REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MACHAKOS

IN THE JUDICIAL REVIEW DIVISION

JR/ MISCELLANEOUS APPLICATION NO 3 OF 2021

IN THE MATTER OF: AN APPLICATION BY ALFONSE KILONZO MULI

FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2020, THE CIVIL PROCEDURE ACT,

THE FAIR ADMINISTRATIVE ACTION ACT, THE INDEPENDENT ECETORAL AND

BOUNDARIES COMMISSION ACT AND THE LAW SOCIETY OF KENYA ACT

IN THE MATTER OF: THE REPRESENTATIVE OF THE LAW SOCIETY OF KENYA

TO THE SELECTION PANEL FOR APPOINTMENT OF COMMISSIONERS OF THE

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

BETWEEN

REPUBLIC...APPLICANT

AND

PARLIAMENTARY SERVICE COMMISSION...............................1ST RESPONDENT

LAW SOCIETY OF KENYA...2ND RESPONDENT

MERCY KALONDU WAMBUA...3RD RESPONDENT

AND

MORRIS KIMULI..1ST INTERESTED PARTY

DOROTHY JEMATOR KEMENGICH................................2ND INTERESTED PARTY

JUDGEMENT

1. The subject of this Judgement is section 5 of the ***Independent Electoral and Boundaries Act***, titled Composition and appointment of the Commission. It states as follows:

> ***(1) The Commission shall consist of a chairperson and six other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act.***
>
> ***(2) The chairperson and members of the Commission shall be appointed in accordance with the procedure set out in the First***

Schedule.

(3) The process of replacement of a chairperson or a member of the Commission shall commence at least six months before the lapse of the term of the chairperson or member of the Commission.

(4) The procedure set out in the First Schedule shall apply, with the necessary modifications, whenever there is a vacancy in the Commission.

3. Paragraphs 1, 2A and 3 of the said First Schedule (hereinafter referred to as "the Schedule") provides that:

(1) At least six months before the lapse of the term of the chairperson or member of the Commission or within fourteen days of the declaration of a vacancy in the office of the chairperson or member of the Commission under the Constitution or this Act, the President shall appoint a selection panel consisting of seven persons for the purposes of appointment of the chairperson or member of the Commission.

(2) The selection panel shall consist of —

(a) two men and two women nominated by the Parliamentary Service Commission;

(b) one person nominated by the Law Society of Kenya; and

(c) two persons nominated by the Inter-religious Council of Kenya.

(2A) A person is qualified for appointment as a member of the selection panel if such person —

(a) is a citizen of Kenya;

(b) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution; and

(c) holds a degree from a university recognized in Kenya.

(3) The respective nominating bodies under subparagraph (2)(b) and (c) shall, within seven days of the declaration of a vacancy in the office of the chairperson or member of the Commission, submit the names of their nominees to the Parliamentary Service Commission for transmission to the President for appointment.

4. According to the ex parte applicant herein, an Advocate of the High Court of Kenya and a Member of the **Law Society of Kenya,** the 2nd Respondent herein (hereinafter referred to as "the LSK")**,** on 15th April, 2021, the LSK submitted his name to the 1st Respondent, the **Parliamentary Service Commission** (hereinafter referred to as "the PSC") for transmission to the President of the Republic of Kenya (hereinafter referred to as "the President") for appointment as a member of the ***Selection Panel for the appointment of Commissioners of the Independent Electoral and Boundaries Commission*** (hereinafter referred to as "the Selection Panel") .

5. However, on 21st April, 2021, the 3rd Respondent, the Secretary of the Law Society of Kenya, acting without any lawful authority wrote to the PSC submitting the name of the 2nd Interested Party for transmission to the President for appointment as a member of the Selection Panel. According to the ex parte applicant, the PSC has, despite lack of authority, constituted itself into an adjudicatory entity for determination for the nominee of the ***LSK*** to the Selection Panel and has disregarded communication from the LSK made on 22nd April, 2021 on the want of authority on the part of the 3rd Respondent to countermand the submission of the name of the 1st Interested Party by the LSK on 15th April, 2021 and the unsuitability of the 2nd Interested Party, and further purported to elect the 2nd Interested Party as the nominee of the LSK to the Selection Panel.

6. The ex parte applicant disclosed that it was reported on Citizen TV that the PSC had elected or chosen the 2nd Interested Party as the nominee of the LSK to the Selection Panel. According to the applicant**,** the 3rd Respondent's action of submitting the name of the 2nd Interested Party is *ultra vires* her powers under Section 26 of the ***Law Society of Kenya Act No 21 of 2014*** and the letter written by the 3rd Respondent on 21st April, 2021 and is therefore invalid and void *ab initio* as the 3rd Respondent does not have the power or authority to elect or choose for the **LSK** a representative to the ***Selection Panel*** and the action taken in that regard is not authorized by the ***Parliamentary Service Act No 22 of 2019*** or the ***Independent Electoral and Boundaries Commission Act No 9 of 2011***.

7. According to the applicant, the actions and decisions of the PSC and the 3rd Respondent are in excess of jurisdiction or power and were materially influenced by an error of law. Further the same were taken with an ulterior motive or purpose calculated to prejudice the legal rights of the ***LSK*** by fronting the 2nd Interested Party to the ***Selection Panel*** to pursue ulterior interests inconsistent with the functions and objects of the LSK. The said decisions and actions, it was contended, were taken in disregard of the law and violated the legitimate expectations of Members of the LSK and were taken in abuse of power for the following reasons:

i. The 2nd Interested Party is a judicial officer having been appointed as a member of the HIV and AIDS Tribunal on 23rd May, 2019 by the Attorney General through Gazette Notice No 4354. The 2nd Interested Party's position in the Judiciary precludes her from representing the LSK in the ***Selection Panel*** on account of the provisions of Articles 10 and Chapter Six of the Constitution of Kenya.

ii. The 2nd Interested Party is a judicial officer again having been appointed as a member of the Energy and Petroleum Tribunal on 3rd March, 2020 by the Cabinet Secretary for Energy through Gazette Notice No 5890. The 2nd Interested Party's position in the Judiciary is inconsistent with the representation of the ***LSK*** in the ***Selection Panel*** on account of the provisions of Articles 10 and Chapter Six of the Constitution of Kenya.

iii. The 2nd Interested Party is a member of the BBI Steering Committee, having been appointed as staff to the Committee which was constituted on 3rdJanuary, 2020 by the Head of the Public Service. The 2nd Interested Party is therefore an interested party in the selection process in view of her associations with the promoters of The Constitution of Kenya (Amendment) Bill, 2020: Jubilee and ODM Parties. The conflict of interest on her part would not permit the ***LSK*** to nominate her to the ***Selection Panel***.

iv. The 2nd Interested Party is a known member and official of the Jubilee Party. The Jubilee Party is well represented in the 1st Respondent which will also submit its own four nominees to the ***Selection Panel***. It cannot be lawful or proper for the Jubilee Party to be represented in the ***Selection Panel*** again, by a nominee unlawfully fronted through the 3rd Respondent.

v. The 2nd Interested Party not only acts for the Independent Electoral and Boundaries Commission but has dubious dealings with the Commission. The said dealings which raise serious questions of integrity and possible professional misconduct on the part of the 2nd Interested Party disentitling her from a serious enterprise of the kind intended in the ***Selection Panel*** are well documented in the Judgement made on 6th May, 2020 in **Dorothy Jemator Kimengech v David Mukii Meraka t/a Mereka & Company Advocates (2020) eKLR**.

8. It was disclosed that subsequent to the filing of this claim, the PSC submitted the name of the 2nd Interested Party to the President who has by gazette notice dated 26th April, 2021 appointed the said 2nd Interested Party as a member of the ***Selection Panel***.

9. Submitting on the issues of jurisdiction, *locus standi* and *sub judice*, the Applicant appreciated the fact that section 9 (2) of ***Fair Administrative Action Act*** bars the making of a claim for judicial review before exhaustion of an appellate procedure or alternative dispute resolution mechanism. He also appreciated that Regulations 96 and 97 of the ***LSK (General) Regulations, 2020*** (hereinafter referred to as "the Regulations") provide for negotiation, conciliation and mediation as well as arbitration as the forum for resolution of disputes between or amongst members of the ***LSK*** and relating to the mandate or management of the affairs of the ***LSK***.

10. The Applicant however contended that the nomination of the representative of the ***LSK*** to the Selection Panel is a dispute between the Ex-Parte Applicant and the PSC for the latter's decision to submit the name of the 2nd Interested Party to the President for appointment to the IEBC Selection Panel instead of the name of the 1st Interested Party. PSC not being a member of the ***LSK***, cannot be subjected to the dispute resolution mechanism under the aforestated ***Regulations*** hence the exhaustion of alternative dispute resolution mechanism or seeking exemption does not arise in this case.

11. It is further submitted that this is not a dispute between the applicant and another member of the ***LSK*** but is a dispute between him and the 3rd Respondent as an employee of the ***LSK*** in so far as the letter written by the former on 21st April, 2021 is concerned. There is a difference between the 3rd Respondent as a member of the ***LSK*** and her role as its employee which should not be lost. Similarly, the exhaustion of alternative dispute resolution mechanism or seeking exemption does not arise in this case.

12. As for *locus standi*, it was submitted that the Ex-Parte Applicant being a member of the ***LSK***, is interested and affected by the choice of the ***LSK***'s representative to the Selection Panel and would be aggrieved by any such decision if the same is not made in accordance with the law hence is perfectly entitled to bring this application pursuant to Section 3 (1) (c) of the ***Fair Administrative Action Act*** gives sufficient foundation for *locus standi* for the Ex-Parte Applicant. The applicant also relied on ***De Smith's Judicial Review, 7th Edition*** and cited was the case of **Republic vs. The Municipal Council of Mombasa & others, ex-parte Uniken Marketing Services Limited [2017] eKLR** .as well as the decision of the Court of Appeal arising from the said matter in **Nairobi Civil Appeal No 49 of 2007, Adopt-A-Light vs. The Municipal Council of Mombasa & 6 others.**

13. As regards the doctrine of *sub judice,* Section 6 of the ***Civil Procedure Act*** upon which it is founded disallows hearing of a claim whose subject matter is directly and substantially in issue in a previously instituted and pending claim between the same parties. The case relied upon to plead *sub judice* must have been filed earlier than the case sought to be stopped from proceeding. It was submitted that the application for leave in this matter was filed on 23rd April, 2021 and leave was granted on the same day. Thereafter the Notice of Motion was filed on 27th April, 2021 and this Court issued directions for the hearing of the Notice of Motion on 3rd May, 2021. Petition No E147 of 2021 **Sheila Mugo vs. LSK & others** on the other hand was filed on 26th April, 2021 while **Petition No E 151 of 2021 Charles Midenga v LSK & 2 others** was filed on 27th April, 2021. The Ex-Parte Applicant is not a party to those two cases and moreover, it was submitted, the order of *mandamus* to compel the submission of the name of the 1st Interested Party for appointment to the IEBC Selection Panel is only sought in this matter. This matter, it was submitted, is therefore not *sub judice.* This submission was based on the decision of the Court of Appeal in **Kenya Ports Authority vs. William Odhiambo Ramogi & 8 others [2019] eKLR**.

14. Based on the above submissions, the applicant contended that the challenges of jurisdiction, *locus standi* and *sub judice* raised by the 3rd Respondent in her Notice of Preliminary Objection dated 3rd May, 2021 are sufficiently disposed of.

15. As regards the question whether the 3rd Respondent has power to reverse the nomination of the 1st Interested Party to the IEBC Selection Panel and replace him with the 2nd Interested Party, it was submitted that the 1st Interested Party was nominated to the Selection Panel in terms of a letter dated 15th April, 2021 from the President of the ***LSK*** to the PSC. On 21st April, 2021 the 3rd Respondent forwarded the name of the 2nd Interested Party to the 1st Respondent for appointment to the same office. According to the Applicant from the tone of the letter by the 3rd Respondent, it is clear that the 3rd Respondent was aware of the nomination of the 1st Interested Party and her

communication sought to reverse that nomination.

16. The Applicant however doubted the 3rd Respondent's power to reverse a decision of the ***LSK*** communicated through its elected President and relied on Sections 26 and 27 of the ***Law Society of Kenya Act*** which provide the scope of the functions and duties of the Secretary of the ***LSK*** and submitted that there is no dispute that the President of the ***LSK*** is its official spokesperson.

17. According to the Applicant, the letter dated 21st April, 2021 purporting to nominate the 2nd Interested Party cannot be a communication of a decision of the ***LSK*** since the decisions of the ***LSK*** are evidenced in minutes or resolutions signed by its President according to Regulations 84 and 85 of the ***Regulations***. It was submitted that what the PSC has placed before the Court as evidence of the making of the decision she purports to have communicated as unsigned minutes of a meeting claimed to have been held on 26th April, 2021 to deliberate the appointment of the 2nd Interested Party and communicated by the 3rd Respondent to the PSC on 21st April, 2021. It is curious, according to the Applicant, how a communication made on 21st April, 2021 can be based upon a decision made five days later on 26th April, 2021.

18. It was submitted that the President of the ***LSK*** wrote to the PSC on 22nd April, 2021 and notified the latter of the want of authority on the part of the 3rd Respondent to submit the name of the 2nd Interested Party. The PSC was also notified of the factors otherwise disqualifying the 2nd Interested Party from nomination. In this regard the Applicant relied on ***Halsbury's Laws of England, 5th Edition Volume 61***, ***De Smith's Judicial Review, 7th Edition.***

19. The case of **Republic vs. Registration of Societies & 5 others ex-parte Uhuru Kenyatta & 6 others [2007] eKLR** was relied upon for the proposition that a secretary of a society and third party cannot take action to alter the will of the members of the society expressed through their elected leaders.

20. It was submitted based on the said decision that the 3rd Respondent's action and decision made on 21st April, 2021 to reverse the nomination of the 1st Interested Party to the IEBC Selection Panel on 15th April, 2021 and replace him with the 2nd Interested Party was illegal and invalid and cannot stand.

21. As regards the question whether the 1st Respondent has power to constitute itself an adjudicator for purposes of determining the representative of the PSC to the Selection Panel, it was submitted that the protest by the President of the ***LSK*** made on 21st April, 2021 on the 3rd Respondent's purported nomination of the 2nd Interested Party was ignored and the 2nd Interested Party gazetted as a member of the IEBC Selection Panel on 26th April, 2021. The coordinated actions and decisions of the 1st and 3rd Respondents, it was submitted, are *ultra vires,* are illegal and were made in excess and abuse of their powers. More importantly, the PSC had no power under the ***Independent Electoral and Boundaries Commission Act*** to choose for the ***LSK*** the Advocate to represent it in the IEBC Selection Panel and reliance was placed on **Republic vs. Registration of Societies & 5 Others ex-parte Uhuru Kenyatta & 6 others** (supra) and the decision of the Supreme Court in **George Mike Wanjohi v Steven Kariuki & 2 others [2014] eKLR** underscoring the respect for the will of the people expressed through elected leaders hence supports the case that the appointment of the 1st Interested Party could not be reversed by the 1st and 3rd Respondents who had no power to do so.

22. It was therefore submitted that the PSC had no power to constitute itself an adjudicator for purposes of determining the representative of the ***LSK*** to the Selection Panel hence the gazettement of the 2nd Interested Party on 26th April, 2021 was invalid and a nullity.

23. Regarding the question whether the decisions of the 1st and 3rd Respondents should be quashed and prohibited, and the 1st Respondent compelled to submit the name of the 1st Interested Party to the President for appointment, it was submitted that the actions and decisions of the 1st and 3rd Respondents evidenced in the 3rd Respondent's letter of 21st April, 2021 and the gazette notice dated 26th April, 2021 are liable to be quashed and further action pursuant thereto prohibited for the reasons illustrated above. The Applicant also submitted that even on merits, the 2nd Interested Party cannot represent the ***LSK*** in the IEBC Selection Panel which forms an additional ground for the grant of the orders sought in so far as her purported appointment is concerned and submitted that since the 2nd interested party is a State Officer, the law against a State officer holding more than one appointment is elaborately established in **Felix Kiprono Matagei vs. Attorney General & 3 others [2016] eKLR** and **Benson Riitho Mureithi vs. J. W. Wakhungu & 2 Others [2014] eKLR.**

24. As regards the prayer for mandamus, the Applicant cited ***Halsbury's Laws of England, 5th Edition Volume 61*** and ***De Smith's Judicial Review, 7th Edition*** and submitted that the nomination of the 1st Interested Party was communicated to the 1st Respondent on 15th April, 2021. A demand to forward the 1st Interested Party's name to the President for appointment was made on 21st April, 2021. The refusal by the PSC to act in accordance with the First Schedule of the ***Independent Electoral and Boundaries Commission Act*** as well as the demand of the ***LSK*** and transmit the name of the 1st Interested Party to the President for appointment is a failure to perform a statutory duty, a failure that can be remedied through a compulsive order of *mandamus.*

25. In support of the submissions, the Applicant cited **Republic vs. The Registrar of Societies ex-parte Francis Kirima M'ikinyua & 2 others [2014] eKLR**, **Republic vs. National Hospital Insurance Fund Board of Management & Another ex-parte Law Society of Kenya [2019] eKLR,** and **Kenya National Examination Council vs. Republic & 2 Others [2019] eKLR**.

26. It was submitted that the role of the ***LSK*** as entrenched in Section 4 of the ***Law Society of Kenya Act*** to assist the Government in matters relating to legislation and the administration of justice cannot be overemphasized. It is for that reason that the ***LSK*** is empowered through the ***Independent Electoral and Boundaries Commission Act*** to participate in the appointment of Commissioners of IEBC. This role risks being squandered if the appointment to the IEBC Selection Panel does not serve interests of the ***LSK*** and the public. According to the Applicant, the attempt to reverse the appointment of the 1st Interested Party to the IEBC Selection Panel was a coordinated effort between the 1st and 3rd Respondents, undertaken in blatant disregard of the law and intended to subvert the will of members of the ***LSK*** and the interest of the Kenyan public. Therefore, the Court has the power to remedy that transgression by issuing the three orders sought in the Notice of Motion

dated 27th April, 2021.

27. The ex parte applicant therefore seeks the following orders:

> **1. An order of *certiorari* be and is hereby issued to remove into the High Court and quash the letter dated 21st April, 2021 by the 3rd Respondent and addressed to the 1st Respondent nominating the 2nd Interested Party to the Selection Panel for the appointment of Commissioners of the Independent Electoral and Boundaries Commission.**
>
> **2. An order of *prohibition* be and is hereby issued restraining the 1st Respondent from submitting to the President of the Republic of Kenya the name of the 2nd Interested Party for appointment to the Selection Panel for the appointment of Commissioners of the Independent Electoral and Boundaries Commission.**
>
> **3. An order of *mandamus*be and is hereby issued directing the 1st Respondent to submit to the President of the Republic of Kenya the name of the 1st Interested Party for appointment to the Selection Panel for the appointment of Commissioners of the Independent Electoral and Boundaries Commission.**
>
> **4. The costs of this application be provided for.**

28. The application was supported by the **LSK**. In response, the LSK relied on its affidavit filed herein in response to the proceedings relating to its legal representation.

29. In the said affidavit, it was deposed that that the decision challenged by the Ex-Parte Applicant was made by the 3rd Respondent on 21st April, 2021 without the authority of the Law Society of Kenya. According to the deponent of the replying affidavit, **Mr Nelson Andayi Havi**, he was duly elected as President of the Law Society of Kenya on 27th February, 2020, assumed office pursuant to the statement of assumption dated 24th March, 2020 and took oath of office on 23rd July 2020 at the Annual General Meeting of the Law Society of Kenya. According to him, it was express from the statement of assumption to office that all communications of the Society would be made to the public and members in writing by himself or the Vice President in the event that he is incapacitated and/or by the CEO with his prior authority or that of the Vice President as the case may be.

30. According to the deponent, the affairs of the Law Society of Kenya are governed by the ***Law Society of Kenya Act No 21 of 2014***, ***The Law Society of Kenya (General) Regulations, 2020***, and the ***Council Charter – Revised 2018***. He set out the composition of the Council of the Society, the eligibility criteria for one to be elected as President or Vice President or as a member of the Council. He then averred that Section 22 of the ***Law Society of Kenya Act*** provides for *inter alia*, removal of the President from office by a General Meeting by a vote of at least two-thirds of all members present and eligible to vote, on the grounds, amongst others, of suspension or expulsion as provided for under the ***Law Society of Kenya Act.*** Any such suspension or expulsion warranting removal of the President under Section 22 is one contemplated under Section 13 of the ***Law Society of Kenya Act*** being suspension or expulsion as a Member of the Law Society of Kenya. On the other hand, the suspension and removal of a member of the Council is elaborately provided for in ***Regulation 22** of **The Law Society of Kenya (General) Regulations, 2020*** and commences with a recommendation of the Council to the General Meeting, which General Meeting considers the recommendation within 60 days of its making and makes a decision as it deems fit.

31. In his view, the deponent averred that his alleged suspension on 8th February, 2021 is void and null *ab initio* for the following reasons:

> a. There is no power under Section 22 of the ***Law Society of Kenya Act*** nor under Regulation 22 of the ***Law Society of Kenya (General) Regulations, 2020*** given to the Council of the Law Society of Kenya to suspend the President or the Vice President;
>
> b. The power of the Council to recommend suspension under ***Regulation 22** of **The Law Society of Kenya (General) Regulations, 2020*** is limited and relates to a member of the Council and not the President or the Vice President;
>
> c. There is no power to suspend the President or the Vice President from their offices either under the ***Law Society of Kenya Act*** or ***The Law Society of Kenya (General) Regulations, 2020***; and
>
> d. The President and the Vice President can only be removed from office and any such removal must be done by the General Meeting in the manner and on the grounds set out under Section 22 of the ***Law Society of Kenya Act***.

32. In view of the foregoing matters, it was averred the claim by the 3rd Respondent that the deponent was suspended and therefore, not authorised to act as President of the Law Society of Kenya is without any legal or factual basis.

33. It was further averred that **George Omwansa, Carolyne Mutheu, Beth Michoma, Aluso Ingati, Ndinda Kinyili, Bernhard Ng'etich, Riziki Emukule** and **Faith Odhiambo** do not have the power or authority of the Law Society of Kenya to instruct Ekusi Lore & Company Advocates to act for it in this matter and to authorise the 3rd Respondent to swear affidavits on behalf of the Law Society of Kenya for the reasons set out herein below:

> a. Section 17 (2) of the ***Law Society of Kenya Act*** provides that the Council of the Law Society of Kenya shall consist of the President, Vice President and eleven members of the Council. There can be no Council of the Society comprised only of members of the Council whatever their number, properly constituted and capable of making decisions on behalf of the Law Society of Kenya, without the President and the Vice President of the Law Society of Kenya;

b. Decisions of the Law Society of Kenya at the General Meeting or the Council are evidenced by minutes and resolutions signed by the President as provided for in Regulations 84 and 85 of ***The Law Society of Kenya (General) Regulations, 2020*;**

c. Meetings of the Council of the Law Society of Kenya are called by or on the instruction of the President under Regulations 18 of ***The Law Society of Kenya (General) Regulations, 2020,*** and **Clause 10.4** of the Charter;

d. In the absence of the President, the Vice President calls for and chairs meetings of the Council of the Law Society of Kenya in terms of Section 16 of the ***Law Society of Kenya Act*** and Clause 12.2 of the Charter; and

e. The President is the spokesperson of the Law Society of Kenya in all matters relating to the Law Society of Kenya and the only person authorised to communicate the position of the Law Society of Kenya in any matter as provided for in Clause 12.1.9 of the Charter.

34. It was disclosed that in the first meeting of the Council of the Law Society of Kenya upon the deponent's assumption to office held on 16th April, 2020, the Council of the Law Society of Kenya affirmed that it was the general practice governing the holding of meetings and also corporate governance to have agenda exercised through the Chairperson and therefore Council members wishing to have new agenda introduced in the agenda of a meeting should have the same done through the President and it was resolved that that position remains. By way of exemplification, it was deposed that the business of the Council of the Law Society of Kenya has been conducted in the manner referred to herein above and averred that between 19th October, 2020 and now, there has been an unlawful attempt orchestrated by the 3rd Respondent with the connivance of **George Omwansa, Carolyne Mutheu, Beth Michoma, Aluso Ingati, Ndinda Kinyili, Bernhard Ng'etich, Riziki Emukule** and **Faith Odhiambo** to create a parallel system of governance which he proceeded to enumerate.

35. According to the deponent, the invalid decision purporting to suspend him is inconsequential as he has continued to perform his role as President of the Law Society of Kenya. However, there is a concerted effort between the 3rd Respondent who submitted the name of the 2nd Interested Party to the 1st Respondent and **George Omwansa, Carolyne Mutheu, Beth Michoma, Aluso Ingati, Ndinda Kinyili, Bernhard Ng'etich, Riziki Emukule** and **Faith Odhiambo** to perpetuate the transgressions by themselves to defeat the interest of members of the Law Society of Kenya and defeat the ends of justice.

36. It further averred that the procedure for nomination of a representative of the Law Society of Kenya to any statutory body is set out in Section 25 of the ***Law Society of Kenya Act*** and elaborated in **Regulations 86, 87, 88** and **89** of **The Law Society of Kenya (General) Regulations, 2020 (LSK Regulations)**. According to the 2nd Respondent, the nomination is undertaken through an invitation to interested qualified members to apply under Regulation 87(1) of the LSK Regulations while Regulation 87(5) of the LSK Regulations enables the nomination of a representative without invitation in cases where the name of the nominee is required to be submitted within ten days or less or where the appointment is for a specific task to be performed within a period not exceeding three months.

37. It was disclosed that there have existed vacancies of four Commissioners of the Independent Electoral and Boundaries Commission since the resignation of **Roselyn Akombe** on 17th October, 2017, **Consolata Nkatha Maina**, **Margaret Mwachanya** and **Paul Kurgat** on 16th April, 2018. On 14th April, 2021 the President declared vacancies in the positions of four members of the Independent Electoral and Boundaries Commission and the name of the Advocate nominated by the Law Society of Kenya was required to be submitted by 20th April, 2021 being seven days from the declaration of the vacancies**.** In the circumstances, the invitation for expression of interest contemplated under Regulation 87(1) of the **LSK Regulations** was waived by operation of law.

38. According to the deponent, on 15th April, 2021, being satisfied of his qualification, the deponent nominated the 1st Interested Party to the ***Selection Panel*** and submitted his name to the PSC with an advance copy by email on 16th April, 2021 and the hard copy by hand delivery on the subsequent working day being 19th April, 2021. The letter duly stamped by the PSC and the 1st Interested Party. According to him, the nomination of the 1st Interested Party could not have been made in any other manner following the suspension by Members of the Law Society of eight Council Members and the resignation of one Council Member on 18th January, 2021, the ensuing litigation thereafter, and an invalid attempt by the eight suspended Council Members and the 3rd Respondent to suspend him as President of the Law Society of Kenya on 8th February, 2021 and to take unlawful decisions and hold them out as decisions of the Law Society of Kenya.

39. However, it was deposed, on 16th April, 2021, the 3rd Respondent acting on a frolic of her own issued notice inviting applications for the position to which the 1st Interested Party was nominated. The applications were to be received by 5.00pm on 20th April, 2021. On 20th April, 2021 at 1.40pm, **Bernhard Ng'etich**, who has hitherto purported to constitute himself the President of the Law Society of Kenya, wrote to the 3rd Respondent in a thread of emails relating to meetings called by the two for 15th and 20th April, 2021 inquiring thus: "Is there any communication from the PORK or IEBC?" It was explained that the acronym PORK connotes President of the Republic of Kenya. It was deposed that on 20th April, 2021 at 1.59pm, the 3rd Respondent forwarded to **Bernhard Ng'etich** a letter dated 16th April, 2021 from the PSC to the 3rd Respondent and received on 19th April, 2021 asking for the submission of a nominee of the Law Society of Kenya to the panel in which the 1st Interested Party was nominated on 15th April, 2021 by 4.30pm on 21st April, 2021. On 20th April, 2021 at 4.07pm, the 3rd Respondent called for a meeting to be held on 21st April, 2021 at 2.30pm to deliberate inter-alia the nomination of an Advocate to represent the Law Society of Kenya in the panel in which the 1st Interested Party was nominated on 15th April, 2021.

40. It was further disclosed that on 21st April, 2021 at 2.20pm, the 3rd Respondent emailed a list of names together with curriculum vitae of Advocates, including the 2nd Interested Party, who had responded to her notice of 16th April, 2021 and on 21st April, 2021 the deponent learnt from media reports that the 3rd Respondent had submitted the name of the 2nd Interested Party for appointment in the office in respect of which the 1st Interested Party was nominated on 15th April, 2021. It was averred that on 23rd April, 2021 the deponent notified the PSC that the 3rd Respondent had no power to countermand the nomination of the 1st Interested Party and replace it with that of the 2nd Interested Party and, further, that the 2nd Interested Party was disqualified for the reasons that: she is a member of the HIV and AIDS Tribunal; she is a

member of the Energy and Petroleum Tribunal; she is a member of the BBI Steering Committee; she is a member and official of the Jubilee Party; and she acts for the Independent Electoral and Boundaries Commission. According to the deponent, the entire process relating to the purported appointment of the 2nd Interested Party commencing with the notice inviting applications issued by the 3rd Respondent on 16th April, 2021 and terminating with the letter by the 3rd Respondent to the 1st Respondent dated 21st April, 2021 is invalid and illegal and the outcome thereof is not a decision of the Law Society of Kenya for the following reasons:

a. The 3rd Respondent is a contractual agent of the Law Society of Kenya who acts only on instructions of the Council of the Law Society of Kenya.

b. The functions and powers of the 3rd Respondent as set out in Section 26 of the ***Law Society of Kenya Act No 21 of 2014*** are day to day administration and management of the Secretariat and the affairs and functions of the Society as the Council shall determine;

c. The Council of the Law Society of Kenya is constituted of the President, the Vice President, and members of Council not exceeding eleven;

d. Agenda of Meetings of the Council are set by the President of the Law Society of Kenya. Meetings of the Council are called on the instructions of the President or in his absence the Vice President. The meetings so called are chaired by the President or in his absence the Vice President. Decisions of the Council are evidenced in minutes and resolutions signed by the President. The President is the spokesperson of the Society. This manner of conduct of meetings of the Council, decision-making and communication is in accordance with Section 17 (1) and (2) of the ***Law Society of Kenya Act***, ***Regulations 18(2)***, ***21(1), 84(4)*** and ***85(2)*** of the ***LSK Regulations*** as read together with Clauses 10.4, 12.1.9, and 12.2 of the ***Council Charter;*** and

e. The notice inviting applications, the email calling for a meeting to deliberate the purported nomination on 21st April, 2021 and the letter written on 21st April, 2021 purporting to nominate the 2nd Interested Party were all made by the 3rd Respondent on her own without the instructions of the President or the Vice President.

f. The 2nd Interested Party was not, in any event, eligible for the purported appointment for the following stated above.

41. According to the deponent, the 1st Respondent's role under the ***Independent Electoral and Boundaries Commission Act No 9 of 2011*** is to transmit the name of the Advocate nominated by the Law Society of Kenya to the President for gazettement. However, the PSC has arrogated to itself the role of deciding for the Law Society of Kenya the Advocate to represent it in the ***Selection Panel*** and has submitted the name of the 2nd Interested Party as a representative of the Law Society of Kenya to the President who has gazetted the 2nd Interested Party to represent the Law Society of Kenya.

42. Based on the foregoing, it was submitted that the actions and decisions impugned by the Ex-Parte Applicant are not undertaken or made by the Law Society of Kenya but by the 3rd Respondent and the PSC.

43. On behalf of the 2nd Respondent it was submitted that the entire process relating to the purported appointment of the 2nd Interested Party commencing with the notice inviting applications issued by the 3rd Respondent on 16th April, 2021 and terminating with the letter by the 3rd Respondent to the 1st Respondent dated 21st April, 2021 is invalid and illegal and the outcome thereof is not a decision of the Law Society of Kenya for four reasons. First, the 3rd Respondent is a contractual agent of the Law Society of Kenya who acts only on instructions of the Council of the Law Society of Kenya. The functions and powers of the 3rd Respondent as set out in Section 26 of the ***Law Society of Kenya Act*** No 21 of 2014 are day to day administration and management of the Secretariat and the affairs and functions of the Society as the Council shall determine. The 3rd Respondent serves as an agent of the Law Society of Kenya with the Council acting through the President as her principal and reliance was placed on ***Bowstead and Reynolds on Agency, 19th Edition***.

44. Secondly, the Council of the Law Society of Kenya is constituted of the President, the Vice President, and members of Council not exceeding eleven. The Council so constituted is the governing organ of the Law Society of Kenya. Agenda of Meetings of the Council are set by the President of the Law Society of Kenya. Meetings of the Council are called on the instructions of the President or, in his absence, the Vice President. The meetings so called are chaired by the President or in his absence the Vice President. Decisions of the Council are evidenced in minutes and resolutions signed by the President. The President is the spokesperson of the Society. This manner of conduct of meetings of the Council, decision-making and communication is in accordance with Section 17 (1) and (2) of the ***Law Society of Kenya Act***, Regulations 18(2), 21(1), 84(4) and 85(2) of the ***LSK Regulations*** as read together with Clauses 10.4, 12.1.9 and 12.2 of the Council Charter.

45. Thirdly, the notice inviting applications, the email calling for a meeting to deliberate the purported nomination on 21st April, 2021 and the letter written on 21st April, 2021 purporting to nominate the 2nd Interested Party were all made by the 3rd Respondent on her own without the instructions of the President or the Vice President. It does not surprise therefore, that the 3rd Respondent has not exhibited any resolution emanating from the meeting of 26th April, 2021. Instead, she has exhibited unsigned minutes of a meeting claimed to have been held on 26th April, 2021 and chaired by **Bernhard Ng'etich** who had no authority to call for the meeting, set an agenda in respect thereof and cannot sign the minutes. Worse still, the meeting is claimed to have been held after the communication of the purported appointment of the 2nd Interested Party. These cannot be legitimate minutes of the Council of the Law Society of Kenya. Nothing more demonstrates the invalidity and illegality of the process.

46. Fourth, the 2nd Interested Party was not, in any event, eligible for the purported appointment for various reasons. One, the 2nd Interested Party serves in the HIV and AIDS Tribunal and the Energy and Petroleum Tribunal as a representative of the Law Society of Kenya and is precluded by Regulation 88(2) (a) of the LSK Regulations from being nominated to any other office. In fact, the 2nd Interested Party is ex facie in violation of the said Regulation in respect to her membership on the Energy and Petroleum Tribunal. Two, the 2nd Interested Party as

an official of Jubilee Party, member of the BBI Steering Committee and an Advocate in the panel of lawyers for the Independent Electoral and Boundaries Commission is conflicted and cannot represent the interests and objects of the Law Society of Kenya. The 2nd Interested Party does not meet the requirements of leadership and integrity set out in Chapter Six of the Constitution of Kenya and which is a requirement under the First Schedule of the Independent Electoral and Boundaries Commission Act No 9 of 2011.

47. It was submitted that the 1st Respondent's role under the Independent ***Electoral and Boundaries Commission Act*** is to transmit the name of the Advocate nominated by the Law Society of Kenya to the President for gazettement. The 1st Respondent arrogated to itself the role of deciding for the Law Society of Kenya the Advocate to represent it in the *Selection Panel* and has submitted the name of the 2nd Interested Party as a representative of the Law Society of Kenya to the President who has gazetted the 2nd Interested Party to represent the Law Society of Kenya. It was submitted that the 2nd Interested Party cannot be an appointee of the Law Society of Kenya as the letter dated 21st April, 2021 in that regard is not an act or deed of the Law Society of Kenya: *non est factum****.***

48. In support of this position the LSK cited **Hardware & Ironmongery (K.) Ltd. v Attorney-General (1972) E.A 271** and **Republic v Law Society of Kenya Ex-Parte Nelson Havi & another (2018) eKLR.** and submitted that the actions and decisions impugned by the Ex-Parte Applicant were not undertaken or made by the Law Society of Kenya but by the 3rd Respondent and the PSC. The Advocate nominated to represent the Law Society of Kenya in the ***Selection Panel*** is the 1st Interested Party whose name the 1st Respondent has failed and/or refused to submit to the President of the Republic of Kenya for gazettement. It is imperative that the issue be determined by the Court and an appropriate order made to ensure that the Law Society of Kenya is represented in the Selection Panel.

49. The 1st interested party also supported the motion. According to him, when the President declared vacancies in the offices of Commissioner, The Independent Electoral and Boundaries Commission, he forwarded his professional profile, certificates and testimonials to the Law Society of Kenya through the President of the Law Society. He deposed that he received a call from the President of the Law Society who wanted to know whether he was "ready and willing to serve my society with integrity, firmness and diligence" as its representative on the panel constituted to select commissioners of the Independent Electoral and Boundaries Commission which he answered in the affirmative. Subsequently, he received a copy of a letter forwarded to Parliament by the President of the Law Society of Kenya, nominating him as the representative of the Law Society on the panel.

50. However, he subsequently I got to know that there was a second nomination from the Law Society of Kenya and also later learned that Parliament had decided not to forward his name to the President for appointment. According to him, in accordance with Article 47 of the Constitution, and the entire body of the ***Fair Administrative Actions Act, 2015,*** Parliament was duty bound to get in touch with him, and to give him reasons why they made the decision they did, yet no one got in touch with him and he only saw reports in the media indicating that Parliament had termed him a stranger. It was therefre his belief that that the decision of the PSC violated his right to fair administrative action guaranteed in Section 4 of the ***Fair Administrative Actions Act***.

51. In support of his position, the 1st interested party cited **Republic vs. Secretary of the Firearms Licensing Board & 2 others Ex -parte: Senator Johnson Muthama [2018] eKLR**, and **Mohammed Ali Baadi and Others vs. The Attorney General and 11 Others, (2018) eKLR.**

52. On its part the PSC's position was that pursuant to the provisions of paragraph 1(2) (b) of the First Schedule to the ***Independent Electoral and Boundaries Commission Act, 2011*** above, upon declaration of vacancies of members of the Independent Electoral and Boundaries Commission, the 1st Respondent informed the ***LSK*** through the 3rd Respondent to nominate one person to the Selection Panel for the appointment by the President to the Selection Panel for the recruitment of Commissioners of the Independent Electoral and Boundaries Commission. Regulation 1(3) of the First Schedule provided provides for seven days within which the nominating bodies are to nominate names of their representatives, forward the same to the 1st Respondent for onward transmission to the President for appointment.

53. Having received the names of the 1st and 2nd Interested Parties from the ***LSK***, one through its President and the other through its Secretary/CEO, against the one name required under paragraph 1 (2) (b) of the First Schedule, and considering the strict statutory timelines for transmission of the names to the President, the 1st Respondent submitted the name of the 2nd Interested Party as the nominee of the ***LSK*** to the President for appointment in line with the relevant statutory guidelines.

54. According to the PSC, contrary to the allegations by the Applicant that the PSC exceeded its power by deciding on the nominees of the ***LSK***, the transmission of the name of the 2nd Interested Party, for appointment as a member of the ***Selection Panel***, was based on the 1st Respondent received a letter from the Secretary/CEO of the ***LSK*** forwarding the name of the 2nd Interested Party as its nominee and also indicating that her nomination was in accordance to the provisions of section 25(1) of the ***Law Society of Kenya Act*** and Regulation 87 (1) of the ***Law Society of Kenya (General) Regulations, 2020***.

55. According to the PSC, it has no interest whatsoever in whichever person the ***LSK*** nominates as its representative in the selection panel as its role is limited to receiving and transmitting the names of the nominees to the President for appointment. However, having received two names against the one required under statute and considering the strict statutory timelines, it was the its assumption that the submission of the name of the 2nd Interested Party had been sanctioned by the Council of the ***LSK*** the name having been forwarded together with the resolution of the ***LSK*** and the invitation to its membership to express interest for nomination as a member of the selection panel. Consequently, in receiving and transmitting the name of the 2nd Interested Party to the President, the PSC was not in way usurping the power of the ***LSK*** but performing its roles under paragraph 1 (3) of the First Schedule to the ***Independent Electoral and Boundaries Commission Act***. It therefore urged the Court to dismiss the Application with costs.

56. The 3rd Respondent's case was that Pursuant to the provisions of Paragraphs 1(1), 1(2) (b), 1(3) of the ***Independent Electoral and Boundaries Commission Act, 2011,*** the Law Society of Kenya was requested to nominate one person to the position of member of the selection panel. Pursuant to the provisions of Section 25 (1) of the Law Society of Kenya Act No 21 of 2014, as read with Regulation 87 (1) of the ***Law Society of Kenya (General) Regulations, 2020***, the Law Society of Kenya informed its members of the said vacancy and called

for applications.

57. According to the 3rd Respondent, thirty none (39) applications were received by the Law Society of Kenya out of which the Governing body of the Law Society of Kenya nominated **Ms Dorothy Kemengich Jemator**, the 2nd Interested Party. Contemporaneously with the said nomination, **Mr Nelson Andayi Havi**, under the auspices of the being the President of the Law Society of Kenya, made a telephone call to **Mr Morris Kimuli**, the 1st Interested Party and enquired whether he was ready to serve the Law Society of Kenya "with firmness and diligence" to which the 1st Interested Party answered in the affirmative. **Mr Havi** thereby purported to appoint him to represent the LSK in the Selection Panel.

58. It was averred that the PSC considered the two rival submissions of the names of the 1st and 2nd Interested Party and was convinced with the explanation given by the 3rd Respondent on behalf of the Law Society of Kenya, and was satisfied that the 2nd Interested party had been nominated in accordance with the procedures stipulated under the ***Law Society of Kenya Act*** and ***Regulations***; thereby forwarded her name for appointment. Subsequently, on 26 April 2021, the President, vide Gazette Notice Number 84, appointed the 2nd Interested Party to serve in the said position, alongside other members nominated by the 1st Respondent and by the Inter- religious Council of Kenya. The Ex Parte Applicant was well aware of this development. It was disclosed that the said members of the selection Panel being **Dr. Elizabeth Muli**, **Gideon Solonka**, **Awori James**, **Elizabeth Meyo**, **Rev. Joseph Ngumbi** and **Dr. Faradim Abdalla** took oath of office on 28 April 2021. A conservatory order issued on 27 April 2021 in **Nairobi High Court E 151 of 2021- Charles Midenga vs Law Society of Kenya and 2 Others** restrained the Interested Party herein from assuming her role as LSK's nominee to the Selection Panel. Similar suits had been filed in the High Court at Nairobi **Nairobi High Court E 147 of 2021 Sheila Mugo vs Law Society of Kenya and 3Others**. Both Petitions (**E151 and E147)** come up before **Mrima, J** on **12 May 2021.**

59. According to the 3rd Respondent, the above notwithstanding, the Petitioner's Notice of Motion Application filed on 27 April 2021 seek for judicial review orders to issue to quash the 3rd Respondent's letter forwarding the 2nd Interested Party's name to the represent LSK in the Selection Panel, to restrain the 1st Respondent from submitting the 2nd Interested Party to the President and to compel the PSC to forward the name of the 1st Interested Party for appointment to the Selection Panel. It was contended that despite the developments well within the Ex Parte Applicant, he has failed to exercise any vigilance and diligence in amending his said prayers, and hopes to benefit from grant of equitable remedies he has not sought.

60. In her case the 3rd Respondent cited legal provisions as regards the composition of the Council of LSK; the nomination of an LSK Representative to the Selection Panel; the nomination of representatives of LSK to the constitutional and statutory bodies; the mandate of the 3rd Respondent regarding such nominations; the decision making process in the LSK Council; and the available administrative remedies against decisions of the LSK Council.

61. According to the 3rd Respondent, the only issue for determination is whether the decision of the LSK Council communicated vide the 3rd Respondent's letter dated 21 April 2021 is one against which should be removed of this Court for purposes of quashing; in simple terms- the appropriateness or otherwise of the mode adopted in arriving at the decision to forward the 2nd Interested party's name to the Selection Panel.

62. According to the 3rd Respondent, unlike Constitutional and Human Rights Petitions filed under Articles 21 and 22 of the Constitution of Kenya (2010), judicial review remedies are of the nature of prerogative orders, which are issued sparingly, cautiously and for the benefit of a person directly affected by an administrative decision. Reliance for this submission was sought from the case of **Durayappah vs. Fernando [1967] 2 AC 337** where it was held that Judicial review remedies are prerogative orders which may only be granted to a person directly affected by a decision subject of a review. It was submitted that the issue of *locus standi* in Constitutional Petitions must be differentiated from *locus standi* in judicial review proceedings and the 3rd Respondents relied on **Lathan Maalim Mohammed & another vs. Principal Secretary Ministry of Interior & Coordination of National Government & 5 others [2017] eKLR, Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others [2018] eKLR**, **Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others [2014] eKLR**.

63. According to the 3rd Respondent, in the present case, the Ex Parte Applicant instituted these proceedings as a member of the LSK. He neither applied for the position of LSK representative to the Selection Panel nor was he party to the process. He seeks an order for mandamus on the 1st Interested Party's behalf. According to the 3rd Respondent, judicial review remedies are not available for him since he seeks to ventilate other issues arising from the matter, namely, LSK representation Politics.

64. It was submitted that since the impugned decision had already been acted upon, transmitted to the 1st Respondent who then forwarded it to the President who appointed the 2nd Interested Party, without amending the pleadings, the reliefs sought have been overtaken by events based on the case of **James Ndungu Gethenji & 3 Others vs. Gitahi Gethenji & 3 others [2018] eKLR** and **Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR**.

65. This Court was urged not to entertain these proceedings on the basis that:

a) Judicial review remedies are not available in matters where facts are disputed;

b) Judicial review remedies are not available for a party who fails to exhaust local/ internal administrative remedies

c) Judicial review concerns itself with procedure rather than merit.

d) Proceedings are sub judice.

66. It was contended that judicial review remedies are invoked sparingly, and should not issue where there are disputes on facts based on the case of **Kenya Revenue Authority & 2 others vs. Darasa Investments Limited [2018] eKLR** and **Funzi Island Development Limited & 2 others vs. County Council of Kwale & 2 Others [2014] eKLR** and **Republic vs. National Transport & Safety Authority & 10 others Ex parte James Maina Mugo{2015} e KLR** it was held:-According to the 3rd Respondent, there is a contentious dispute on the material facts relating to these proceedings. So disputed they are that this Court had to, at some point, for purposes ensuring that the application proceeds without being derailed by the disputes surrounding the management of the Law Society of Kenya, gave directions on representation. The Court in doing so noted that a number of issues which would have an impact on the matter were in dispute, including the suspension of **Mr Nelson Havi** and the constitution of the Council by a majority thereof, in the absence of the President and the Vice President.

67. According to the 3rd Respondent, there are also a number of material and factual disputes as to whether the 2nd Interested Party's engagement with the BBI Secretariat, the HIV & AIDS Tribunal and the Energy Tribunal are by virtue of nomination as a representative of LSK. Further, the factual materiality of the 1st Interested Party's qualification is in dispute. It was contended that the presence of such contentious disputes before this Court, then judicial review remedies cannot issue.

68. According to the 3rd Respondent, where a party has not exhausted the available administrative remedies, then they do not deserve of any judicial review remedies. This contention was based on Section 9 (2) of the ***Fair Administrative Action Act*** and the case of **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 Others [2015] eKLR** and the case of **Cortec Mining Kenya Limited vs. Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR.** In this case it was contended that the Applicants herein failed to disclose to this Court why the administrative procedures under the ***LSK Act*** were not efficacious therefore resorting to these proceedings. In any event, the Applicant would have at least filed a formal application to be exempted from those remedies as is contemplated under Section 9(4) of the Fair Administrative Action Act and reliance was placed on the case of **Secretary, County Public Service Board & another vs. Hulbhai Gedi Abdille [2017] eKLR**. According to the 3rd Respondent, the Law Society of Kenya has an elaborate system for dispute resolution which the Applicant ought to have had recourse to, and exhausted, before litigating in court. Such remedies include those available to all members to requisition an SGM under Section 31(1)(a) of the LSK Act. Since the General meeting is the supreme authority of the LSK it is an available remedy that should be considered while challenging the decision of the LSK Council.

69. The 3rd Respondent relied on **Cementers Limited vs. Multichoice Kenya Limited & 13 others [2019] eKLR** and **Standard Group PLC vs. Wesley Kiptoo Yegon & another [2019] eKLR** and contended that the existence of a claim against parties who are not subject to arbitral proceedings is not a bar to resolution of disputes through arbitration.

70. According to the 3rd Respondent, judicial review proceeding concerns itself, not on the merit, but on the procedure leading to the impugned decision and she relied on **Republic vs. County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR** and **Municipal Council of Mombasa vs. Republic & Another [2002] eKLR** as well as **Commissioner of Lands vs Kunste Hotel Ltd [1997] eKLR**.

71. In this case it was contended that this Court this being invited to look into the merits of the LSK's decision; whether the 2nd Respondent was the best candidate, and whether the Council of the LSK considered her 'political' profile before nominating her. Doing so, would be tantamount to merit review, beyond the scope of this Court's jurisdiction as invoked. Factual and evidential aspects of the decision are irrelevant considerations herein.

72. It was nevertheless submitted that the 2nd interested party fulfilled all the requirements for nomination as the representative of LSK in the Selection Panel and the procedure was also followed to the latter.

73. According to the 3rd Respondent, these proceedings are sub judice ***Petition E147 of 2021- Sheila Mugo vs LSK & Others*** and ***Nairobi Petition E151/2021- Charles Midenga vs Law Society of Kenya & 2 Others***. According to the 3rd Respondent, the date(s) of filing does not arise when determining such a serious statutory dictate under Section 6 of the ***Civil Procedure Act***. In his view, the main Motion before this Court is the Notice of Motion dated and filed on 27 April 2021. When it was filed, a conservatory order had issued in Petition E151; and Petition E147 had long been filed. They are therefore earlier cases for the purposes of the sub judice rule. Reliance was placed on **Republic vs. Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR**.

74. While setting out the relevant legal proceedings, it was the 3rd Respondent's position that the appropriate procedure to be followed was that which is provided for under Regulation 87(1) and (2) of the LSK Regulations, and having been observed to the letter, there is no cause to warrant an order for judicial review.

75. In the 3rd Respondent's view, this is one of such cases where this Court's jurisdiction has been improperly invoked, and is being invited to run the Law Society of Kenya and unnecessarily interfere in its internal affairs. This Court is thereby invited to fan the fires of factionalism at the expense of the law and regulations. It was contended that since it is not the desire of Courts to run independent institutions, and Courts should not unnecessarily interfere in the internal processes of independent institutions. See **Brian Onyango Moses & 5 others vs Vice Chancellor, Kisii University & 3 others [2017] eKLR** and as was observed in the case of **Nyongesa and 4 Others vs. Egerton University [1990] KLR 962**.

76. It was noted that the matter subject of this Court's determination is subject of strict statutory timelines. And reliance was placed on the decision of the Court of Appeal **Attorney General & another vs. Tolphin Nafula & 5 Others; Attorney General (Interested Party) [2021] eKLR**.

77. Based on the foregoing, the 3rd Respondent asserted that that the Application lacks merit and should be dismissed with costs to the 3rd Respondent.

78. The case for the 2nd interested party was that Regulation 95 and 96 of the Law Society of Kenya General Regulations 2020 provide for alternative dispute resolution mechanisms for settlement of disputes with respect to the exercise of the mandate or management of the affairs of the LSK, which brings into question the jurisdiction of this Court to determine the present suit.

79. According to the 2nd interested party, following the issuance of a notice of vacancy of the position of Representative of the 2nd Respondent in the Selection Panel she submitted her application before 5.00 pm on 20th April, 2021. Pursuant to a Council meeting of the LSK held on 21st April, 2021, she was duly nominated to represent the 2nd Respondent on the Selection Panel. It was her position that the 8 Council members of the Law Society are rightfully and lawfully in office pursuant to a Court order issued on 3rd February 2021 by **Korir, J** in Petition No. E025 of 2021, **Adrian Kamotho Njenga vs. Law Society of Kenya** suspending and staying all the resolutions and decisions of the Special General Meeting of the 2nd Respondent held on 18th January, 2021, including the impugned resolution of the members of the 2nd Respondent to suspend the said council members, pending the hearing and determination of the said Petition.

80. It was averred that pursuant to the instruction of the Council of the 2nd Respondent, the 3rd Respondent, being the Secretary to the Council of the ***LSK***, forwarded her name to the 1st Respondent on behalf of the Council of the ***LSK*** and therefore by forwarding my name to the 1st Respondent, the 3rd Respondent herein acted on the instruction of the Council of the ***LSK*** and within her mandate as the Secretary of the Council of the ***LSK*** as per the provisions of Section 26 of the ***Law Society of Kenya Act*.**

81. However, vide a letter dated 15th April, 2021, the President of the ***LSK*** in complete disregard to the provisions of regulation 87 (1) and (5) of the LSK regulations nominated the 1st Interested Party and forwarded his name to the Chairperson of the PSC. However, the letter dated 15th April, 2021 by the President of the ***LSK*** does not specifically state the procedure undertaken in the nomination of the 1st Interested Party nor does it make any reference to a decision by the Council of the ***LSK*** nominating the 1st Interested Party herein.

82. It was the 2nd interested party's position that the 1st Respondent acted within its mandate under Section 1 (3) of the First Schedule of the ***Independent Electoral and Boundaries Commission Act*** by forwarding her name as the ***LSK***'s nominee to the President.

83. In her view, the allegations that she is unsuited to be nominated have no substance and she proceeded to expound on the same.

84. The 2nd interested party averred that the prayers for certiorari and mandamus are misconceived and are devoid of merit and should be dismissed with costs.

85. In the submissions filed on her behalf, the 2nd interested party relied on the provisions of *inter alia* the Section 9 (2) of the ***Fair Administrative Action Act*** and Section 41 of the ***Law of Society of Kenya Act***. She also relied on ***Regulations 95 (1) and 96 of the Law Society of Kenya (General) Regulations, 2020*** which provide for alternative dispute mechanisms of resolution, including negotiation, conciliation or mediation and arbitration for the settlement of disputes with respect to the exercise of the mandate or management of the affairs of the ***LSK***. **From the foregoing, it was submitted that it is apparent that the *Law Society of Kenya Act* and the Regulations thereto not only provide for mechanisms and/or procedures for resolving disputes but also prescribe effective remedies to address any violation or threat of violation of the Act, which are available to the *ex-parte* Applicant without the intervention of this Court. According to the 2nd interested party,** the principle of exhaustion dictates that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should strictly be followed and exhausted before this Honourable Court's judicial review jurisdiction is invoked. To this end reliance was placed on **Speaker of the National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, Republic vs. Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 others Ex-parte Alfred Kiptoo Keter & 3 others [2018] eKLR,**

86. It was reiterated that the 3rd Respondent demonstrated that the nomination of te2nd interested party was procedurally ad lawfully done and that the 1st Interested Party is not a nominee of the ***LSK*** as the letter dated 15th April, 2021 is not based on a decision of the Council of the ***LSK***. In light of the above, it was submitted that the decision of the Council of the ***LSK*** communicated by the 3rd Respondent vide the letter dated 21st April, 2021 did not constitute a reversal of the 1st Interested Party's nomination as of 21st April, 2021 there was no valid, legal or lawful nomination by the Council of the ***LSK***.

87. According to the 2nd interested party, the ex parte Applicant has not demonstrated by way of evidence that the decision of the 3rd Respondent herein was: made without or in excess of their jurisdiction; materially influenced by an error of law; taken with an ulterior motive; taken in disregard of the law and violated the expectation of the members of the ***LSK*** or; taken in an abuse of power. Therefore, the *ex parte* Applicant is not entitled to the issuance of an order of *certiorari* removing into this Court and quashing the letter dated 21st April, 2021 by the 3rd Respondent and addressed to the 1st Respondent nominating the 2nd Interested Party to the Selection Panel for the appointment of Commissioners of the Independent and Boundaries Commission.

88. In support of her submission we rely on the case of **Republic vs. Attorney General & another Ex-Parte Ongata Works Limited [2016] eKLR**, **Republic vs. Moses Akaranga & 3 Others Ex-Parte AGN Kamau Advocates [2020] eKLR** and contended that since validity of the 1st Interested Party's nomination by the President of the ***LSK*** *vide* the letter dated 15th April, 2021 is in issue, the *ex parte* Applicant has not demonstrated that the public duty to submit the 1st Interested Party's name to the President of the Republic of Kenya has crystalized to warrant the issuance of the order of mandamus sought in the Application herein.

89. It was submitted that the Notice of Motion dated 27th April, 2021 lacks merits and should be dismissed with costs.

Determination

90. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions and authorities cited.

91. Before delving into the merits of the matter, there are preliminary issues that need to be determined.

92. First, it is argued that this application is not ripe based on the exhaustion doctrine. The relevancy of the said doctrine to these proceedings is based on section 9(2) of the ***Fair Administrative Action Act*** which provides that:

> ***(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***
>
> ***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***
>
> ***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

93. The effect of that provision is that it bars the Court from proceeding to hear and determine a dispute covered by the said Act where there exist mechanisms including internal mechanisms for appeal or review and remedies available under any other written law until such remedies are exhausted.

94. In my view where alternative dispute resolution mechanisms are provided by statute, whether expressed in mandatory terms or whether *prima facie* directory only, they must be resorted to unless the applicant is exempted from doing so pursuant to section 9(4) of the ***Fair Administrative Action Act***. That is not only a statutory requirement but is also a constitutional requirement pursuant to Article 159(2)(c) of the Constitution.

95. Whereas the availability of an alternative remedy is a factor to be taken into consideration, the Court ought not, in its decision to sanitise a patently illegal action just because there is a right of appeal provided by the statute especially where such a right is less convenient, effective and beneficial. Therefore where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) of the Constitution are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law is decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. In other words, if there is no dispute resolution mechanism fully covering the circumstances of the case, to tell the applicant to resort to such non-existent mechanism would be absurd.

96. In this case, it is contended ***Regulations 95 (1) and 96 of the Law Society of Kenya (General) Regulations, 2020*** provide for alternative dispute mechanisms of resolution, including negotiation, conciliation or mediation and arbitration for the settlement of disputes between or amongst members of the ***LSK*** and relating to the mandate or management of the affairs of the ***LSK***.

97. In the matter before me, the substance of the dispute is the action or inaction by the 1st Respondent, the ***Parliamentary Service Commission***. Parliamentary Service Commission is clearly not a member of the Law Society of Kenya and is not subject to the said dispute resolution mechanism. Apart from that, the issues raised herein deal with the violation of Article 47 of the Constitution. It is doubtful whether the LSK's dispute resolution mechanism is capable of resulting into a determination which can be termed as convenient, effective and beneficial in light of the constitutional issues raised. In the premises I disallow the said objection.

98. The second objection relates to the locus of the applicant in these proceedings. It is contended that since ex parte applicant is not the person in whose favour or against whom the impugned decision was made, he has no *locus standi* in these proceedings. It is not in doubt that the ex parte applicant is a member of the Law Society of Kenya, the body that is statutorily entitled to nominate a person to the Select Panel. Clearly members of the Law Society of Kenya have an interest in the person being nominated to represent them in the said Selection Panel. Section 3 of the ***Fair Administrative Action Act*** provides as follows:

> ***3. (1) This Act applies to all state and non-state agencies, including any person-***
>
> > ***(a) exercising administrative authority;***
> >
> > ***(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or***
> >
> > ***(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.***

99. The issue of standing was dealt with by **Nyamu, J** (as he then was) in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** as follows:

> **"The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over**

cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others……Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law…The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue….Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase "person aggrieved" was treated as a question of fact – "grievances are not to be measured in pounds and pence"……..Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest…In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them……..The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are "persons directly affected". I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan."

100. ***De Smith's Judicial Review, 7th Edition*** opine that:

> **"The test is expressed in terms of interests rather than rights because What modern public law focuses upon are wrongs-that is to say, unlawful acts of public administration. These often, of course, infringe correlative rights, but they do not necessarily do so: hence the test of standing for public law claimants, which is interested-based rather than rights-based."**

101. In **Republic vs. The Municipal Council of Mombasa & others, ex-parte Uniken Marketing Services Limited [2017] eKLR** the Court held that:

> **"So in Kenya now, any person, other than an officious intervenor or wayfarer or a crank or other mischief maker meddling in a matter that does not concern him at all is a person with sufficient interest qualified to maintain an action for judicial redress of public injury arising from breach of a public duty or violation of some provision of law and to seek enforcement of such public duty or observance of such legal provision. The right considered sufficient for bringing or maintaining a proceeding of this nature is not necessarily a right in the jurisdic sense. It is enough if one discloses that one has a personal interest alone or with others in the matter, which involves loss of some personal benefit or advantage or curtailment of a privilege, liberty or franchise…Even if I am wrong on the view I hold that the law on *locus standi* has generally developed to a point that any public spirited individual, even without suffering personal injury or loss, has a right to commence legal proceedings and enforce public law rights and it is held that we are to stick to the old English Act of 1938 criterion of a person aggrieved, I still find that the Ex-parte Applicant in this case is such aggrieved person. How is the Ex-Parte Applicant an aggrieved person."**

102. The Court of Appeal affirmed this position in **Nairobi Civil Appeal No 49 of 2007, Adopt-A-Light vs. The Municipal Council of Mombasa & 6 others** by holding that:

> **"To our mind, much as this was a judicial review application the holding above equally applies here. What the 3rd respondent was engaged in was public interest litigation. It came to court in its capacity as stakeholder in the advertising industry as well as a rate payer. The 1st respondent was accountable to the 3rd (sic) and any other rate payers on how revenue is collected and utilized and how services and goods are procured by the 1st respondent. On the whole, we are in agreement with the learned judge that the 3rd respondent had the necessary *locus standi* to sue on account of either as a person aggrieved, sufficient interest or even as a public spirited person in the vindication of the law."**

103. Under our current constitutional dispensation judicial review remedies are now constitutional remedies. That being the position, the principles applying to locus in constitutional matters must of necessity apply to judicial review. As was appreciated in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43, judicial review is:**

"… like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of *Donoghue vs. Stephenson* in the last century…"

104. It is my view and I hold that the ex-applicant is properly within his rights to institute these proceedings.

105. The last preliminary issue is the with regard to the application of the doctrine of *sub judice*. It is contended that there exist other similar petitions in respect of the same subject matter. The ex parte applicant however contends that the application for leave in this matter was filed on 23rd April, 2021 and leave was granted on the same day. Thereafter the Notice of Motion was filed on 27th April, 2021 and this Court issued directions for the hearing of the Notice of Motion on 3rd May, 2021. Petition No E147 of 2021 **Sheila Mugo vs. LSK & others** on the other hand was filed on 26th April, 2021 while **Petition No E 151 of 2021 Charles Midenga v LSK & 2 others** was filed on 27th April, 2021. The Ex-Parte Applicant is not a party to those two cases and moreover, it was submitted, the order of *mandamus* to compel the submission of the name of the 1st Interested Party for appointment to the IEBC Selection Panel is only sought in this matter. This matter, it was submitted, is therefore not *sub judice.*

106. It is therefore clear that the said petitions were commenced after leave had been granted herein one of them was filed before the substantive motion was filed. In my respectful view it would be ridiculous to hold that a party in whose favour leave has been granted and against whom time has started to run ought not to file the substantive motion if other proceedings are commenced subsequent to the grant of leave but before the Motion is filed. To so hold would open a Pandora's box for mischief makers who would simply commence proceedings with a view to obstructing the person in whose favour leave has been granted from proceedings with his proceedings. The rationale for this principle must, however, be properly appreciated. As was restated in Kampala High Court Civil Suit No. 450 of 1993 - **Nyanza Garage vs. Attorney General**:

"In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."

107. In this case, it cannot be said that these proceedings were commenced with a view to promoting a multiplicity of suits since they were commenced subsequent to leave which was granted prior to the institution of the said petitions. In the circumstances of this case, I decline to uphold the said objection.

108. Having resolved the preliminary issues, I now proceed to deal with the substantive issues raised in this application.

109. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

110. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision 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 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."**

111. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

112. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

113. I also associate myself with the expressions in **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR,** that:

> "**...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision**…**I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter...**"

114. In **JR. Misc. Application No. 477 of 2014:** **Republic vs. Public Procurement Administrative Review Board & 2 Others** this Court expressed itself as follows:

> **"…the issue for judicial review is not whether the decision is right or wrong, nor whether the Court agrees with it, but whether it was a decision which the authority concerned was lawfully entitled to make since a decision can be lawful without being correct. The Courts must be careful not to invade the field of policy entrusted to administrative and specialized organs by substituting their own judgment for that of the administrative authority. They should judge the lawfulness and not the wisdom of the decision. If the decision was wrong, it should be remedied by an appeal which allows the appellate court to engage in an intrusive analysis of evidence by the trial tribunal and review the merit of the decision in question…In my view the Respondent was entitled to find that the supplementary grounds did not contain fresh issues or otherwise. The mere fact that it made one decision and not the other does not justify this Court in the exercise of its judicial review jurisdiction in interfering therewith. Similarly, the Respondent's finding that the 2nd interested party did not comply with its directions issued in the respondent's earlier decision is a matter which would go to the merit rather that the process."**

115. **Republic vs. Public Procurement Administrative Review Board & Another *ex parte* Gibb Africa Ltd & Another [2012] eKLR** where the court set out the established reach of judicial review in Kenya thus:

> **"In judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge's decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means lest he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals. The Court of Appeal in *Grain Bulk Handlers Limited v J. B. Maina & Co. Ltd & 2 others [2006] eKLR* summarized the purpose of judicial review by stating that:-**
>
> **"Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions."**
>
> **From the foregoing it is clear that in judicial review, the court does not exercise its appellate powers. It mainly looks at the decision-making process to ensure that the citizen who has come into contact with an administrative body or tribunal has**

been treated fairly. But as observed by Lord Diplock in the already cited *Civil Service Unions vs Minister for the Civil Service case*, the court can quash the decision if the same is so unreasonable to the extent that a reasonable tribunal addressing its mind to the facts of the case would not have arrived at such a decision. In doing so, I submit, the court will have descended into the arena of decision-making. For a court to justify such action it must be clearly obvious that the decision is truly and obviously unreasonable which I submit is not the case here."

116. Similarly, in **Hangsraz Mahatma Gandhi Institute & 2 Others [2008] MR 127** it was stated that:

> **"Judicial Review is not a fishing expedition in unchartered seas. The course had been laid down in numerous case laws. It is that this court is concerned only with reviewing, not the merits of the decision reached, but of the decision making process of the authority concerned. It would scrutinize the procedure adopted to arrive at the decisions to ascertain that it is in uniformity with all elements of fairness, reasonableness and most of all its legality. It must be borne in mind and which had been repeated many times by this court that it is not its role to substitute itself for the opinion of the authorities concerned. This court on a judicial review application does not act as a court of appeal of the decision of the body concerned and it will not interfere in any way in the exercise of the discretionary power which the statute had granted to the body concerned. However it will intervene when the body concerned had acted ultra vires its powers, reached a decision which is manifestly unreasonable in the Wednesbury sense; had acted in an unfairly manner and the applicant was not given a fair treatment."**

117. In **Penina Nadako Kiliswa vs. Independent Electoral & Boundaries Commission (IEBC) & 2 Others (2015) eKLR,** Supreme Court of Kenya held at paragraph 28:

> **"The well-recognized principle in such cases is that the court's target in judicial review is always no more than the process which conveyed the ultimate decision arrived at. It is not the merits of the decision, but the compliance of the decision-making process with certain established criteria of fairness. Hence, an applicant making a case for judicial review has to show that the decision in question was illegal irrational or procedurally defective."**

118. **The *Code of Civil Procedure*,** Volume III Pages 3652-3653 by **Sir Dinshaw Fardunji Mulla** states:

> ***"The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure…The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."***

119. However, the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 Others [2016] KLR,** expressed itself at paras 55-58 as follows:

> **"55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, *Section 7 (2) (l)* of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b)* and *(e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.**
>
> **56. Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.**

57. In <u>Mbogo & another -v- Shah</u> (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in <u>Mbogo -v- Shah</u> *(supra)* and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act*, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e)* and *(h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts."

120. The same Court **(Kiage, JA)** emphatically expressed itself, inter alia, in **<u>The Judicial Service Commission and Another vs. The Chief Registrar of the Judiciary and Lucy Muthoni Njora CIVIL APPEAL NO. 486 of 2019</u>** as hereunder:

"I think that it would be unrealistic for a court to engage in a dry and formalistic approach, steeped in process alone, while eschewing a measure of merit examination. Such merit review is a sine qua non of meaningful engagement with the question of reasonableness and fairness as the antidote to the arbitrary, capricious or illegal conduct of authorities, that invite judicial review in the first place. Judicial review as an area of law is not static and its parameters have never been cast in stone. Thus, in the common law jurisdictions, there have been major developments in the field, especially in the last four decades or so. In the United States, for instance, there has been a decisive shift, with the Supreme Court there seeming to impose a heightened standard of judicial review that involves more judicial scrutiny of administrative action through "a searching and careful" engagement. This has been recognized as the "hard look doctrine". It is much less deferential to the decision-maker as formerly encapsulated in the process-only approach. 26 I have had the advantage of perusing Prof. Patrick M. Garry's article Judicial Review and the Hard Look Doctrine (originally published on 7 Nev. L.J. 151 2006-007) and found it to be highly persuasive. The learned author's conclusion, which I would respectfully endorse and adopt, is that;

"Prior to, and during the two decades following passage of the Administrative Procedure Act, judicial review of agency action was quite deferential. This changed on the early 1970s, when judicial review became more scrutinizing … courts began employing a 'hard look' review that examines agency decision-making under a more heightened standard. … The hard look doctrine has evolved from the very nature of judicial review … the courts have… become less deferential and less of a rubber stamp on agency decisions … Hard look can thus be seen as inherent in the very process of judicial review. In a way hard look represents an internal duty owed by the courts to the constitutional function of judicial review …." (Our emphasis)

In our own jurisdiction, judicial review has taken the same trajectory in recent years, spurred in large measure by the 27 Constitution of Kenya, 2010. It changed the fundamental underpinnings of judicial review from the common law as codified in the Law Reform Act, to its Article 22(3) (f), which recognizes judicial review as one of the appropriate reliefs available. This is bolstered by Article 47(1), which decrees the right to fair administrative action, given further effect by the Fair Administrative Action Act which, at Section 7(2), sets out an expansive list of circumstances in which a court may review an administrative action or decision. The superior courts of this country have spoken with near unanimity that the current constitutional and statutory landscape calls for a more robust application of the relief of judicial review to include, in appropriate cases, a merit review of the impugned decision. See, for instance, COMMUNICATION COMMISSION OF KENYA vs. ROYAL MEDIA SERVICES & 5 OTHERS [2014] eKLR by the Supreme Court, this Court's decisions in SUCHAN INVESTMENT LTD vs. MINISTRY OF NATURAL HERITAGE & CULTURE & 3 OTHERS [2016]eKLR and CHILD WELFARE SOCIETY OF KENYA vs. REPUBLIC & 2 OTHERS Ex parte CHILD IN FAMILY FOCUS KENYA [2017]eKLR and the High Court's. in REPUBLIC vs. COMMISSIONER OF CUSTOMS SERVICES Ex 28 Parte IMPERIAL BANK LTD [2015] e KLR (per Odunga, J.). They all speak to the unmistakable sea change and approach, stated thus by this Court in SUPER NOVA PROPERTIES LTD & ANOR vs. DISTRICT LAND REGISTRAR MOMBASA & 2 OTHERS, KENYA ANTI CORRUPTION COMMISSION & 2 OTHERS (INTERESTED PARTIES) [2018] eKLR;

"27. On our part, we find no fault that the Judge expanded the grounds of judicial review above the conservative grounds to include the principles of proportionality, public trust, accountability by public officers, justice and equity. The test of proportionality would automatically lead to a greater intensity of review of the merits as it invites a court to evaluate the merits of the decisions by assessing the balance to make; that is whether the decision to be made is within the range of rationality or reasonableness. Secondly, the proportionality test may go deeper into examination of the interests of those affected by the said decision."

This Court conducted a thorough and exhaustive review of the post-2010 jurisprudence on the evolution of judicial review into the deeper scrutiny, hard look, merit-based standard of review mode in its recent decision in GEOFFREY AJUONG OKUMU & ANOR VS. 29 ENGINEERS BOARD OF KENYA [2021] eKLR. I respectfully echo as representing the current legal position on the subject what we said there was on our way to the conclusion that;

"--- we have been able to demonstrate from … the decisions we have enumerated that, by stating that he could not consider evidence presented as defence or analyze the agreements executed by the parties in the dispute because doing so would amount to a merit review, the learned Judge erred."

We emphatically find and hold that there is nothing doctrinally or jurisprudentially amiss or erroneous in a judge's adoption of a merit review in judicial review proceedings. To the contrary, the error would lie in a failure to do so, out of a

misconception that judicial review is limited to a dry or formalistic examination of the process while strenuously and artificially avoiding merit. That path only leads to intolerable superficiality."

121. It is now recognised that one of the grounds for grant of judicial review relief is unreasonableness of the decision being challenged. This is clearly a deviation from the traditional common law approach that what is to be considered is the process by which the decision is arrived at rather than the decision itself. An examination of whether or not a decision is unreasonable clearly calls for some measure of consideration of the merits of the decision itself though not in the manner contemplated by an appellate process.

122. According to **De Smith, Woolf and Jowell,** ***Judicial Review of Administrative Action*****, 7th edition** at paragraph 11-036 on page 602, a decision is also irrational if it lacks ostensible logic or comprehensible justification and that though the terms irrationality and unreasonableness are these days used interchangeably, irrationality is only one facet of unreasonableness, hence a decision is said to be irrational in the strict sense of that term if it is unreasoned; if it is *"lacking ostensible logic or comprehensible justification".*

123. Unreasonableness, according to the same work at para 11-029, connotes decisions which have been accorded manifestly inappropriate weight; strictly "irrational" decisions, namely, decisions which are apparently illogical or arbitrary; uncertain decisions; decisions supported by inadequate or incomprehensible reasons; or by inadequate evidence or which are made on the basis of a material mistake or material disregard of fact.

124. According to **De Smith's Judicial Review** (sixth edition) at Page 559 that:

> **"Although the terms irrationality and unreasonableness are these days used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion perhaps by spinning a coin or consulting an astrologer or where the decision simply fails to add up-in which in other words there is an error of reasoning which robs the decision of logic…Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decisions or where there is absence of evidence in support of the decision."**

125. **Sedley, J** in **R vs. Parliamentary Commissioner for Administration, ex parte Balchin and Another [1998] 1 PLR 1**, states at page 11 that:

> **"What the not very apposite term "irrationality" generally means in this branch of the law is a decision which does not add up-in which, in other words, there is an error of reasoning which robs the decision of logic."**

126. In **Salim Juma Oditi vs. Minister for Local Government & Ors (2008) eKLR**, **Wendoh, J** referring to the case of **Associated Provincial Pictures Houses Ltd vs. Wednesbury Corporation (1948) 1KB 223** at P. 229 held that:

> **"It is true discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey their rules, he may truly be said and often is said to be acting unreasonably similarly there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."**

127. Based on **Bato Star Fishing Ltd vs. Minister of Environmental Affairs and Tourism [2004] ZACC 15** at 44,which was dealing with section 6(2)(h) of the South African ***Promotion of Administrative Justice Act***, a legislation which squares with section 4(2)(k) of the ***Fair Administrative Action Act, 2015*** to the extent that it forbids unreasonable administrative actions or decisions, because of the constitutionalisation of fair administrative action, an unreasonable decision is simply a decision that a reasonable decision-maker could not reach and not necessarily an egregious one per ***Wednesbury.*** In the South African Case the Court opined that:

> **"42...It is well known that the pre-constitutional jurisprudence failed to establish reasonableness or rationality as a free-standing ground of review. Simply put, unreasonableness was only considered to be a ground of review to the extent that it could be shown that a decision was so unreasonable as to lead to a conclusion that the official failed to apply his or her mind to the decision.**
>
> **44. ...The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be "reasonable". Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."**

128. It is in this respect that I understand **Onguto, J's** decision in **Kenya Human Rights Commission vs. Non-Governmental Organisations Co-Ordination Board [2016] eKLR** where the Learned Judge held that the Court, effectively has a duty to look both into the merits and legality of the decision made due to the requirement of "reasonable" action under Article 47, and also the process and procedure adopted due to the requirement of following all precepts of natural justice under both Articles 47 and 50(1) of the Constitution.

129. Guided by the said decisions, while I appreciate this Court's remit as regards merit review, some of the issues raised in this application such as the suitability of the interested parties to serve in the Selection Panel cannot be properly determined in this application. They invite

the Court to make findings regarding the appointment of the interested parties to the alleged Tribunals or Committees. Such a finding may well impact adversely on the composition of such bodies and the appointing authorities without them being afforded an opportunity of being heard.

130. In this case, the gist of the application is that the manner in which the 1st Respondent, the Parliamentary Service Commission, proceeded to submit the 2nd interested party's name to the President for appointment to the Select Panel was unlawful and unprocedural. According to the ex parte applicant on 15th April, 2021, the LSK submitted the name of the 1st Interested Party to the 1st Respondent, the Parliamentary Service Commission, for transmission to the President for appointment as a member of the ***Selection Panel for the appointment of Commissioners of the Independent Electoral and Boundaries Commission.*** However, on 21st April, 2021, the 3rd Respondent, the Secretary of the Law Society of Kenya, acting without any lawful authority wrote to the PSC submitting the name of the 2nd Interested Party for transmission to the President for appointment as a member of the Selection Panel.

131. **Mr Nelson Andayi Havi**, the President of the Law Society of Kenya, deposed that he submitted the name of the 1st interested party to the Parliamentary Service Commission for submission to the President for appointment to the Selection Panel with an advance copy by email on 16th April, 2021 and the hard copy by hand delivery on the subsequent working day being 19th April, 2021. The letter duly stamped by the PSC and the 1st Interested Party. According to him, the nomination of the 1st Interested Party could not have been made in any other manner following the suspension by Members of the Law Society of eight Council Members and the resignation of one Council Member on 18th January, 2021, the ensuing litigation thereafter, and an invalid attempt by the eight suspended Council Members and the 3rd Respondent to suspend him as President of the Law Society of Kenya on 8th February, 2021 and to take unlawful decisions and hold them out as decisions of the Law Society of Kenya.

132. None of the parties has disputed the fact that **Mr Nelson Andayi Havi**, in his capacity as the President of the Law Society submitted the 1st interested party's name to the Parliamentary Service Commission on 16th April, 2021. It is also not in dispute that the 3rd Respondent submitted the name of the 2nd interested party to the same Parliamentary Service Commission on 21st April, 2021. The Parliamentary Service Commission has not contested the fact that it received **Mr Havi's** communication regarding the nomination of the 1st interested party earlier than that from the 3rd Respondent. Its contention, if I understand it correctly, is that having received two sets of nominations, it was entitled to decide which one to rely on and chose to rely on one that seemed to have been supported by the minutes. The applicant has however pointed out the that allege minutes were not genuine as they were unsigned.

133. Without purporting to resolve the outstanding dispute surrounding the management and leadership of the Law Society of Kenya, it is clear that the alleged nomination of the 1st interested party by the President of the Law Society of Kenya was made earlier than the alleged nomination of the 2nd interested party through the 3rd Respondent. No legally justifiable reason has been placed before me by the 1st Respondent why it decided to ignore the alleged earlier nomination in favour of the later one. A reading of Paragraphs 1, 2A and 3 of the said First Schedule clearly shows that the role of the 1st Respondent with regard to the nomination of the representative of the Law Society of Kenya to the Selection Panel, is that of transmitting the name to the President.

134. It has no business decideding who is properly nominated by the LSK. Having received the name of the 1st Interested Party before that of the 2nd interested party, he was bound by statute to submit that name to the President and upon receiving the name of the 2nd interested party, he could only inform the 3rd Respondent of the fact of receipt of the name of the 1st interested party and leave the matter to be sorted out following the due process without being seen to be playing a role in the nomination of the Law Society's representative to the Selection Panel.

135. By purporting to arbitrate and decide who between the 1st and the 2nd interested parties ought to have been nominated, the 1st Respondent clearly acted in excess of its powers. In so doing, it made decision which violated the rights of the 1st interested party without affording him an opportunity of being heard. It has been held that a decision made in excess of or without jurisdiction or in violation of the rules of natural justice is a nullity. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

> **"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly...And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise...... Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.......Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."**

136. Being a nullity, all consequential decisions must fall by the wayside since you cannot expect to place something on nothing and expect it to stand.

137. It is now clear that judicial review remedies can be granted on grounds of *ultra vires*, jurisdictional error, misdirection in law, errors of precedent fact such as fundamental factual errors or findings devoid of evidence, abdication of or fettering discretion, insufficient inquiry or failure to consider material or relevant facts, considering irrelevant facts, bad faith or improper motive, frustration of the legislative purpose, substantive or procedural fairness, inconsistency in decision making, unreasonableness, lack of proportionality, bias and failure to give reasons for the decision. See ***Judicial Review Handbook*** 6th Edition by **Michael Fordham**.

138. It is trite that even in cases where a discretion is given to an authority the Court is entitled in appropriate cases to interfere with the same (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

139. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** the Court while citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** held:

> **"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...Illegality is when the decision-making authority commits an error of law in the process of taking 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...Procedural Impropriety is when there is a 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."**

140. This Court is aware of the dynamic nature of the law; it is always speaking and develops as new legal problems emerge in society or the old ones metamorphose into complicated and coloured problems. As was held in **R vs. Panel on Take Over and Mergers Ex Parte Datafin [1987] QB 815**, judicial review is developing fast and extending itself beyond the traditional targeted areas and grounds. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing.

141. In the premises the decision by the 1st Respondent transmitting the name of the 2nd interested party to the President for appointment to the ***Selection Panel for the appointment of Commissioners of the Independent Electoral and Boundaries Commission*** is tainted with illegality, irrationality and procedural impropriety. It cannot be allowed to stand. The law imposes a duty on the 1st Respondent upon receipt of communication transmitting the name of the nominee of the Law Society of Kenya to transmit the same to the President for appointment. That is a legal duty which it is obliged to perform. In other words, its role is that of a conveyor belt. Having received the 1st interested party's name earlier than that of the 2nd interested party, it was obliged to convey the same to the President without any further ado.

142. I associate myself with the holding in the case of **Republic vs. Registration of Societies & 5 others ex-parte Uhuru Kenyatta & 6 others [2007] eKLR** where the Court expressed itself, inter alia, as hereunder:

> **"The whole exercise appears to have been choreographed and became a charade tainted with both procedural impropriety, unfairness, breach of the rules of natural justice, bias and outright illegality on the part of Registrar of Societies…The remedy of Certiorari exemplifies the central principle of the legal answerability of public authorities for due observance of the proper limits of the powers conferred upon them. The orders of mandamus and prohibition are more specialized, the former lying to compel positively, the performance of duties unlawfully omitted and the latter lying to prohibit expected performance of acts not lawfully permitted, both look to the future conduct of authorities challenged and so exert a legal control over prospective policy. The remedy of *Certiorari* invalidates past decisions in such a way as to concentrate attention on the issue of legality even though it is official policy which is affected thereby."**

143. As opined in ***Halsbury's Laws of England, 5th Edition Volume 61*** and ***De Smith's Judicial Review, 7th Edition***:

> ***"If the court has found there to be a breach of a duty, a mandatory order may be granted if in all the circumstances that appears to the court to be the appropriated form of relief."***

144. In the premises the orders which commend themselves to me and which I hereby issue are as follows:

> **1) An order of *certiorari* is hereby issued removing into this Court for the purposes of being quashed and quashing the decision of the 1st Respondent transmitting to the President the name of the 2nd interested party for appointment to the Selection Panel for the appointment of Commissioners of the Independent Electoral and Boundaries Commission and any subsequent actions and decisions taken in pursuance of the said transmission.**

2) An order of *mandamus* is hereby issued directing the 1st Respondent to submit to the President of the Republic of Kenya the name of the 1st Interested Party for appointment to the Selection Panel for the appointment of Commissioners of the Independent Electoral and Boundaries Commission.

3) This being a matter of public interest, there will be no order as to the costs of these proceedings.

145. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF MAY, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kilonzo for the ex parte applicant

Mr Havi for the 2nd Respondent

Mr Wikfred Nderitu, SC, Mr Onyango and Mr Ekusi for the 3rd Respondent

Mr Kiima for Mr Ongoya for the 1st interested party

Ms Cherono for Mr Nyamodi for the 2nd interested party

CA Geoffrey