



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 94 OF 2019

IN THE MATTER OF ARTICLES 2, 10, 73, 88, 248, 250 & 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LAW SOCIETY OF KENYA ACT, 2014

AND

IN THE MATTER OF THE JUDICIAL SERVICE COMMISSION ACT

AND

IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT

AND

THE FAIR ADMINISTRATIVE ACTIONS ACT

MARK NDUNGU NDUMIA.....PETITIONER

-VERSUS-

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

ALLEN W. GICHUHL.....2ND RESPONDENT

HARRIET CHIGGA.....3RD RESPONDENT

ROSELINE O. ODEDE.....4TH RESPONDENT

HERINE A. KABITA.....5TH RESPONDENT

MARIA M. MBENEKA.....6TH RESPONDENT

BONIFACE A. AKUSALA.....7TH RESPONDENT

CAROLYNE D. KAMENDE.....8TH RESPONDENT

AILEN A. INGATI.....9TH RESPONDENT

DAMARI N. KINYILI.....10TH RESPONDENT

JANE M. CHEPTOO.....11TH RESPONDENT
BERNARD K. NGETICH.....12TH RESPONDENT
ERICK W. NYONGESA.....13TH RESPONDENT
DAVID NJOROGE.....14TH RESPONDENT
THE HON. ATTORNEY GENERAL.....15TH RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....16TH RESPONDENT
PROF. TOM OJIENDA.....1ST INTERESTED PARTY
ALEX I. GATUNDU.....2ND INTERESTED PARTY
CHARLES O. MONGARE.....3RD INTERESTED PARTY
MACHARIA NJERU.....4TH INTERESTED PARTY
IRUNGU GATHI.....5TH INTERESTED PARTY

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 93 OF 2019

IN THE MATTER OF ARTICLE 22, 23,165 AND 258 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 10, 27(1),
38(2), 73(2) (A) AND 171(F) OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE LAW SOCIETY OF KENYA ACT, CAP 18

AND

IN THE MATTER OF THE JUDICIAL SERVICE ACT. NO 1 OF 2011

AND

**IN THE MATTER OF THE IRREGULAR NOMINATION OF SOME NOMINEES FOR ELECTION OF THE LAW SOCIETY
OF KENYA MALE REPRESENTATIVE TO THE JUDICIAL SERVICE COMMISSION**

BETWEEN

KIMANI WAWERU.....1ST PETITIONER

EDWIN MCMILLAN JENGO.....2ND PETITIONER

AND

LAW SOCIETY OF KENYA.....	1 ST RESPONDENT
HON. ATTORNEY GENERAL.....	2 ND RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....	3 RD RESPONDENT
ALEX IRUNGU GATUNDU.....	1 ST INTERESTED PARTY
GATHII IRUNGU.....	2 ND INTERESTED PARTY
MACHARIA NJERU.....	3 RD INTERESTED PARTY
TOM ODHIAMBO OJIENDA.....	4 TH INTERESTED PARTY
CHARLES MONG'ARE ONGOTO.....	5 TH INTERESTED PARTY

JUDGMENT

Petitioners Petition

1. The two petitions were consolidated on 13th March 2019 as the subject in dispute is similar and High Court petition No. 94 of 2019 made the lead file.

2. The petitioners in petition No. 94 of 2019 dated 11th March 2019 prays for the following orders:-

a. An order of certiorari do issue quashing the decision of 11th February 2019 by the Council of the Law Society of Kenya clearing all five candidates to run for the position of male candidate for the **JSC** elections as the decision was ultra vires the Constitution, Sections 4, 6 and 29 of the Law Society of Kenya Act, the Fair Administrative Actions Act, the Leadership and Integrity Act, the Judicial Service Act and the Law Society of Kenya Electoral Code of Conduct (*Revised*) 2018.

b. An order of Mandamus do issue compelling the Council of the Law Society of Kenya to adopt the report dated 11th February 2019 from the independent body comprising the Independent Electoral and Boundaries Commission, the **LSK** Secretariat and three Senior Counsel and submit the names of the three eligible candidates namely Alex I. Gatundu, Charles O. Mongare and Macharia Njeru to the Independent Electoral and Boundaries Commission.

c. An order of prohibition do issue prohibiting the Independent Electoral and Boundaries Commission from conducting the Law Society of Kenya Election of its Male Representative to the Judicial Service Commission with the names of Professor Tom O. Ojienda and Irungu Gathii included in the ballot papers.

d. A declaration do issue that the actions of those Council Members who refused to review the decision of 11th February 2019 during the extraordinary meeting of the Council called on 18th February 2019 was ultra vires the Constitution, Sections 4, 6 and 29 of the Law Society of Kenya Act, the Fair Administrative Actions Act, the Leadership and Integrity Act, the Judicial Service Act and the Law Society of Kenya Electoral Code of Conduct (*Revised*) 2018.

e. A declaration do issue that members of Council are duty bound to uphold the Constitution and the Rule of Law and acted in excess of jurisdiction and power to suspend the **LSK** Electoral Code of Conduct (*Revised*) 2018 as may be revised from time to time in any future elections of the Law Society of Kenya or depart from the minimum standards set by any Act of Parliament dealing with elections of **LSK** members to any constitutional or statutory office or body.

f. A declaration do issue that those Council Members who refused to review the decision of 11th February 2019 during the extraordinary meeting of the Council called on 18th February 2019 are unfit to hold public office for derogating from the Constitution and the Rule of Law.

3. The Petitioners in petition No. 93 of 2019 dated 10th March 2019 pray for the following orders:-

1. A declaration that the 1st Respondent's decision to nominate the 2nd and 4th Interested Parties, Gathii Irungu and Tom Odhiambo Ojienda, as candidates for the election of the **LSK** Male representative to the **JSC** is illegal, unlawful, ultra vires the **LSK** Act,

LSK General Regulations and **LSK** electoral regulations and codes and further unconstitutional.

2. A declaration that the decision by the 1st Respondent's Council made on 11th February 2019 and confirmed on 18th February 2019, and communicated to the members of the 1st Respondent, is null and void to the extent that it purports to declare as validly nominated for election the 2nd and 4th Interested Parties, Gathii

Iringu and Tom Odhiambo Ojienda respectively, despite having not fulfilled the requirements under the Electoral Code of Conduct and the governing law.

3. An order of Certiorari bringing to the High Court and quashing the decision of the 1st Respondent to nominate the 2nd and 4th Interested Parties, Gathii Irungu and Tom Odhiambo Ojienda respectively, to participate as candidates for election to the office of the **LSK** Male Representative to the Judicial Service Commission.

4. An order of mandamus compelling and directing the 1st Respondent's Council to adopt the report of the Independent Committee dated 11th February 2019 and proceed to declare the 1st, 3rd and 5th Interested Parties, Alex Irungu Gatundu (Admission No. P. 105/3855/98), Macharia Njeru (Admission No. P. 105/2221/91) and Charles Mong'are Ongoto (Admission No. P.105/3969/99) as the only validly nominated candidates for election for the **LSK** Male Representative to the Judicial Service Commission.

5. An order directing the 1st and 3rd Respondents to proceed to conduct the election of the **LSK** Male Representative to the Judicial Service Commission with the 1st, 3rd and 5th Interested Parties, Alex Irungu Gatundu (Admission No. P.105/3855/98), Macharia Njeru (Admission No. P.105/2221/91) and Charles Mong'are Ongoto (Admission No.

P.105/3969/99 as the only duly nominated candidates for election.

6. An order of a mandatory injunction directing the 3rd Respondent, its agents, servants and employees, to proceed with the election of the **LSK** Male Representative to the Judicial Service Commission with the duly nominated candidates, being the 1st, 3rd and 5th Interested Parties, Alex Irungu Gatundu (Admission No. P.105/3855/98),

Macharia Njeru (Admission No. P.105/2221/91) and Charles Mong'are Ongoto (*Admission No. P.105/3969/99*).

7. Costs of and incidental to these proceedings be borne by the 1st Respondent.

8. Any other or further relief that the court may be pleased to grant.

The 1st Respondent's Response

4. The 1st Respondent, the Law Society of Kenya, filed a Replying affidavit dated 15th April 2019 and sworn by Mercy Wambua, the Secretary to the Council and Chief Executive Officer of the Law Society of Kenya, deponing, that the petitioner in petition No. 94 of 2019 and the 2nd to 14th Respondents are all members of the Law Society of Kenya and, that the 1st to 5th Interested parties are also members of the Law Society of Kenya. She has also deponed, that the petitioners in petition No. 93 of 2019 are members of the Law Society of Kenya and, that the 1st to 5th Interested parties in the aforesaid petition are also members of the Law Society of Kenya. It is further deponed that the statutory body responsible for the professional regulation of advocates in Kenya, for the purposes of Article 171 of the Constitution of Kenya is the Law Society of Kenya. It is deponed, that by majority deliberations the council adopted the report of the **LSK-IEBC** Committee with amendments and accepted nomination applications of all the candidates, however the President of the Law Society of Kenya, and Council members Eric Nyogesa, David Njoroge and Maria Mbeneka abstained from taking any position on the two available options namely, adoption of the report of the committee with amendments to clear everyone on adoption of the report of the committee clearing everyone apart from Irungu Gathii who had submitted his papers late.

5. The secretary to the Council and Chief executive officer of the Law Society of Kenya avers that on 18th February 2018, the President of the Law Society of Kenya called for an extra ordinary meeting of council with the agenda item, namely, to review the council decision made on 11/2/2019 with regard to nomination of candidates, carry out a proper vetting in accordance with the Constitution. That by a resolution "by majority decision the council resolved that there was no need to renew and or consider the council decision made on 11/02/2019 with regard to nomination of candidates, carry out a proper vetting in accordance with the constitution." (*See MKW2 a true copy of the Notice*). On developing of code of conduct in respect of all the **LSK** elections following concerns by members of the public with respect by the conduct of candidates and members during campaigns and election arising period for the **LSK** positions in Council and the Judicial Service Commission (*see MKW-3*, a true copy of the code of 2015) which by the Annual General Meeting of 24/03/2018, members of the Law Society of Kenya resolved to amend the said code of conduct to revoke Rule 14 of the Code of Conduct, which limited the right to vote to holders of previous years' practicing certificate (*see MKW-4 a true copy of the Revised Code of Conduct*). It is further urged that in the Annual General meeting of 30th March 2019, during the pendency of these proceedings, the members adopted a resolution removing the twin requirements for **HELB**, and **KRA** clearance from the Electoral Code of Conduct.

The 2nd Respondent's Response

6. The 2nd Respondent, the President of Law Society of Kenya, filed a Replying affidavit dated 16th April 2019, supporting the petition and setting out the eligibility criteria set out in section 18 of the Law Society of Kenya Act No. 21 of 2014 and the Leadership and Integrity Act No. 19 of 2012, which is enacted pursuant to Chapter six of the Constitution. He has deponed that it was his view at the meeting that the position of the male representative to the **JSC** was that of a State officer and therefore it was necessary that there be strict compliance with the Constitution, the **LSK** Electoral Code and applicable laws. He further averred he abstained from voting together with some council members on the final decision by a majority in the council to the effect that all candidates were to be cleared.

Response for 3rd, 11th and 12th Respondents

7. A Replying affidavit was filed for the 3rd, 11th and 12th Respondents by Akusata Boniface Advocate in opposition of the two petitions

averring that on 14th December 2018 a meeting of council of Law Society of Kenya discussed the issue of election of a male Representative of the Law Society of Kenya to Judicial Service Commission and passed some resolutions; that in subsequent meetings the council adopted the report of **LSK-IEBC** Committee with amendment and accepted nominations applications of all candidates.

The 5th Respondent's Response

8. The 5th Respondent is opposed to the petitions and in doing so filed a Replying affidavit dated 23rd April 2019. It is the 5th Respondents position that by a majority resolution, the council adopted the report of the **LSK-I EBC** Committee with amendments and accepted nomination application of all candidates. That on 18th February 2019, in an extra ordinary meeting of council to review the council decision made on 11/02/2019 with regard to nomination of candidates and carry out a proper vetting in accordance with constitution was not accepted as the council resolved, that there was no need to review and/or reconsider the council decision of 11/2/2019 with regard to nomination of candidate.

The 6th Respondent's Response

The 6th Respondent filed a Replying affidavit dated 5th April 2019. The 6th Respondent avers, that in the council meeting held on 11th February 2019 she opposed the decision to clear the 1st and 5th Interested parties and did not vote for the decision to disregard the report of the independent committee tasked by council to carry out the vetting of candidates for the JSC position.

The 7th, 8th and 10th Respondents' Response

9. The 7th, 8th and 10th Respondents filed grounds of opposition being as follows:-

a. The impugned decision of 13th February, 2019 has since been overtaken by events. By the Resolution of the Members at the Annual General of the Law Society of Kenya held on 30th March, 2019, the 1st Respondent's members specifically considered, debated and deleted the requirement of a Tax Compliance Certificate as well as Higher Education Loans Board clearance from the Code. The Petitioners are barred by the doctrine of mootness.

b. Regulation 52 of the Law Society of Kenya (*General*) Regulations, 1962 as well as Regulation 2 of the Law Society of Kenya (*Arbitration*) Regulations, 1967 provide for mandatory arbitration of disputes between the Petitioners and the Respondents. Under section 16 of the Judicial Service Act, 2011 the obligation to ensure, that nominees comply with the requirements set out in the Constitution is internal, the Petitioners were bound to exhaust the existing dispute resolution mechanisms within the Respondent Society.

c. Hence there are available, efficient and effective internal dispute resolution mechanisms within the Respondent Society, which the Petitioners could have had recourse to before invoking the court's jurisdiction.

d. As a result, this Petition is prohibited by Section 9 of the Fair Administrative Action Act, 2015. The section forbids the High Court from reviewing decisions prior to exhaustion of alternative remedies. The application for leave having been filed prematurely is therefore neither justifiable ripe for judicial review.

e. Further, the Petitioners have not sought exemption and do not meet any of the three cumulative conditions under section 9(3) of the Fair Administrative Action Act, 2015 for exemption from the obligation to exhaust alternative dispute resolution mechanisms. The Petitioners have not – applied for exemption; demonstrated exceptional circumstances, or proved that exemption would be in the interest of justice.

f. The doctrine of primary jurisdiction in section 9 of the FAA has constitutional underpinning in Article 159(c) of the Constitution requiring this court to promote, and not usurp, alternative forms of dispute resolution.

g. On the merits there is no proof that the Code sought to be enforced has ever either been approved by members of the Society or promulgated and gazette as Regulations to the Law Society of Kenya Act, 2014 or any other statute.

h. In any case, the un-gazetted draft regulations are not law and are therefore merely advisory and not binding.

The 9TH Respondent Response

10. The 9th Respondent is opposed to the two petitions and has filed an affidavit sworn on 5th April 2019. It is the deponents view that the council cannot reverse a decision of the membership without taking it back to the members.

The 16th Respondent's Response

11. C. Owiye, AG Director, legal and public Affairs with **IEBC** swore affidavit dated 2nd April 2019, stating, that the **IEBC**, upon request by **L.S.K**, the 1st Respondent herein, the commission agreed to preside over the election of the **L.S.K**. male representative to **JSC** and appointed one of its staff by the name Dr. Eroo mele as the Returning Officer. That it was agreed term between **LSK** and **IEBC**, that **LSK** would conduct nominations while **IEBC** would only preside over the elections based on candidates submitted to it. It is **IEBC** position, that it has not breached its duty as provided under Article 88(4) of the Constitution of Kenya nor has it committed any election irregularities as

the intended election is yet to take place and the same is set for 9th May 2019.

The 1st Interested Party Response

12. The 1st Interested party is opposed to the petitioners petitions and in doing so filed a Replying affidavit dated 5th April 2019. It is the 1st Interested party's contention, that he submitted his nomination papers for election on 7th December 2018 and was duly approved by Council of the **LSK** for the election, scheduled for 9th May 2019, in a notice issued to members of **LSK** on 13th February 2019. It is the 1st Interested party position, that Judicial Service Act and Law Society of Kenya Act do not precondition eligibility of election of **LSK** representative to **JSC**, to submission of Tax Compliance Certificate. It is further contended by the 1st Interested party that on 11/2/2019 the Council of **LSK** approved his nomination for re-election, a decision that was affirmed by the said council on 18th February 2019. That the petition and Notice of Motion he avers are for all practical and legal purposes challenges the decision made by the **LSK** Council on 11/2/2019 and 18th February 2019.

13. The 1st Interested party depones, that the matter deponed in his affidavit in dispute in this petition in respect to election scheduled for 9th May 2019 is a matter to be determined within the internal dispute Resolution mechanism envisaged under Regulation 2 of the Law Society of Kenya (Arbitration) Regulation 1997 and avers there is no jurisdiction to determine the matter in dispute before this court.

The 2nd Interested Party Response

14. The 2nd Interested party contention is, that the Petitioners failed to plead to any particulars of infringement as required in the case to meet the constitutional threshold. That the 1st Respondent has lawfully discharged its lawful mandate. That the orders sought if granted, will be a violation of Article 171 and/or chapter six of the Constitution of Kenya. It is the 2nd Interested party averment, that the Law Society of Kenya, (Arbitration), Regulations 1997 provides, that if a dispute arises between the members of the Law Society of Kenya and the Law Society of Kenya, the same should be determined through Arbitration rather than the courts. The 2nd Interested party avers, that he has not at any time been invited by the law society of Kenya council nor the Independent committee for a hearing on whether he qualifies to contest in the up-coming elections. That the Independent Committee recommendations were unfair and unjust as the same was reached without giving a fair hearing to the affected parties.

The 3rd Interested party Response

15. The 3rd Interested party filed Replying affidavit dated 29th March 2019, averring, that he fulfilled all requirements as set out in the Notice of Nomination and that he is prepared for the elections and he leaves the matter to the court for determination.

The 4th Interested Party Response

16. The Interested party filed a Replying on 5th April 2019 challenging the petition on the grounds, that there is no jurisdiction to determine the petition for reason that the court is not the prescribed forum and that the petition does not raise any constitutional issues.

The 5th Interested Party Response

17. The 5th Interested party filed Replying affidavit dated 5th April 2019. The 5th interested party avers, that he meets all the requirements as set for one to contest in elections for Law Society of Kenya male Representative to Judicial Service Commission and presented his nomination papers on 11th December 2018, as on 10th of December 2018, the 1st Respondent's offices were closed by time his documents were taken. That on 11th February 2019 the **LSK** met and cleared all the five candidates, including Gathii Irungu and Tom Odhiambo Ojienda, to vie for the position of the Law Society of Kenya male Representative to the Judicial Service Commission. That todate he has not received formal communication from **LSK**, that his candidature has been revoked and that at no time has he been called by **LSK** or Independent Committee for hearing whether he qualifies in the upcoming elections. He avers the Independent Committee recommendations were unfair and unjust as its decision was reached without giving a fair hearing to the affected parties. The 5th Interested party avers, that the Law Society of Kenya, (Arbitration), Regulation 1997 provides, that if a dispute arises between the members of the Law Society of Kenya and the Law Society of Kenya, the same should be determined through Arbitration rather than the court.

Analysis and Determination

18. I have considered the petitions, various Replying affidavits by the Respondents and Interested parties; the grounds of opposition; counsel rival written submissions and oral submissions made by respective parties in support and in opposition of the rival positions taken by parties herein, and from the above several issues for considerations have been raised, one of which is on the issue of jurisdiction. I find that this court is mandated whenever an issue of jurisdiction is raised to deal with the same first, before venturing on the other issues, for once a court finds it has jurisdiction, it has to proceed to consider the other issues but if the court finds it lacks jurisdiction, it has to down its tools and leave the matter at that point without making any finding on the other raised issues. I will therefore proceed to consider the issue of jurisdiction first and issue of alternative dispute resolution mechanism.

Want of jurisdiction and alternative dispute Resolution Mechanism

19. The 1st Respondent, the 7th, 8th and 10th Respondents, 1st Interested party, the 2nd Interested party, the 4th Interested party challenges the jurisdiction of this court on the grounds, that the petitions before this court are not ripe for court action given the existence of Alternative Dispute Resolution Mechanism. It is the above Respondents and Interested parties position, that the two petitions are premature as they are

yet to be ripe for hearing.

20. In the 1st Respondent's Replying affidavit dated 15th April 2019 by Mercy Wambua, the Secretary to the Council and Chief Executive officer of the Law Society of Kenya, she has deponed that the Petitioners, Respondents and Interested parties are all members of the Law Society of Kenya, the statutory body responsible for professional regulation of Advocates in Kenya for the purposes of Article 171 of the Constitution is the Law Society of Kenya. The only parties in these two petitions which are not members of Law Society of Kenya in both petitions are the Hon. Attorney General and IEBC both of whom have no role at all in the nomination of the male representative by LSK to the Judicial Service Commission. The nomination is purely an internal affair of the Law Society of Kenya.

21. The office of male member representative of the LSK to JSC is a constitutional office established by Article 171(2) (f) of the Constitution of Kenya. The holder of the office is required to be of at least fifteen years' experience and should be elected by members of the statutory body responsible for the professional regulation of Advocates. The statutory body in this case is the Law Society of Kenya. The Council of the LSK may with approval by resolution of members under **section 41(m) of the Law Society Act**, make regulations providing *interalia*;

"(M). The manner of election; removal and replacement of a person nominated by the society to any constitutional or statutory body."

22. The Law Society in its operation has over the years relied upon the Law Society of Kenya (*General*) Regulations, 1962. Under **section 43 (3) of the Law Society Act**, it is provided:-

"(3) A person who was immediately before the commencement of this Act serving as the Secretary or an employee of the Society under the repealed Act shall continue in office until the expiry of their term."

23. From the above as regards all disputes resolution on matters relating to L.S.K, the Law Society of Kenya (Arbitration) Regulation 1997; Regulation 2 provides:-

"Where a dispute arises relating to the management of the affairs of the Law Society of Kenya:-

a. Between a member or members of society and the society; or

b. Between a member or members of society and the council of society such dispute shall be reported in writing to the council of society by aggrieved party, or parties."

24. From the above provision of the Law Society of Kenya (Arbitration) Regulations, 1997 it must be demonstrated before a dispute is referred to Arbitration under the Law Society of Kenya (Arbitration) Regulation 1997, as follows:-

a. The dispute relate to the management of affairs of the Law Society of Kenya.

b. The Dispute is between a member or members of society and the society.

c. The dispute is between a member or members of the Law Society of Kenya and the council of Law Society, and such dispute shall be reported in writing to council of the society by the aggrieved party or parties.

The dispute herein relates to nomination of male representative by L.S.K to JSC. The Black's Law Dictionary Tenth Edition at page 1104, defines management as follows:-

"Management of the people in an organization who are vested with a certain amount of discretion and independent judgment in managing its affairs."

The dispute of nomination of a male representative of L.S.K. to J.S.C, is in view of the above a dispute relating to the management of affairs of the Law Society in, that it is an internal affair, in which, it is only LSK, which is mandated to carry out the nomination of the candidates to contest for the position set for the professional body herein. The dispute as averred in the uncontroverted affidavit by the secretary to the council and chief executive officer of the Law Society of Kenya is between a member or members of the society and the society or between a member or members of the society and the council of society.

25. The petitioners contend, that this is not a dispute contemplated under Regulation 2 of the Law Society of Kenya (Arbitration) Regulations, 1997 as it is just not a dispute between a member or members of the society and the society or between a member or members of the Law Society of Kenya and the council of the Law Society, as the dispute includes two other substantive members, the Attorney General of the Republic of Kenya and IEBC being 15th and 16th Respondents and who are not members of the society. Indeed the two are not members of the society as submitted by the petitioners, however on perusal of the petition no specific prayer is made against any of them as regards nomination of the male representative by LSK to JSC. The nomination is purely an internal affair of LSK and the two other parties have no role to play, when it comes to nomination, the issue in dispute. I find it would be not correct to state that the dispute includes the two as substantive members. The role of the two is totally not related to the dispute as regards nomination. The two are not by provisions of the Law Society Act, required to take any part in the nomination nor in the alternative dispute resolution, as provided for under Regulation No. 2 of the Law Society of Kenya (Arbitration) Regulation, 1997.

26. It is settled principle that "Ripeness" of a case is a matter, that must be ventured into before a court proceeds to analyse and determine a

matter before it on merits; and more so, where there exists available, efficient and effective internal dispute resolution mechanism with the Respondent society, which the petitioners could have had recourse to before invoking the court's jurisdiction. Regulation 2 of the Law Society of Kenya (Arbitration) Regulation 1997 provide for mandatory arbitration of disputes between the petitioners, Respondents and Interested parties herein. The Petitioners were bound to exhaust the existing dispute resolution mechanism with the Respondent society before moving the court for orders sought in the petitions.

27. In view of the above this court is not allowed to review decisions made by the 1st Respondent prior to the Petitioners exhausting of alternative remedies especially provided under the Regulation No.2 of the Law Society of Kenya (Arbitration) Regulation 1997. The Petitioners have not sought exemption and having not met the conditions under the Fair Administrative Act Act 2105 for exemption from obligation to exhaust alternative dispute resolution mechanism have come to court prematurely. The Petitioners did not apply for exemption, nor did they demonstrate exceptional circumstances, or proved the exemption would be in the interest of justice.

28. I have considered the Fair Administrative Action Act under section 9 and it is clear the same has constitutional underpinning as clearly spelled under Article 159(2) (c) of the Constitution 2010 which enjoins this court to promote alternative forms of dispute Resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism.

29. In regard to the above proposition, I am guided by several authorities submitted by the counsel. In the case of **Wanjiru Gikonyo and 2 others vs the National Assembly of Kenya & 4 others (2016) eKLR** Hon Justice L. Onguto, referred to the case of Jesse Kamau and 25 others vs the Attorney General, Misc. Application 890 of 2004, where the court stated:-

"In some cases, the Constitutional ripeness of the issues presented depends more upon a specific contingency needed to establish concrete controversy rather than upon general or underlying facts. For example, litigants alleging that a government action has affected an unconstitutional taking without just compensation are normally obliged to exhaust all avenues for obtaining compensation before the issue is deemed ripe."

30. In case of **Council of County Governors vs Lake Basin Development Authority & 6 others (2017) eKLR** Hon. Justice Mativo in a Constitutional Petition held thus:-

"I have no doubt that alternative dispute resolution processes are complementary to the Judicial process and by virtue of Article 159(2) (c) of the Constitution, the Court is obligated to promote these modes of alternative dispute resolution. A Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy."

31. In the case of **Jennifer Shamalla vs Law Society of Kenya & 15 others (2017) eKLR** it was held:-

"It has been said time without number that whenever an Act of Parliament provides for a clear procedure or mechanism or redress, the same ought to be strictly follows."

32. In **Nelson Adanyi Havi vs Law Society of Kenya & 3 others (2018) eKLR** it was held:-

"It is also important to mention that the Law Society of Kenya (Arbitration) Regulations, 1997 do provide for Arbitration. None of the parties addressed this subject. Internal remedies are designed to provide immediate and cost-effective relief, giving the parties the opportunity to utilize their own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid."

33. The requirement to pursue a dispute in a manner and forum set out by the Constitution of an organization was clearly reiterated in the case of **Francis Mwangi Muturi & 2 others vs Kanja Njeru & 2 others (2009) eKLR** where the court stated:-

"As members of Kanu, the Plaintiffs as well as the 1st and 2nd defendants are beholden to their Kanu constitution. They ought therefore to have referred this dispute to arbitration as per their constitution instead of rushing to court. I do not agree with the submissions of Mr. Muhoho that much as Kanu constitution talks of internal resolution mechanism, that alone does not divest this court from hearing and determining the dispute. The need to invoke internal dispute resolution mechanism within Kanu is couched in mandatory terms. The plaintiffs have no alternative but to comply. In my view courts of law should be reluctant to interfere in the running and management of societies and private members clubs unless of course there is breach of rules of Natural Justice or the said clubs and or societies act outside their mandate."

"The council may, subject to the provisions of this Act and with approval by a resolution of members, make regulations, which shall be binding on all members of the society, prescribing any of the follows matters;

q. Alternative forms of dispute resolution, including reconciliation, mediation and arbitration."

34. I find that the Law Society of Kenya Act and further as per its subsidiary legislation the Law Society of Kenya (Arbitration) Regulation 1997; the said Regulation specifically regulates the disputes between a member or the members of the Law Society and the society or between a member or members of the society and the council of the society, and it has a well laid down procedure for restitution of the disputes. I have considered the dispute in the two petitions and I am satisfied the two disputes concern a dispute between members of the society and the council of the society. The disputes have not been resolved by the 1st Respondent and the petitioners as well as the Interested parties herein in accordance with the alternative dispute resolution mechanism under the Regulation No. 2 of Law Society of Kenya (Arbitration) Regulation 1997. The Petitioners, Respondents and Interested parties are bound by their constitution. I find that the dispute

herein ought to have been referred to arbitration as per the Law Society Act and the Law Society of Kenya (*Arbitration*) Regulations 1997, instead of moving this court without complying with the Law Society Constitution. The fact that the petitions raises serious issues, alone, does not give this court jurisdiction to hear and determine the matter without parties having complied with the clearly set out conditions as regards settling internal disputes. I find the petitioners, the Respondents and Interested parties have no way out of the provisions regarding internal dispute resolution mechanism and as set out in the 1st Respondent's constitution. I find in such circumstances the courts of Law should not move into the arena of dispute between the parties and interfere in the internal running and management of affairs of societies and their members. The parties are under obligation before moving to courts to exhaust all alternative dispute Resolution mechanism as per their constitution and Regulations.

35. Having come to the conclusion, that I have, I find, that the petitioners' petitions are premature for having not complied with the provisions of the Law Society Act and the Law Society of Kenya (*Arbitration*) Regulations, 1997. The matters in dispute should have been put up for determination under the dispute resolution mechanism of Law Society of Kenya. I find that the jurisdiction of this court, is as such barred by virtue of existence of alternative mechanism of resolution of the dispute. I find that this matter is for hearing and determination through alternative dispute Resolution Mechanism. The same is for striking out for want of jurisdiction. Accordingly the petitions are struck out and dismissed.

36. These petitions are matters of public interest and as such I order each party to bear its own costs.

Dated, signed and delivered at Nairobi this 7th day of May, 2019.

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J .A. MAKAU

JUDGE