the qualification and eligibility of candidates is governed by the Act and the Regulations and that the Regulations are adopted under section 41 of the Act to govern, *inter alia*, LSK elections. That these Regulations, being subsidiary legislation, enjoy the force of law and supersede any other instruments of a lesser status such as the Code. The Board observed that the Code primarily governs candidates' behaviour during the electoral process and does not enjoy similar force of law as the Act and the Regulations and cannot amend the express provisions of the substantive law.
21. On whether the Board was bound by past decisions, the Board emphasised that it is not bound by any omissions or shortcomings that may have arisen from previous elections. That if indeed it is the case that some unqualified nominator was able to successfully nominate a candidate in a previous election held under these Regulations, then the Board believes that if the full effect of these Regulations had been brought to the attention of the previous board, it is obvious that that board would have come to a different conclusion as to the validity of that aspirant's nomination. The Board asserted that it has a legal obligation to discharge its mandate in accordance with the applicable law.



22. The Board rejected the application of the contra proferentem rule in favour of Victor. It held that this rule only applies as against the drafter of the contract/law and in favour of a person relying on that law. In this regard, the Board observed that the Regulations were developed by the membership of LSK through the Council and approved by the membership at a Special General Meeting on 15.09.2018 pursuant to section 41 of the Act. The Board stated that Victor is a member of LSK and therefore, assuming for the sake of argument that any provision of the Regulations is ambiguous as Victor claimed, then members of LSK who are the makers/drafters of the Regulations cannot invoke that ambiguity as an argument in their favour. The Board upheld its previous determination that Victor was not validly nominated to contest for the position of Member of Council of LSK (2024-2026), Nairobi Representative.
23. The Decisions have precipitated the present appeals by the Appellants which appeals have been canvassed by way of oral and written submissions. Since they regurgitate the positions I have already summarised above, I will only make relevant references in my analysis and determination below.

Analysis and Determination

24. This court derives its appellate jurisdiction from Regulation 44(11) of the Regulations which empowers the High Court to entertain appeals from decisions of the Board. As the general rules regarding civil appeals apply to this case, it is the court's role then to re-evaluate the evidence on record and then determine whether the conclusions reached by the Board are to stand or are to be disturbed and give reasons explaining why it has arrived at a particular conclusion (see *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013]eKLR and *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR).
25. In his memorandum of appeal Shadrack raised eighteen issues which he condensed into six issues in his submissions as below and I endeavour to deal with each of them:
 1. When was the decision invalidating the nomination of the Appellant made?
 2. When did the nomination process close?
 3. Whether the LSK'S notice of 17th January 2024 inviting members to change polling stations had an effect on the nomination process.
 4. Whether the 2nd Respondents acted in violation of the Regulations and the Appellant's rights and fundamental freedoms.
 5. Whether Regulation 29 is contra statute and reasonable in the circumstances.
 6. Whether the Appellant was validly nominated as a candidate in the LSK elections.

When was the decision invalidating the nomination of Shadrack made?

26. Shadrack has submitted that the decision to disqualify him was made on 18.01.2024 and not 16.01.2024 as alleged by the Board. That even if it is to be assumed that the decision was made on 16.02.2024, then the Board violated Regulation 32(2) of the Regulations which demands that the LSK issue the notice for immediately for publication on the website of LSK, specifying the names of the candidates who had been validly nominated together with such other details and which the Board is yet to do to date.
27. The Board maintained that the determination was made on 16.01.2024 and that in any event, nothing turns on this as Shadrack had not complied with the law by the date of the deadline for submission of



nomination papers on the cut-off date being 12.01.2024. The Board also maintained that the Decision was made on 01.02.2024 and communicated to him on 02.02.2024 which was within the 14-day timeline provided in Regulation 44(6). That the Complaint by Shadrack to the Board was lodged through electronic mail on 19.01.2024 at 12:43 A.M hence the fourteen (14) days within which to render a decision pursuant to Regulation 44(6) of the Regulations lapsed at midnight on 02.02.2024 in line with section 57(a) of the *Interpretation and General Provisions Act*.

28. From the record, the decision by the Board informing Shadrack that he had not been validly nominated to the position of Nairobi Representative was communicated to him by email on 18.01.2024. The Board on its part, annexed an extract of minutes of a meeting of the Board held on 16.01.2024 where it was resolved therein that Shadrack was not validly nominated and therefore the Board declined to approve his nomination. Therefore, whereas the decision of the Board declining Shadrack's nomination was communicated to the Appellant on 18.01.2024, I find that the minutes of the Board annexed are conclusive proof that the said decision was made on 16.01.2024 and as such, I answer this issue that the decision invalidating the nomination of Shadrack was made on 16.01.2024.

When did the nomination process close?

29. Shadrack submitted that the nomination process closed on 18.01.2024 when members were notified of the successfully nominated candidates. The Respondents submitted that in LSK's notice dated 05.12.2023 candidates were duly notified to submit their nomination papers not later than 12.01.2024 at 5:00pm in conformity with Regulation 28(3)(c) and that this was the set date for close of the nomination process.
30. In support of his argument, Shadrack submitted that by applying the case of Nelson Andayi Havi v Law Society of Kenya (Supra), the Board observed that a plain reading constrained to the language of Regulation 29 as read together with 32(1) and (2) reveals that it is only upon a member being scrutinized and found to be legally sufficient that it may be said that such a candidate has been nominated. Thus, ipso facto, the nomination period terminates upon a finding that a person has been nominated or otherwise and that such was indeed the finding of the High Court in the case of Republic v Law Society of Kenya & another Ex parte Frank Ochieng Walukwe (Supra).
31. At the said Para. 17 of Shadrack's Decision, the Board noted as follows:

To vary the qualification and eligibility requirements for both the aspirant and their nominators as expressly stipulated in the relevant law would be ultra vires as the Board does not have the authority to do so. As the High Court warned in Nelson Andayi Havi v. Law Society of Kenya & 3 others(Havi), a body entrusted with applying the law is "constrained by the language used...[and] may not impose a meaning that the text is not reasonably capable of bearing"

32. Regulations 29, 32(1) and (2) provide as follows:

- 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.



32(1) An elections board shall, within 7 days after the deadline set for submitting nomination papers, scrutinise the nomination papers and determine the applicants who qualify to contest for various positions in the relevant election.

(2) The elections board shall immediately issue notice, for publication on the website of the Society, specifying the names of the candidates who have been validly nominated to various offices together with such other details as the board shall consider necessary.

33. Resolution of this issue turns on the interpretation of the Regulations more so the ones reproduced above. In *Nelson Andayi Havi v Law Society of Kenya (Supra)* the court stated as follows on interpretation of statutes and statutory instruments:

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? 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.

In interpreting the provisions of a statute the Court should apply the golden rule of construction. The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, e.g. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.

34. A plain reading and ordinary interpretation of the aforementioned Regulations indicate that there is in fact a date that is to be set for close of nominations and that there is a deadline set for submitting nomination papers. My interpretation of the 'set date for close of nominations' at Regulation 29(a) and 'deadline set for submitting nomination papers' at Regulation 32(1) is that they relate to the same date. I say so because the succeeding paragraphs of the Regulations talk of nothing else or more but scrutiny of what has been presented and publication of the findings in respect of the scrutiny. Prospective members seeking nomination cannot do anything after the deadline of submission of their nomination documents and the reason for this is not difficult to discern. This is obviously to allow the Board time, that is the 7 days, within which they can scrutinise the nomination papers and determine the applicants who qualify to contest for various positions in the relevant election. Allowing a different interpretation that the presentation of nomination papers can be done until the time when the Board can publish the names of the specific candidates who have been validly nominated will negate and undermine the scrutiny exercise and the Board would definitely have no time to conduct the said exercise.

35. Whereas Shadrack invited the court to consider the holding of the court in *Republic v Law Society of Kenya & another Ex parte Frank Ochieng Walukwe (Supra)* where the court indeed stated that nominations commence at the time LSK announces vacancies and invites nominations and that the closing date presumably would be on the date the members are notified of the successfully nominated candidates, I note that the court was making reference to the Electoral Code of Conduct, 2015 as regulations governing the conduct of elections were yet to be made at the time. It is obvious that the



former 2015 Code preceded the Regulations and as such, the manner in which nominations were conducted was different then than it is now with the Regulations. It is on this basis that the aforesaid decision can be distinguished. The question when the nominations close is now governed by the Regulations which set the date for submission of nomination papers and that this date was the date of close of nominations, after which the Board was required to scrutinize the papers presented within 7 days and immediately publish the findings of the scrutiny.

36. I therefore find and hold that the close of nominations which was also the deadline for presenting nomination papers was the date set by LSK in its notice of 05.12.2024 which was on 12.01.2024 at 5.00pm.

Whether the LSK'S notice of 17th January 2024 inviting members to change polling stations had an effect on the nomination process

37. Having come to the conclusion that the close of nominations was on 12.01.2024 when Shadrack was expected to have presented his nomination papers, I find that LSK'S notice of 17.01.2024 inviting members to change polling stations had no effect on the nomination process. The nominations closed on 12.01.2024 and that it was not open for any prospective nominee to submit any further papers/ documents after this date. A reading of the said notice of 17.01.2024 does not indicate or mention any changes to the nomination process like changing the date of submission of nomination papers, which buttresses the point that the said notice was not in respect and did not affect the nomination process.

Whether the 2nd Respondents acted in violation of the Regulations and Shadrack's rights and fundamental freedoms

38. Shadrack submitted that the nomination form circulated to members of LSK is obsolete and illegal and that the decision to disqualify him based on the nominator's information appearing on the nomination form had no legal basis. Moreover, he and his nominator were entitled to be given prior notice and to be heard before the adverse decision to invalidate the Appellant's nomination was made as required by Articles 47 and 50 of *the Constitution* as read together with section 4(3) of the Fair Administrative Actions Act 2015.
39. Shadrack submitted that had he been heard, or the Board taken into consideration the content of the nominator's email, it would have, most certainly, arrived at a different decision. That the Board relied on procedural technicalities that were unreasonable and irrelevant contrary to Article 159(2)(d) of *the Constitution* and that on 31.01.2024, the Board declined to notify him of the date and time the decision was to be made as required under Regulation 44(7) after the hearing. That as a result he was ambushed when the Decision dated 01.02.2024 was sent and received by him on 02.02.2024 at 22:47 hours.
40. Shadrack submitted that the nomination form was obsolete and illegal as Regulation 30 excludes the provision of details of a nominator in the nomination form while Regulation 28(3)(d) provides that LSK's notice to members shall, inter alia, require that nomination of a candidate to be by at least two practicing members of the Society. In sum, Shadrack stated that there was no regulation where the two nominators ought to be listed in the nomination form and that the schedule to the Code which provides a form for Declaration of compliance by candidates stipulates at rule 9(2) thereof that a candidate's nominators must be members of the society and entitled to vote at the election without any further qualification is appropriate.
41. It is true that Regulation 30 provides for the content of the nomination paper and that Regulation 28(3)(d) provides that the notice of vacancies to the LSK's council shall require that nomination of a candidate to be by at least two practising members of LSK. Going through the Notice of 05.12.2023, I



note that at Para. 3 thereof it states that “Each candidate must be nominated for one (1) position only by two (2) nominators who are members of the Society and qualified to be elected to the office to which nomination relates”. I find that this paragraph satisfies the requirement of Regulation 28(3) (d) and I cannot say that the Respondents were in violation of the same. Whereas Regulation 30 does not state that the content of the nomination paper shall include the names or details of the two nominators, this does not negate the requirement of the two nominators and their qualifications under Regulation 29(b) that they should, ‘.... qualified to be elected to the office to which the nomination relates’. There was also nothing that barred the Respondents from including the details of the nominators in the nomination papers and that the said details could either be part of the nomination paper or attached therein. Whichever the case, the details of the nominators had to have been indicated and submitted to the Respondents.

42. On Shadrack’s reliance of the Code as opposed to the Regulations, I accept the Board’s submission that as the Regulations came after the Code, the Regulations amend the Code to the extent of specifying the qualification requirements and that even if a conflict was said to exist, the doctrine of implied repeal would lead to the enforcement of the provisions of the Regulations. Thus, as between the Regulations and the Code, the Regulations would be applicable to the extent they modify the Code. In any event, I find that section 41(h) of the *Law Society of Kenya Act*, 2014 provides that it is the Regulations, which is binding on all members of LSK, and not the Code that prescribes the ‘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’. The Code is therefore inapplicable in prescribing the manner of the election and the nomination process in this case. If anything, it is a document that complements the Regulations as the Code primarily governs candidates’ behaviour during the electoral process.
43. Further, I do not agree that Shadrack’s right to a hearing and fair administrative action were violated by the Board. I accept the position taken by the Board that the Regulations only require nominees to be accorded a hearing after the verification and scrutiny exercise. It is only after the findings of the scrutiny have been communicated, that the applicant is allowed to challenge such a finding. Shadrack had the fullest opportunity to present his case before the Board. On his further contention that he was never notified of date the Decision would handed down as required under Regulation 44(7), Regulation 44(6) gives the Board a 14-day window from the date of lodging the complaint within which to make a decision on the complaint. Since Shadrack lodged his complaint on 19.01.2024, it was expected that a decision will be rendered latest by 02.02.2024, which is what happened in this case. He cannot therefore claim that he was ambushed by the Decision when it was expected that the same would be rendered latest by 02.02.2024. It is therefore my finding that Shadrack’s rights to a hearing and a fair administrative action were not violated by the Decision.

Whether Regulation 29 is contra statute and reasonable in the circumstances.

44. According to Shadrack Regulation 29(b) contradicts Regulation 28(3)(d) and that both of them are inconsistent with section 12(a) of the *Law Society of Kenya Act*. Regulation 29(b) provides that for one to be qualified for nomination, he or she must be nominated by at least two practising members of LSK who are qualified to be elected to the office to which the nomination relates whereas Regulation 28(3)(d) requires that nomination of a candidate to be by at least two practising members of LSK. I agree with the Board’s position that the entire Regulations must be read as a whole, and not piecemeal and disjunctively as advanced by Shadrack. A holistic reading of the two provisions indicate that an applicant must not only be nominated by at least two practising members of LSK but that the nominators must also be qualified to be elected to the office to which the nomination relates. I find



nothing inconsistent or contradictory with the aforementioned Regulations and if anything, they complement each other.

45. Section 12(a) of the Act provides that, ‘a paid up member with a practicing certificate shall have all rights of a member’. On whether this provision is inconsistent or contradictory to the Regulations above, my answer is in the negative. While every paid up member possess such and all rights of a member of LSK, I accept the Board’s position that the Regulations implement the Act by providing mechanisms for exercising such rights, including the right to vote and the manner of conducting nomination of candidates. As I have stated before, the Act provides that the Regulations are the ones that prescribe the manner of elections and that all members are bound by them. I therefore reject the argument that the Regulations are inconsistent with the Act as urged by Shadrack.

Whether Shadrack was validly nominated as a candidate in the LSK elections

46. It is common ground that Shadrack sought to be nominated to vie for the position of Nairobi Representative. Under section 17(2)(e) of the Act, the Nairobi Representative shall be a person who ordinarily practises in Nairobi. As per Regulation 29(b) as read with 28(3)(d), the persons who sought to nominate Shadrack must have been ordinarily practising in Nairobi. It is not in dispute that as at 10.01.2024 when Shadrack submitted his nomination papers and 12.01.2024 when the nomination closed, Mr Munyithya, one of his nominators, indicated that his place of practise was Mombasa and not Nairobi. He attempted to ‘rectify’ this on 17.01.2024 by stating that he had changed his voting station from Mombasa to Nairobi as per LSK’s notice of the same date.
47. I reject the argument by Shadrack that Mr Munyithya had switched his “ordinary place of practice” to Nairobi when he applied to have his voting center changed from Mombasa to Nairobi. I accept LSK’s submission that this change was in respect of the nominator’s voting centre as per the said Notice which was to facilitate the nominator’s convenience for purposes of voting but not change his designated principal place of practice to Nairobi. Indeed, as per Regulation 55(2), ‘Where a member owns or operates an office in different branches, the member may have membership in each of those branches, but for the purpose of participating in an election for a national office, that member is deemed to belong only to the branch which the member or in default the secretary has designated as the member’s principal place of practice.’ In the declarations accompanying the nominator’s applications for practising certificates for the year 2023 and 2024 that have been annexed by the Board, the nominator indicated that the contacts for his place of business was in Mombasa. I find that this was his ordinary place of practise and that the said switch of voting center of 17.01.2024 could not be construed to mean that the nominator changed his ordinary place of practise from Mombasa to Nairobi.
48. Therefore, since the nominator’s ordinary place of practise was Mombasa as at the date of close of nominations and the deadline for submitting the nomination papers was on 12.01.2024, I hold that Shadrack failed to comply with the mandatory requirements of law regarding nomination. His nominator was not qualified to contest the position Shadrack was contesting and that this disqualified him from participating in the upcoming elections as he was not validly nominated. I therefore hold that Shadrack was not validly nominated as a candidate in the upcoming LSK elections and I uphold the Board’s Decision.

Victor’s appeal

49. I now turn to determine Victor’s appeal which was initially filed as an application for Judicial Review but transferred to the Civil Division for hearing and determination. From his submissions, he identifies



two issues for determination; whether the Board erred in invalidating his nomination and whether LSK's failure to scrutinize his nomination papers during submission was in order and procedural.

Whether the Board erred in invalidating Victor's nomination

50. As stated in the introductory part, the reason why Victor's nomination was invalidated was because his two nominators had not been in practice for at least two years as stipulated by section 18(2)(b) of the Act which provides that, "A person is eligible for election as a member of the Council if the person - has been practise for at least two years, from the date of admission". The Board further made reference to Regulation 29 which as stated stipulates that a person must be nominated by members who are qualified to be elected to the office to which the nomination relates.
51. Victor submitted that the above provisions are contrary to Para. 9 of the Code whose only requirement for the nominators is that they must be members of LSK and entitled to vote in the upcoming election. I have already found that under the Act, it is the Regulations and not the Code that prescribe the manner of elections. The Code, only guides the candidates' behaviour during the electoral process but does not determine the parameters of their eligibility and qualifications. The Code is subsidiary and subservient to the Act and the Regulations and cannot override express provisions including the requirements for nominators to be able to nominate candidates. Victor's reliance on the Code, rather than the Act and Regulations in respect of his nominators' eligibility and qualifications is a misapprehension of the law. Since he does not deny that his nominators had not practised for at least two years from the date of admission, it follows that they were ineligible to contest the position of Nairobi Representative and as such, they could not nominate Victor for the same position. I therefore uphold the Board's decision.

Whether LSK's failure to scrutinize Victor's nomination papers during submission by him was in order and procedural.

52. Victor relies on Para. 9(3) of the Code which provides that, "The Secretary must confirm that the person nominated is entitled to be a candidate and that the nominators are entitled to vote in the election" to argue that the LSK Secretary ought to have reviewed his nomination papers and given him an opportunity to correct any errors. I once again restate it is the Act and the Regulations made thereunder and not the Code that prescribe the manner in which LSK's elections are carried out.
53. I agree with the Board's decision that the role of scrutinising nomination papers and determining those who qualify and are validly nominated to contest is the function of the Board as provided under Regulation 32(1). Scrutinizing is not the role of the LSK Secretary. Further, the exercise of scrutiny can only be done after the deadline set for submitting nomination papers and not during the submission as advanced by Victor. The Secretary's role under the Code was tied to determining Victor's entitlement to be a candidate and the nominators' entitlement to vote. This role was correctly discharged as it has not been disputed that Victor was entitled to be a candidate as the Nairobi Representative and the nominators were entitled to vote.
54. I therefore hold that the failure by the LSK Secretary to scrutinize Victor's nomination papers during submission by him was in order and procedural as this was not the role of that office. Scrutiny could only happen after and not during submission of the nomination papers and this could only be done by the Board.

Disposition

55. Both Appellants failed to comply with the Regulations governing LSK elections. They were not validly nominated as confirmed by the Board. The Appellants have not demonstrated any grounds for



interfering with the Board's decisions. The appeals lack merit and are dismissed. Each party shall bear their own costs.

DATED and DELIVERED at NAIROBI this 21st day of FEBRUARY 2024.

D. S. MAJANJA

JUDGE

