REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI,

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 607 OF 2017

IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 22, 23, 24, 27, 35, 47, 48, 50 (1), 159, 165 AND 258 OF THE CONSTITUTION OF KENYA, 2010

NELSON ANDAYI HAVI…..
…….PETITIONER

VS

LAW SOCIETY OF KENYA.....1STRESPONDENT

ATTORNEY GENERAL.....…….…..2ND RESPONDENT

APOLLO MBOYA (HSC).....1STINTERESTED PARTY

FRED OJIAMBO (MBS, SC).....2NDINTERESTED PARTY

JUDGMENT

The Parties

1. The Petitioner is an advocate of the High Court of Kenya and a Member of the Law Society of Kenya (the first Respondent), a body corporate established under Section **3** of the Law Society of Kenya Act[1] (the Act).

2. The second Respondent is the Honourable Attorney General of the Republic of Kenya established under Article **156** of the Constitution, and the principal legal adviser of the Government.

3. The first interested Party, an advocate of the High Court of Kenya, was until 2015, the Secretary and Chief Executive Officer of the first Respondent. The second Interested Party is an Advocate of the High Court of Kenya, a Senior Counsel and the Chairperson of the Senior Counsel Committee.

The Petitioners' case

4. The Petitioners' case is that he was admitted to the bar on **12th** June 2003. His first practicing certificate was issued on **19th** June 2003.At the time of his admission, the applicable law governing the election of the Chairman and Vice Chairman of the first Respondent was Section **18** of the Law Society Act[2] (Repealed). Under the repealed act, qualification for election as Chairman and Vice Chairman was to have served as a Council Member. Currently, the applicable law is the Law Society of Kenya Act[3] (the Act) which came into force on **14th** January 2015.

5. The Petitioner avers that Section **41** of the Act requires the first Respondent's Council, acting upon approval by a resolution of Members of the first Respondent, to make Regulations for *inter alia* "manner of election, removal and replacement of the President, the vice-president and the other members of the Council, and representatives of the Society in the Disciplinary Committee." He states that the Act preserves the operation of the Regulations made under the Repealed Act[4]but does not provide for an elaborate mechanism for election of the President, Vice-President and Members of the Council of the first Respondent, save for Section **20** thereof which requires Members of the first Respondent to approve a body proposed by the Council to supervise the elections.

6. The Petitioner also avers that the first elections of the President, Vice-President and Members of the Council of the first Respondent under the new Act was held on **26th** February 2016 without Regulations in place. He avers that the exercise was marred by irregularities and interference by third parties through the Independent Electoral and Boundaries Commission (I.E.B.C). He avers that the irregularities gave rise to suits among them *R vs Law Society of Kenya & another ex parte Frank Ochieng Walukhwe**[5]*** in which the court reiterated the urgent need of making regulations to ensure integrity in the procedure governing the elections and *Jeniffer Shamala vs Law Society of Kenya & 15 Others*[6]where allegations of impropriety and manipulation of the Members register by the Secretary and Chief Executive Officer of the first Respondent and IEBC were alleged.

7. The Petitioner also states:-

> *a. that in an annual meeting held on 11th March 2017,it was reported to Members that a Committee had been tasked to develop Regulations under Section **41** of the Act with a view to operationalizing the Act.*
>
> *b. that on 19th October 2017, the Secretary and Chief Executive Officer of the first Respondent notified Members of a Special General Meeting to be held on **11th** November 2017, to consider amongst others, approval of Regulations made under Section **41** of the Act.*
>
> *c. That the Regulations provided at Part **111**, Regulations **25** to **46**, an elaborate procedure for election of President, Vice-President and Members of the first Respondents' Council. Under Regulation **29**, elections are to be supervised by the Elections Board, to be established two weeks before the deadline for submission of Nomination papers.*
>
> *d. That the Elections Board is mandated to scrutinize nomination papers, determine whether a person was validly nominated, resolve nomination and election disputes and complaints, be the liason with the body tasked with conducting elections to ensure fairness and justice.*

8. Also, on 27th October 2017, his advocate wrote to the first Respondent seeking inclusion in the agenda of the meeting scheduled for **11th** November 2017, the appointment of a suitable audit firm to supervise the elections, but on **2nd** November 2017, the Secretary and Chief Executive Officer of the first Respondent called off the Special General Meeting purportedly to enable the Council of the first Respondent to deliberate on the Regulations in light of the judgment in Petition **287** of 2016,[7]yet there was no relationship between the said judgment and the matters scheduled for discussion in the said meeting. Thus, the said meeting was put off with a view to scuttling deliberation on the issues raised in his advocates' letter referred to above.

9. The Petitioner avers that there is no justification why the regulations have never been submitted for

approval by members three years after the Act came into force and two years after the High court decision and the Members Resolution of **11th** March 2017.

10. Also, on **6th** November 2017, the first Respondent issued notice to its members for nominations for the elections. Being qualified to run, and having attained fifteen years of practice, he presented his nomination papers together with the supporting documents to vie for Presidency of the Society. Upon inquiring to confirm the status of his nomination papers, the President of the Law Society referred him to the Secretary who upon request e-mailed him informing him that his nomination was not accepted on grounds that he had not attained fifteen years in practice.

11. The Petitioner maintains that he is qualified to run for the office of the President of the first Respondent by dint of Section **18 (1) (a)** and **(b)** of the Act,[8] having been admitted to the bar on **12th** June 2003 and that he was issued with a practicing certificate for year 2003. He avers that Section **24** of the Advocates Act[9] defines a practice year as running from **1st** January to **31st** December, hence, he has attained **15** years in practice.

12. He states that the first interested party informed him that an opinion on what constitutes a practice year was sought by the first Respondent from the Second Interested Party, whose opinion was that one's year of practice is computed as a practice year if the date of admission is before **1st** December. He also avers that the first Respondent has over all the years collected charges for practicing certificates on annual basis, the practice year commencing from **1st** January to **31st** December without prorating the amounts payable to a shorter duration of the year, a confirmation that a practice year is represented by the practice certificate issued.

13. Alternatively, the Petitioner avers that under Section **12** of the Act, a member is entitled to vote and to vie for any office. That the minimum fifteen years to contest as chairman and two years for council member restricts over **60%** of the members from vying for offices of president, vice president and council members. And, that, the requirement that for a member to vote must have a practicing certificate as at **31st** December of the year locks out members issued with certificates subsequent to the issuance of the notice.

14. He challenges the refusal of his nomination papers based on Section **18 (1) (a)** and **(b)** of the Act and Article **166 (3) (b)** of the Constitution on grounds that it is unlawful, irrational, unjustifiable; and that the was not afforded the right to be heard; and that the above provisions contravene Articles **24, 25** and **27** of the Constitution.

15. Also, proceeding with the elections in absence of the Board as required under Section **41** of the Act would be perpetuating an illegality and is against the Petitioners legitimate expectation. Further, the first Respondent or its secretary has no power to make Code of Conduct and Rules for Eligibility for elections, or conduct elections without the approval of the Members, or to scrutinize/verify the nomination papers, hence they acted in contravention of Section **7** of the Fair Administrative Action Act.[10] He also questions the list of the nominees on ground that it was not published two months before the election date, contrary to the 2016 practice, and that the council and I.E.B.C. cannot be trusted with the conduct of the elections.

First Respondents Response

16. Mercy Wambua, the Secretary to the Council and the Chief executive officer of the first Respondent, in her Replying Affidavit filed on **22nd** January 2017 avers that the governing law is the Law Society of Kenya Act; that Section **20** provides that the elections shall be conducted by such body as the Council may propose and approved by the general meeting preceding the election and that the procedure is outlined in the Law Society of Kenya (General) Regulations, 1962 which remain in force until such a time when Parliament approves the draft Law Society of Kenya (General) Regulations 2017 as finalized.

17. She avers that on **11th** March 2017, the first Respondents' AGM vested the conduct of the 2018 elections in IEBC in compliance with Section **20** of the Act, and on **6th** November 2017, the first

Respondent sent a written notice to all the members of the Society, announcing the number of vacancies and inviting nomination of candidates for the various posts in strict compliance with Section **19** of the Act and Regulation **12**. Nomination papers were dispatched to all the members. At the close of the nominations, scrutiny and verification process for confirmation of compliance with the law and Regulations was conducted by IEBC, and the Petitioner was found not to have met the eligibility criteria set out in Section **18 (1),** hence his nomination was not accepted.

18. He was notified that he had not attained the **15** years experience as a legal practitioner as required under Section **18(1) (a) (b)** of the Act as read with Article **166 (3) (b)** of the Constitution. He was admitted on **12**th June 2003, he shall have attained at least **15** years experience as a legal practitioner in over three months after the elections scheduled for **22nd** February 2018, and over two months after the new Council assumes office.

19. On the draft Regulations, she averred that deliberations were deferred on **11th** March 2017 owing to time constraints and request by members to have further consultations before approval. Further, the cancellation of the special general meeting was in consideration of the need to have the L.S.K. Regulation committee to reconsider and possibly re-engage members on the Regulations 2017 in light of a court of appeal decision in which the Court held that the branches are neither semi-autonomous or autonomous which was different from what was in the Regulations. Thus, the cancellation was in consideration of the need for the council to deliberate and engage the various organs of the Society on the effect of the Court of Appeal decision. Also, the cancellation had no impact on the elections because even if they had been adopted, it was a requirement that they would be forwarded to Parliament, thus, the elections were to be held under the existing Regulations.

20. She averred that a legal practitioner is a person admitted as an advocate as stipulated under Section **15** of the Advocates Act.[11] Also, Section **15 (4)** provides that a person admitted as an advocate shall sign the roll, hence the period runs from the date of signing the Roll and that the practicing certificate is a regulatory tool for confirmation of compliance with the necessary requirements governing practice of law, and a license to practice in the particular year[12]effective date being the date of issue, and that the petitioners Practicing certificate was issued on **19th** June 2003, hence he could not be deemed to have been in practice between **1st** January 2003 to **18th** June 2003.

21. Further, the **15** years experience must be computed from the date of admission and practice experience evidenced by issuance of practicing certificates unless exempted under Section **10** of the act. On the alleged opinion by the second interested Party, she stated that the second interested party wrote disputing the alleged advise.

22. She described the alternative case as a fallacious interpretation of the law and averred that the enactment of the L.S.K. Act was through consultation with the society's Members, that the Bill was sent to Members for review and was an item for deliberations at the 2012 AGM. Also the council held stakeholder forums to obtain views from Members on diverse dates listed in paragraph **47** of the Petition and upon deliberations it was settled that persons qualified to run for the position of Chairman should possess more years experience beyond the requirements for appointive position of Secretary and Chief Executive Officer of the LSK, and that a person qualified to be President of the Society should posses qualifications of Supreme Court Judge in order to match the important functions under Section **4** of the Act, and that neither the petitioner nor any Member has formally notified the Council of the first Respondent requiring the review of Section **18** of the Act, and that the Section is reasonable, justifiable and a necessary limitation permitted under Article **24** of the Constitution and matches the intention of the Members.

Second Respondents Grounds of opposition

23. The Hon. Attorney General filed grounds of opposition stating:- **(a)** the Petitioner does not meet the criteria set out in Section **18 (1)** of the Act and Article **166 (3) (b)** of the Constitution, **(c)** that Section **24 (2)** of the Advocates Act[13] provides that a practicing year shall be from January **1st** ending December

31st with each practicing certificate expiring at the end of the practicing year of issuance. **(c)** that the Petitioner has not demonstrated that the provisions are unconstitutional, **(d)** that a court is required to interrogate the entire process leading to the enactment of a legislation and in the instant case there was public participation prior to the enactment, **(e)** that declaring a law to be unconstitutional has serious ramifications and the court should be persuaded that the unconstitutionality has been proved which had not been done.

Interested Party's Responses

24. The first interested party did not file any response nor did he participate in the proceedings. The second interested party filed a notice of a preliminary objection stating that the Petition does not disclose a case against him, and no orders have been sought against him. He disputes the alleged opinion, and adds, if it existed as alleged, the same is privileged,[14]being communication between an Advocate and a client.

Supplementary Affidavits

25. In his supplementary affidavit filed on 24th January 2018, the Petitioner *inter alia* denies knowledge of LSK Bill, 2012 being transmitted to Members or being an agenda item at the 2012 AGM. He also denies stakeholders participation and avers that the requirement for fifteen years practice was introduced in Parliament without consulting Members, nor is there a rationale for the requirement. Also, the age requirement is peculiar to Kenya unlike other jurisdictions cited in paragraphs **28** to **36** of the supplementary affidavit.

26. Mercy Wambua's supplementary Affidavit states that the Council at the invitation of the Clerk to the National Assembly appeared before the Departmental Committee on Justice and Legal Affairs and submitted its views on the Bill. Also, the Council forwarded views to the Honorable Attorney General as evidenced by the annexures to her affidavit.

Reliefs sought

27. The Petitioner seeks the following orders/reliefs:-

> *i. A declaration that Sections **18 (1) (a) & (b)** of the Act**[15]** is inconsistent with rights conferred to members of the Law Society of Kenya under Section **12 (e)** and **(f)** of the Act**[16]** for being irrational, unreasonable, discriminatory, hence, they contravene Articles **24, 25** and **27** of the Constitution.*
>
> ii. C*ertiorari* to quash **(a)** *Decision made on 13th December 2017 declaring him in illegible to contest for President of the first Respondent in the elections scheduled for **22nd** February 2018;* **(b)** *Decision made on **15th** December 2017 communicated through social media and e-mail notifying the list of nominees declared to run in the elections for elections; **(c)** item **4** of the Electoral Code of Conduct, 2015, limiting the eligibility of voters in an election to members with practicing certificates as at date of **31st** December of the year in which the notice is issued calling nomination of candidates.*
>
> *iii. An order directing the first Respondent to call a Special General meeting of its Members to approve the Regulations forwarded to Members with the Notice dated **10th** November 2017 and to constitute an election Board to undertake fresh nominations and elections for the above offices*.
>
> *iv. An injunction restraining the first Respondent from proceeding with the elections for the above offices on **22nd** February 2018 or in any event, before the members approval of the Regulations made under Section **41 (h)** of the Act**[17]** and the constitution of an Elections Board to oversee fresh nominations and the elections.*

Issues for determination

28. From the facts enumerated above, I find that the following issues distil themselves for determination:-

a. Whether the Petitioner has attained the Statutory and Constitutional requirements to qualify for nomination to vie for President of the Law Society of Kenya.

*b. Whether Section **18 (1) (a) & (b)** is inconsistent with rights conferred to members of the Law Society of Kenya under Section **12 (e)** and **(f)** of the Act.**[18]***

*c. Whether the Section **18 (1) (a)** and **(b)** offend Articles **24, 25** and **27** of the Constitution.*

d. Whether the Petitioner has established grounds to qualify for the injunction sought.

e. Whether the Petitioners Right to reasonable expectation has been violated.

f. Whether the Petitioners Right to natural justice and Fair Administrative Action was violated.

g. Whether there was sufficient public participation in the enactment of the LSK Act

h. Does the Petition discloses a case against the Interested Parties.

29. I will address the Advocates submissions as I discuss each of the above issues. However, I must point out that all the advocates referred to numerous authorities which I have considered. I find it appropriate to make a general observation on the relevancy of some of the authorities cited, some of which I will point out to later.

30. It is settled law that a case is only an authority for what it decides. This is correctly captured in the following passage:-[19]

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides..." (Emphasis added)

31. The ratio of any decision must be understood in the background of the facts of the particular case.[20] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[21] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[22]

32. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[23]In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[24] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[25] My plea is to keep the path of justice clear of obstructions which could impede it.

33. The other important point to mention is that all the counsels cited some foreign decisions in support of their respective cases. I have also considered foreign decisions in this determination. Foreign

jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues that confront us in this matter. At the same time, it is important to appreciate that foreign case law will not always provide a safe guide for the interpretation of our Constitution. Except the Republic of South Africa, most decisions cited are from countries whose constitutions are not similar to ours.

34. Our Constitution gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law.[26] Exercise of judicial authority is now entrenched in the Constitution[27] which underscores the Independence of the Judiciary.[28]

35. The philosophy, values and the structures of the previous Constitution had to give way to those of the new constitutional order which included enactment of new legislations, the realignment of the bureaucracy and management of institutions and the rallying of the national consciousness to the new dawn.[29] Courts are accountable to the Constitution and the law which they must apply honestly, independently and with integrity.

36. When developing our jurisprudence in matters that involve constitutional rights, as the present case does, we must exercise particular caution in referring to foreign jurisprudence[30]and develop our common law in a manner that promotes the values and principles enshrined in our Constitution. This leads me to the question, what are the guiding principles in Constitutional and Statutory interpretation.

Guiding principles of Constitutional and Statutory interpretation

37. Determining the issues identified above involves interpreting the relevant statutory and Constitutional provisions, hence, I find it appropriate to briefly discuss the guiding principles of Constitutional and Statutory interpretation.

38. Interpretation as I understand it is the process of attributing meaning to the words used in a document, be it legislation, statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence. The ‘inevitable point of departure is the language of the provision itself,’ read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.[31]

39. I have severally observed in my determinations that Article **259** of the Constitution introduced a new approach to the interpretation of the Constitution. It obliges courts to promote *'the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance.* This approach has been described as 'a mandatory constitutional canon of statutory and Constitutional interpretation'. The duty to adopt an interpretation that conforms to Article **259** is mandatory.

40. It is also necessary to restate the well-known general principles relating to constitutional interpretation, which are, in any event, incontrovertible. The *first* principle is that the Constitution of a nation is not to be interpreted like an ordinary statute. In his characteristic eloquence, the late Mahomed AJ described the Constitution as 'a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government'. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.[32]In keeping with the requirement to allow the constitutional spirit and tenor to permeate, the Constitution must not be interpreted in ‘a narrow, mechanistic, rigid and artificial’ manner.[33]Instead, constitutional provisions are to be ‘broadly, liberally and purposively’ interpreted so as to avoid what has been described as the ‘austerity of tabulated legalism.’[34]It is also true to say that situations may arise where the generous and purposive interpretations do not coincide.[35] In such instances, it was held that it may be necessary for the generous to yield to the purposive.[36] *Secondly*, in interpreting constitutional rights, close scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question.[37]

41. Section **1** of the Act reads:-"This Act may be cited as the Law Society of Kenya Act, 2014 and shall come into operation in accordance with the Constitution. Cleary the Act is umbilically linked to the Constitution, hence, as we interpret it, we must seek to promote the spirit, purport and objects of the Constitution.

42. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied by the statutory provisions in question. We must understand the provision within the context of the grid, if any, of related provisions and of the Constitution as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context.

43. In construing the provisions, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance. We are also obliged to be guided by the provisions of Article **159 (e)** of the Constitution.

44. It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.[38]

45. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in Article **259**.

46. Courts have on numerous occasions been called upon to bridge the gap between what the law is and what it is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute, a document or an action of an individual which is certain to subvert the societal goals and endanger the public good.

47. There are numerous rules of interpreting a statute, but without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.

48. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The Court cannot add words to a statute or read words into it which are not there. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.

49. In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature.

50. In interpreting the provisions of a statute the Court should apply the golden rule of construction. The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According

to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, e.g. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.[39]

51. To buttress this point, I recall the often quoted words of the Supreme court of India:-***[40]***

> *"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."*

52. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[41]Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[42] If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

Whether the Petitioner has attained the requisite Statutory and Constitutional requirements to qualify for nomination to vie for President of the Law Society of Kenya.

53. Counsels for the Petitioners cited Section **24 (2)** of the Advocates Act[43] which states that every practicing certificate shall expire at the end of the practicing year in which it was issued and submitted that the Petitioner holds **15** practicing certificates, hence he has attained fifteen years in practice. They cited *Willis Evans Otieno vs Law Society of Kenya and 2 Others*[44]where the Court defined a practicing year. The core argument here is that the Petitioners first practicing certificate is dated **19th** June 2003, for the year ending 2003. He has since continuously held practicing certificates for fifteen successive years.

54. Counsels for the first Respondent submitted that the Petitioner having been admitted on **12th** June 2003 will attain at least fifteen years experience as legal practitioner on **12th** June 2018 and that the Petitioners' claim that having been issued with a practicing certificate on **19th** June 2003, the practicing certificate constitute a complete practice year is incorrect and a fallacious interpretation of the law. They cited Section **24 (1)** of the Advocates Act[45] which provides that a practicing certificate shall have effect from the date of issue. This position was supported by the second Respondents Counsel.

55. As pointed out earlier, a decision is only an authority for what it decides. *Willis Evans Otieno vs Law Society of Kenya and 2 Others*[46] defined a practice year as provided under Section **24 (3)** of the Advocates Act. It did not address itself to Section **24 (1).** We cannot impose the interpretation of Section **24 (3)** on Section **24 (1)** which defines the effective date of a practicing certificate.

56. Section **2** of the Act defines an advocate as follows:- **"advocate"** has the meaning assigned to it in the Advocates Act.[47] The Advocates Act defines an advocate as **"advocate"** means any person whose name is duly entered upon the Roll of Advocates or upon the Roll of Advocates having the rank of Senior Counsel and, for the purposes of Part **1X**, includes a person mentioned in Section **10**.

57. Section **18** (1) of the Act now under attack provides that *"A person is eligible for election as the president or vice-president if the person—**(a)** is a member or former member of the Council: or **(b)** is qualified to be a Judge of the Supreme Court.*

58. The Petitioner is not a member or a former Member of the Council. Hence, Section **18 (1) (a)** is not applicable to him. The second requirement is that one has to be qualified to be a Judge of the Supreme Court. Under Article **166 (3)** of the Constitution, a Judge of the Supreme Court is required to have— ***(a)***

at least fifteen years experience as a superior court judge; or ***(b)*** *at least fifteen years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or* ***(c)*** *held the qualifications specified in paragraphs* ***(a)*** *and* ***(b)*** *for a period amounting, in the aggregate, to fifteen years.*

59. The Petitioner was admitted to the bar on **12th** June 2003. His first practicing certificate was issued on **19th** June 2003. He states that a practice year starts from **1st** January and ends on December **31st.** He has exhibited **15** practicing certificates. The qualifications for practising as an advocate are prescribed in Section **9** of the Advocates Act.[48] A person must have been admitted as an advocate, his name must be on the Roll and must have in force a practising certificate. This Section warrants no elaboration. Prior to 1**2th** June 2003, the Petitioner had not been admitted, his name was not on the Roll and he did not have in force a Practising Certificate. Hence, a computation of the fifteen years that includes or purports to include the period when the Petitioner did not possess the above qualifications is out rightly erroneous.

60. Section **22 (2)** of the Advocates Act provides that the Registrar must be satisfied that the applicants name is in the Roll before issuing a practicing certificate. Under Section **23**, a person becomes a Member upon being issued with a practicing certificate. Thus, the Petitioner became a Member on **19th** June 2003 and in computing the fifteen years, we cannot include the period he was not a Member nor can he be said to have been in practice prior to becoming a Member of the Society.

61. The Petitioner states that practicing year starts from **1st** January and ends on **31st** December. This argument is based on Section **24 (2)** of the Advocates Act. However, sub-section **(1)** on date and validity of practicing certificate provides that *"Every practicing certificate shall bear the date of the day on which it is issued and shall have effect from the beginning of that day, Provided that a practicing certificate which is issued during the first month of any practicing year shall have effect for all purposes from the beginning of that month."*

62. From the above provision, the Petitioners certificate for all purposes can only be said to have had effect from the beginning of June 2003, and not before. Hence, the Petitioners practicing certificate issued on **19th** June 2003 was effective from the beginning of June 2003 as per sub-section **(1)** and cannot be said to have been effective from **1st** January 2003. It is my conclusion that the Petitioners fifteen years in legal practice must be computed from the effective date of his first practicing certificate. In my view, the Petitioner will attain **15** years experience in legal practice on **19th** June 2018. Hence, as at the time his nomination papers were rejected he had not attained the fifteen years experience in legal practice.

63. Dr. Khaminwa, citing a dictionary meaning of "legal practitioner", argued that pupilage should be factored in the computation of time stating that a pupil engages in matters touching on legal practice, hence, he is legal practitioner for the purposes of the requirements under Article **166 (3) (b).** I am afraid, this argument flies on the face of the clear provisions of the law cited above. A pupil cannot appear in court. He cannot competently draw and file pleadings in court or execute conveyance instruments. His name in not in the Roll of Advocates.

64. It is a settled principle that provisions must be construed purposively and in a contextual manner and that courts are constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be "unduly strained"[49] but should avoid "excessive peering at the language to be interpreted.[50] In my view, the interpretation propounded by the Petitioner on computation of time is not supported by the language in the provisions or the authorities cited. Stretching the date to January 2003, to cover the period prior to admission and prior to issuance of practicing certificate not only flies on the fact of Section 24 (1) discussed above, but amounts to unduly straining the language of the provision.

65. The principle which emerges is that the statutory definition of effective date of a practicing certificate in Section **24 (1)** should prevail. There is nothing to show the Legislature intended otherwise. In deciding whether the Legislature so intended, I have generally asked myself whether my interpretation would result in such injustice or incongruity or absurdity as to lead to the conclusion that the Legislature could

never have intended the statutory definition to bear the above meaning.[51]As stated earlier, where the language of the provision is clear as in Section **24 (1)** of the Advocates Act, judicial inquiry is complete.

66. The interpretation propounded by the Petitioner inviting the court to compute time to run from a period he was not in practice, prior to his admission, if upheld by the Court, can lead to absurdity. A court cannot uphold a construction that will lead to an *"absurdity", or unworkable or impracticable result, or anomalous or illogical result, or an artificial result, and lastly, the law should serve public interest.*

67. In view of my above analysis, my answer to the first issue is in the negative.

Whether Section 18 (1) (a) & (b) is inconsistent with rights conferred to Members of the Law Society of Kenya under Section 12 (e) and (f) of the Act.

68. Counsels for the Petitioners submitted that Section **12 (e)** and **(f)** of the Act guarantees Members the Right to vie for the various posts, hence Section **18 (1) (a) & (b)** to the extent it limits the said rights is inconsistent with Section **12 (e)** and **(f)** and violates Articles **24, 25, 27, 36 (1), 38 (3) (a) (c)** of the Constitution.

69. The first Respondents counsels submitted that Section **18** of the Act is founded on permissible classification in order to meet the legitimate interest of promoting inclusiveness through proportionate representation. Further, there is a strong nexus between the professional experience classification and the legislative policy and object of the impugned provision.

70. Counsel for the second Respondent submitted that the requirement for experience before taking up a certain job is not peculiar to the leadership of the first Respondent, but applies in many professions. Further there is a general presumption of constitutionality of laws enacted by Parliament,[52]and that declaring a statute to be unconstitutional is a grave issue and the court should be slow to do so.[53]

71. Article **2 (3)** of the Constitution proclaims the Constitution to be the supreme law of the country. Importantly, it declares that any law or conduct inconsistent with it is invalid. The Constitution is underpinned by a Bill of Rights that, according to Article **19**, is declared a cornerstone of our democracy. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

72. The rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State. Article **21** commands the State, and every state organ to observe, to respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights subject to the limitations in Article **24** of the Constitution.

73. I have severally stated that when the constitutionality of legislation or a provision in a statute or conduct of any person is challenged, a court ought first to determine whether, through "the application of all legitimate interpretive aids,"[54] the impugned legislation or provision or conduct is capable of being read in a manner that is constitutionally compliant.

74. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution. In interpreting the constitution, the court should give life to the intention of the document instead of stifling it.

75. The challenged provisions prescribe the qualifications to vie for presidency of the Law Society of Kenya. The rule of law is a founding value of our constitutional democracy.[55] It is the duty of the courts to insist that the state, individuals or statutory bodies in all their dealings, operate within the confines of the law. The supremacy of the Constitution and the guarantees in the Bill of Rights add depth and content to the rule of law. When upholding the rule of law, we are thus required not only to have regard to the strict terms of regulatory provisions but so too to the values underlying the Bill of Rights.

76. Because of the above fundamental commitments, a court should be slow to declare a law prescribing

qualifications to lead a professional body especially when the qualifications are grounded on the law and are consistent with the constitutional values. Article **166 (3)** of the Constitution prescribes the qualifications for Supreme Court Judges. By adopting the said qualifications, the intention of the drafter was to ensure that the President of the Law Society is elected from the most suitable, experienced and qualified person.

77. The intention of Parliament is also clear from the contribution made on the floor of the house as evidenced by the Parliamentary debates annexed to the Petitioners supplementary Affidavit, that a person desiring to serve as president of the Law Society must have the qualifications of a Supreme Court Judge.

78. Section **12 (e)** and **(f)** confer the rights to vote or contest while Section **18 (1) (a) & (b)** stipulates the qualifications to vie. I find no inconsistency at all in the two provisions. A provision that prescribes qualifications to view as in the present case cannot be deemed to be taking away the right to vote. It is aimed at prescribing a permissible statutory requirement to exercise the right. In all elections, whether Parliamentary, presidential or County Assemblies, the law lays down qualifications to contest.

79. In view of my findings, my answer to the issue under consideration is in the negative.

Whether the Section 18 (1) (a) and (b) offends Articles 24 and 27 of the Constitution

80. Three points were raised under this issue. *First*, the Petitioners Counsels submitted that the impugned provision is discriminatory, in that it offends Article **27** and international conventions guaranteeing equal protection. Further, the provision creates discrimination on account of age in that subsection **(1) (a)** allows young lawyers who have served in the counsel to vie for Presidency, while the rest are subjected to the 15 years rule.

81. Under article **24** of the constitution, fundamental Rights may be limited only to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

82. The crucial question which must be answered is what is the standard by which the constitutional validity of the challenged Section should be judged. In this regard such a question should be answered with reference to the standards of review laid down by courts when the constitutional validity of a statute is challenged which include two main standards:-

> *a. The first is the **"rationality**" test. This is the standard that applies to all legislation under the rule of law;*
>
> *b.The second, and more exacting standard, is that of **"reasonableness**" or **"proportionality**", which applies when legislation limits a fundamental right in the Bill of Rights. Article **24 (1)** of the Constitution provides that such a limitation is valid only if it is **"reasonable** and **justifiable** in an open and democratic society."*

83. In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:- **(a)** the objective is sufficiently important to justify limiting a fundamental right; **(b)** the measures designed to meet the legislative object are rationally connected to it; and **(c)** the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[56]

84. It is important to mention that the prescribed qualifications are "reasonably related" to a legitimate purpose, that is to ensure the leadership of the first Respondent is accorded to the best suitable person to fulfill its statutory mandate. In determining reasonableness, relevant factors include:-**(a)** whether there is a "valid, rational connection" between the qualifications and a legitimate and public interest to justify it, which connection cannot be so remote as to render the requirement for the qualifications arbitrary or irrational.

85. In this regard I hold the strong view that requirements for high qualifications and professional experience is a legitimate purpose. **(b)** the second consideration is whether there are alternative means of exercising the asserted right that remain open to the affected person. In this regard, the Petitioner, upon attaining the requirements in the fullness of time will be eligible to render his candidature.

86. It is equally important that the court should also as far as possible, avoid any decision or interpretation which would bring about the result of rendering the system of selecting suitable candidates unworkable in practice or create a situation that will go against clear provisions of the law governing the subject in issue. In this case, the law and the Regulations in question are designed at maintaining and ensuring the most qualified and experienced candidates are elected to run the affairs of the first Respondent.

87. It is my view that the qualifications prescribed in the law have not been shown to be unreasonable and or violating the Petitioners Rights as alleged. The provisions in question advance a compelling public interest to ensure the affairs of the Law Society are placed under the management of the most qualified persons, which is a legitimate interest.

88. A law aimed at promoting legitimate public interest is fair, reasonable, and is in my view consistent with the provisions of the Constitution. The provisions of the constitution must be read and interpreted in a wholesome manner. The right to contest for the leadership of the first Respondent must be read and appreciated with the constitutional provisions that prescribe values and principles of public service, leadership and integrity and national values and principles of governance.

89. My reading of the challenged provisions does not in any manner reveal any infringement of the provisions of the constitution. The challenged provisions are clear, precise, and unambiguous. However, if at all any limitation is imposed on the rights of the petitioner or any citizen, then in my view such a limitation is proportionate considering the purpose of the law in question. To me, the provision satisfies the requirements set out under article **24** of the Constitution in that the limitation is provided under the law and that the same is reasonably justifiable in a modern democratic society.

90. In determining discrimination, the guiding principles are clear. The first step is to establish whether the law differentiates between different persons.[57]The second step entails establishing whether that differentiation amounts to discrimination.[58]The third step involves determining whether the discrimination is unfair.

91. Discrimination means treating differently, without any objective and reasonable justification, persons in similar situations. The European Court of Human Rights described discrimination as:-[59]

> *"...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society".**[60]***

92. From the above definition, it is safe to state that the Constitution prohibits unfair discrimination. In my view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.

93. I find it useful to refer to the test for determining whether a claim based on unfair discrimination should succeed laid down by South Africa Constitutional Court[61]:-

> *"They are:-*
>
> *(a)Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless*

amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:-

> *(i)Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*
>
> *(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation.……..*

(c)If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause of the ...Constitution).

94. The clear message emerging from the authorities, both local and foreign, is that mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason is a most reprehensible phenomenon. But where there is a legitimate reason, then, the conduct or the law complained of cannot amount to discrimination.

95. It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.

96. The jurisprudence on discrimination suggests that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose. The rationality requirement is intended to prevent arbitrary differentiation. The authorities on equality suggest that the right to equality does not prohibit discrimination but prohibits unfair discrimination.

97. The requirement for qualifications to occupy a particular office cannot amount to unfair discrimination. The test will depend on the nature of the job or post the applicants are required to perform, and the responsibilities that go with it. The drafters of the provisions under challenge in their wisdom felt that the post of the President of the Law Society is a high calling that calls for the most qualified person. Consequently, they opted for high qualifications. They felt that the qualifications similar to those required for appointment of a Supreme Court Judge would suffice.

98. Save for the Republic of South Africa, most examples cited by the Petitioners Counsel where the Bar Associations have no age limit or such high requirements do not have a progressive and transformative Constitution like Kenya.

99. In my view, lowering the bar to make it easy for people to qualify may not necessarily be in the best interests of the society. But should the majority feel the necessity to effect the changes, then this can be achieved legally by Members voting for the changes in a properly constituted AGM. That way, the majority will have their say as opposed to a Court decision which may have the force of law, but may go against the preference of the majority. In other words, a court of law should be hesitant to involve itself in internal matters of professional bodies especially where the law provides for clear mechanisms of resolving them.

100. Second, the Petitioners counsels argued that item **14** of the Electoral Code of Conduct which limits

electors in an election to Members with practicing certificates as at **31st** December of the practice year locks out members who are admitted thereafter, hence, it is discriminatory.

101. I do not see how a members' right to vote can be construed to operate retrospectively. If a person was not a Member or did not hold a practicing certificate as at the time the election process kicked off, the mere fact he obtained a practicing certificate after the process started or was admitted after the process started cannot be said to be a ground to confer voting rights retrospectively.

102. An Election is a process not a one day event. It "*is, in effect, a process set in a plurality of stages."****[62]*** The voters register cannot be amended any time new advocates are admitted or a person decides to obtain a practicing certificate after the nomination process has kicked off. The effective date of practicing certificate as stated earlier is from the month of issue. Membership Rights accrue upon a person becoming a Member not before. To hold that an Advocate who is admitted and obtains a practicing certificate after the election process has began amounts to conferring upon such a Member rights which accrued prior to him or her becoming Member. Such an interpretation is in my view a wrong interpretation of the law.

103. Third, the Petitioners counsels argued that Section **18 (1) (a)** is unfair in that it allows a young advocate who served as a Council Member to vie for Presidency, yet sub-section **(2)** which provides the other avenue requires such a person to have at least fifteen years experience creating an unfair disparity, hence, discrimination.

104. A literal interpretation of Section **18 (1) (a)** and **(b)** of the Act shows that there are two avenues for vying for Presidency of the Law Society. The provision makes it easier for members who have the benefit of serving in the Council as opposed who have attained many years in practice. The implication is that a person who has served in the council will

105. I agree with the first Respondents Counsels submissions that, any Member aggrieved by the above provision has the option of raising the issue at AGM. for deliberation, consideration and voting. In so doing, the majority view will prevail as opposed to a Court decision which may not necessary represent the majority wishes. This court should not descend to run the affairs of a professional Society governed by clear provisions of a statute where the Members have a legal channel of addressing the issues.

106. Decisions of a society taken by its majority cannot be thwarted at the instance of one individual. In the first place, it has to be borne in mind that it is established law that at the instance of one member Courts are highly reluctant to interfere; at any rate, would not lightly interfere with the functioning of a corporate body or a society. It is not a dispute between two private individuals.[63] The above provisions affect the Members and they can best be resolved by the Members in a properly constituted A.G.M.

107. In view of my analysis of the law, facts and authorities enumerated above, I find that the challenged provisions do not offend Article **27** in any manner. My answer to the third issue in the negative.

Whether the Petitioner has established grounds to qualify for the injunction sought.

108. The Petitioner seeks to stop the elections scheduled for **22nd** February 2018 or in any event, before the Members approve new Regulations under Section **41 (h)** of the Act[64] and constitution of an Elections Board to oversee fresh nominations and the elections.

109. It's not disputed that Regulations are yet to be passed. I have followed carefully the reasons offered by **Mercy Wambua** as to why the regulations are yet to be passed and the efforts made so far. I find no reason to impute improper motive on the part of the council for the delay in passing the Regulations as the Petitioner seems to insinuate.

110. Further, even if the Regulations are passed today, its trite that they require Parliamentary approval. We cannot stop elections on this ground for the simple reason that neither the council nor the Petitioner, not even this court can control the calendar of Parliament or dictate to Parliament when to approve the

Regulations.

111. In any event, there is no lacuna in that the Regulations made under the repealed Act are still in force, alive and kicking. Section **43 (3)** of the Act provides that:-

> *(3) Any rule or regulation made, order or directive issued, notification given or any administrative act undertaken under the repealed Act, shall be deemed to have been made, issued, given or undertaken under this Act and shall continue in force and have effect as if it had been so made, issued, given or undertaken under this Act.*

112. The Regulations made under the Repealed Act remain in force by dint of the above Section. Section **24** of the Interpretation and General Provisions Act[65]bearing the short title "Effect of repeal of Act on subsidiary legislation" provides that *"Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder."*

113. No argument was advanced before me that the Regulations now in force are inconsistent with the current law nor has a contrary intention been alleged or demonstrated. In fact, the Act clearly provides that the existing Regulations shall remain in force *as if it had been so made, issued, given or undertaken under this Act.*

114. Clearly, the Regulations made under the Repealed Act remain in force until new Regulations under the new act are enacted. It follows that there are Regulations in place governing the elections and the process cannot be faulted or stopped on account of absence of Regulations made under the current Act.

115. 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 utilise 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.

116. I find that there is no basis at all to grant the injunction sought. In any event, it is trite law that an injunction cannot be issued to defeat clear provisions of a statute.

Whether the Petitioners Right to legitimate expectation was violated.

117. Addressing the subject of legitimate expectation, ***H. W. R. Wade & C. F. Forsyth[66]*** at pages 449 to 450, thus:-

> *"It is not enough that an expectation should exist; it must in addition be legitimate….**First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation….. **Second**, clear statutory words, of course, override an expectation howsoever founded….. **Third,** the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*

> *"An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."* (Emphasis added)

118. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker

cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute. The impugned decision is grounded on the relevant statutory provisions, in particular Section **18 (1) (a) & (2)** and Article **166 (3) (b)** of the Constitution and the Regulations in force. Thus, the plea for alleged violation of legitimate expectation fails.

Whether the Petitioners Rights under Article 47 & 50 were violated

119. The Petitioner states that he was not heard before the decision rejecting his nomination papers was made nor was he called to explain himself. The first Respondents' case is that compliance with the requirements is a matter prescribed in the statute and once the papers are scrutinized, non compliance is confirmed, it is not necessary to grant a hearing, nevertheless, the Petitioner was notified the reasons in writing.

120. To buttress their argument that the Petitioner was entitled to be heard before his papers were rejected, counsels cited several decisions among them *Richard Bwongo Birir vs Narok County Government & 2 Others*,[67]*Henry Asava Mudamba vs Institute of Certified Public Accountants of Kenya*[68] and *R.vs Independent Electoral and Boundaries Commission & 3 Others ex parte Wavunya Ndeti*.[69] As I stated earlier, a case is only an authority for what it decides and is not to be taken to be a general exposition of the law in the area in question.

121. *Richard Birir's* case involved dismissal from a county executive committee, *Henry Asavas'* involved suspension, while *Wavinya Ndeti* challenged a decision by IEBC stating that she belonged two political parties. The facts in this case are totally different. The above authorities can be distinguished from this case and demonstrated below.

122. Counsels for the first Respondent cited J.S.C. vs Mbalu Mutava[70] *and correctly argued that the right to a fair administrative action under Article **47** is distinct right from the right to a fair hearing under Article **50 (1).** Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law. Fair hearing applies in proceedings before a court of law or independent and impartial tribunals or bodies.*

123. I should also add that a similar finding was arrived at by Majanja J in Dry Associates Limited vs CMA & Another[71] *where the leaned judge held that Article **50** applies to a court, impartial tribunal or a body established to resolve a dispute while article **47** applies to administrative action generally.*

124. Article **47** codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[72]Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[73]

125. The question that begs for answers is whether during the scrutiny and verification of the nomination papers to confirm compliance, the Petitioner was entitled to be heard prior to the rejection of his nomination papers. Was the first Respondent required to apply the rules of natural justice and if so, whether the manner they acted constituted a breach of the rules of natural justice.

126. As I resolve this question, I must point out that administrative or statutory bodies are created for a variety of reasons to meet a variety of needs and in some instances, some functions are a necessary element to fulfilling their mandate. Provided that the particular decision-maker is not acting outside its statutory authority (and the governing statute is constitutional), such functions may stand court scrutiny.

127. The function under consideration here is scrutinizing nomination papers for confirmation of compliance with the statutory, constitutional and other prescribed requirements. This can be likened to

national elections were the electoral body invites interested candidates to submit their nomination papers or where a person applies for a job and submits his credentials and all the required documents.

128. What follows next is scrutiny for the body to satisfy itself that the applicants meetS the requirements'. It's a formal exercise which can be likened to a preliminary investigation as opposed to a trial.

129. Guidance can be obtained from a Supreme Court of Philippines[74] in which the court stated conduct of a preliminary investigation, is only for the determination of probable cause and that the rights of an affected person in a preliminary investigation are limited to those granted by procedural law.[75] Even though this case related to a preliminary criminal investigation, the concept can shed light in the case before us.

130. The exercise of scrutinizing nomination papers to confirm compliance with the statutory and constitutional requirements falls into the category of areas which are not disturbed by the courts unless the decision under challenge is constitutionally fragile and unsustainable. If the decision is legal and lawful, the reasonableness and propriety of the same may not be questioned by the courts. In other words, among the *Wednesbury* principles of 'illegality', 'irrationality' and 'impropriety', if the decision can get over the first test, it may withstand the other two tests, unless it is shockingly unreasonable, perverse or improper.

131. The test of reasonableness is not applied in a vacuum but in the context of life's realities. As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to those formulated by professional societies possessing the expertise and experience of actual day to day working of their institutions. If any member is unhappy with the process of scrutinizing nomination papers to confirm compliance, the issue can be tabled in the AGM and a majority decision made accordingly.

132. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded.

133. The Respondent is statutorily vested with powers to appoint a body to run the elections. There is a Code of the elections. No abuse of such powers has been alleged or proved. It has not been shown that this power to scrutinize nomination papers was not exercised as provided for under the law or regulations. The decision in question can only be challenged on grounds of ***illegality, irrationality*** *and* ***procedural impropriety.*** A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be *illegal* or *ultra vires* and outside the functions of the Respondent.

134. The grant of the orders or *certiorari*, *mandamus* and *prohibition* is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

135. In my view, to hold that it is was a requirement for the Petitioner to be heard at the time the papers were scrutinized for compliance would in my view amount to overstretching the purpose of Article 47. The Court of Appeal decision Mutava case supports this position. I must however add that, once it was confirmed that the Petitioner did not qualify, he was entitled to a prompt decision and reasons. In this regard, it is admitted that the Petitioner was notified of the rejection and the reasons thereof and he has exhibited the relevant e-mail communication.

136. Section **7 (2)** of the Fair Administrative Action Act[76]provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. None of these has been proved in this case.

137. To hold that hold that an applicant for a job, an interview or an applicant to contest an election must be given a hearing just to be explained why he did not satisfy the requirements would be imposing an unnecessary burden upon the decision maker which was not contemplated under the law. To me, it is sufficient that the Petitioner was notified the reasons why he did not qualify.

138. What constitutes a "fair" procedure will depend on the nature of the administrative action and circumstances of the particular case. The circumstances of this case are clear. All the nomination papers were to be scrutinized for compliance. None of the applicants was required to attend the scrutiny. The need for statutory bodies to utilise their own fair procedures is crucial in administrative action, provided they act within the provisions of the governing statute and Regulations.

139. My answer to the issue under consideration is in the negative.

Whether there was sufficient public participation in the enactment of the LSK Act

140. It was argued that the legislative process was not subjected to public participation and that amendments were introduced in Parliament without affording members the opportunity to air their views. Mercy Wambua in her supplementary affidavit addressed this question. She annexed documents to show that the council was invited to offer views by the relevant Parliamentary Committee. They also forwarded views to the AG. Further, the Bill was circulated to members for comments.

141. When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. For a court to exercise its powers to invalidate a legislation, it must act on clear evidence beyond doubt that either the legislative process was unconstitutional or the legislation is out rightly unconstitutional.

142. Indisputably, there exists a presumption as regards constitutionality of a statute. The Rule of presumption in favour of constitutionality, however, only shifts the burden of proof and rests it on the shoulders of the person who attacks it. It is for that person to show that there has been a clear transgression of constitutional principles.[77] But this rule is subject to the limitation that it is operative only till the time it becomes clear and beyond reasonable doubt that the legislature has crossed its limits.

143. In ***Doctors for Life International vs. Speaker of the National Assembly and Others***[78] the S.A. court held that in determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. In determining whether what Parliament has done is reasonable, the Court will pay respect to what Parliament has assessed as being the appropriate method. The Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. This balance is best struck by the Court considering whether what Parliament does in each case is reasonable.

144. During the legislative process, amendments may be introduced to the Bill and to hold that every amendment must be subjected to public participation, would negate the legislative process.

145. I am satisfied by the explanation offered by Mercy Wambua that the Bill was circulated to members, it was discussed in various forums, and that the council submitted view to the Parliamentary Committee and the Attorney General, hence there was sufficient Public participation of all stakeholders.

Whether the Petition discloses a case against the Interested Parties

146. The first interested party did not participate in this case. However, from my analysis of the material before me, the Petition does not disclose a case against him.

147. I also agree with counsel for the second interested party that the Petition does not disclose a case

against the second interested party. The second interested party disputes rendering the alleged opinion nor does not recall rendering the opinion. Alternatively, if at all the opinion was rendered, the same is privileged being communication between an advocate and a client.

148. The Petitioner had duty to prove the existence of the opinion, which he did not discharge. He framed the case in a way shifting the burden to the interested Parties to come to court and help him in his case. Unfortunately, he who alleges must prove. On these grounds, the Petitioners case against the interested parties cannot stand.

Summary of findings

149. In conclusion, I find and hold as follows:-

*a. The Petitioner, who was admitted to the Roll of Advocates on **12th** June 2003 and was issued with his first practicing certificate on 19th June 2003 had not attained the statutory and constitutionally prescribed fifteen years experience in legal practice as at the time his nomination papers were rejected by the first Respondent.*

*b. In computing the period of fifteen years prescribed under Article **166 (3) (b)** of the Constitution and Section **18 (1) (2)** of the Act, time starts to run from the effective date of his first practising certificate. This position is consistent with Section **41 (1)** of the Advocates Act.*

*c. That the requirements for minimum qualifications to vie for the Presidency of the Law Society of Kenya meets the permissible test of limitation of Rights under Article **24** of the Constitution, in that the limitation is fair, reasonable, necessary and justifiable in a modern democratic society based on openness, justice, human dignity, equality and freedom.*

d. Mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason is a most reprehensible phenomenon. But where there is a legitimate reason, then, the conduct or the law complained of cannot amount to discrimination.

e. The Constitution prohibits unfair discrimination. But it is not every differentiation that amounts to discrimination. It is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination. Hence, the challenged provisions are consistent with the Constitution.

*f. By virtue of Section **43** of the Act, the Regulations made under the Repealed Act remain in force until new Regulations are enacted under the current Act.*

g. That Petitioner has not established a case for the court to grant the injunction sought.

h. Statutory words override legitimate expectation howsoever founded. A decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his/her decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute.

i. Scrutiny of nomination papers to confirm compliance with the statutory and constitutional papers is not a trial and it is not necessary for the Petitioner to be heard at this stage. However, where the scrutiny concludes that the Person does not satisfy the requirements, the affected person is entitled to be promptly furnished with reasons/grounds for the rejection. In this case, I am satisfied that the Petitioner was promptly supplied with the reasons/grounds.

*j. The Petitioner did not prove that the power to scrutinize nomination papers was not exercised as provided for under the law or regulations. The decision declaring he Petitioner ineligible to view can only be challenged on grounds of **illegality, irrationality** and **procedural impropriety.** None of*

these was demonstrated. The decision has not been shown to be illegal or ultra vires and or outside the functions of the first Respondent.

k. For a court to exercise its powers to invalidate a legislation, it must act on clear evidence beyond doubt that either the legislative process was unconstitutional or the legislation is out rightly unconstitutional.

l. In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances.

m. The Petition does not disclose a case against the Respondents or the Interested Parties.

150. In view of my conclusions herein above, I find that this Petition fails. Consequently, I dismiss it with no orders as to costs.

Orders accordingly.

Signed, Dated and Delivered at Nairobi this **5th** day of **February** 2018

John M. Mativo

Judge

---

[1]Act No 21 of 2014

[2]18 of the Law Society Act, Cap 18, Laws of Kenya-(Repealed) and The Law Society of Kenya (General Regulations 1962)

[3] Supra Note 1

[4]Section 43 (3) provides that:- "Any rule or regulation made, order or directive issued, notification given or any administrative act undertaken under the repealed Act, shall be deemed to have been made, issued, given or undertaken under this Act and shall continue in force and have effect as if it had been so made, issued, given or undertaken under this Act."

[5]{2016}eKLR

[6]{2017}eKLR

[7]Supra note 5

[8]Supra

[9]Cap 16 Laws of Kenya

[10]Act No. 4 of 2015

[11]Cap 16, Laws of Kenya

[12] Section 24 of the Advocates Act

[13] Cap 16, Laws of Kenya

[14] Under Section 34 o the Act

[15] Act No. 21 of 2014

[16] Ibid

[17]Supra

[18] Ibid

[19] As observed in State of Orissa vs. Sudhansu Sekhar Misra MANU/SC/0047/1967

[20] Ambica Quarry Works vs. State of Gujarat and Ors. MANU/SC/0049/1986

[21] Ibid

[22] Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59)

[23] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[24] Ibid

[25] Ibid

[26] Article 10 (1) (a)-(e)

[27] Article 159

[28] Article 160

[29] Ibid

[30] Ibid

[31]See Wallis JA dealt with the matter as follows in Natal Joint Municipal Pension Fund vs Endumeni Municipality 2012 (4) SA 593 (SCA) at para [18]

[32]S v Acheson 1991 NR 1(HC) at 10A-B

[33]Government of the Republic of Namibia v Cultura 2000 1993 NR328 (SC) at 340A

[34] Id at 340B-C

[35]See the South African Constitutional Court cases of *S v Makwanyane* 1995 (3) SA 391 (CC) at Para [9] footnote 8; *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) at para 17.

[36]*Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) at 183J-184B; *S v Zemburuka* (2) 2003 NR 200 (HC) at 20E-H; *Tlhoro v Minister of Home Affairs* 2008 (1) NR 97 (HC) at116H-I; *Schroeder and Another v Solomon and 48 Others* 2009 (1) NR 1 (SC) at 6J-7A; *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2009 (2) NR 596 (SC) at 269B-C.

[37]*Minister of Defence v Mwandinghi* 1993 NR 63 (SC); *S v Heidenreich* 1998 NR 229 (HC) at 234

[38]Smith Dakota vs. North Carolina, 192 US 268(1940)

[39]This rule is restated by Joubert JA in *Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800(A)* at 804BC

[40] In Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others {1987} 1 SCC 424

[41]Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, "A guide to reading, interpreting and applying statutes" https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf

[42] Plain meaning should not be confused with the "literal meaning" of a statute or the "strict construction" of a statute both of which imply a "narrow" understanding of the words used as opposed to their common, everyday meaning. Supra note 1

[43] Cao 16, Laws of Kenya

[44] {2011]eKLR at page 8

[45] Cap 16, Laws of Kenya

[46] Supra

[47] Cap 16, Laws of Kenya

[48] Cap 16, Laws of Kenya

[49]Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24

[50] Johannesburg Municipality v Gauteng Development Tribunal and Others [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another 1950 (4) SA 653 (A) at 664G-H.

[51] A similar position was upheld in Canca vs Mount Frere Municipality 1984 (2) SA 830 (TkSC) at 832 B - G

[52]Counsel cited Hambardda Wakhana vs Union of India {1960} AIR 554

[53]Counsel cited Mount Kenya Bottlers Limited & 3 Others vs A.G & Others, {2012}eKLR

[54]National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24

[55] Articles 10 and 259

[56] See Nyambirai v National Social Security Authority & Another 1995 (2) ZLR 1 (S) at 13C-F, GUBBAY CJ

[57] See note 18 below (at para 48).

[58] Ibid Par 54

[59] **Willis vs The United Kingdom, No. 36042/97, ECHR 2002 – IV**

[60] See Andrews vs Law Society of British Columbia [1989] I SCR 143, as per McIntyre J.

[61] In Harksen v Lane NO and Others {1997} ZACC 12; 1998 (1) SA 300(CC); 1997 (11) BCLR 1489(CC) (Harksen) at para 48.

[62] The Supreme Court of Kenya Advisory opinion number **2** of 2012

[63] Dr. A.C. Muthiah S/o (Late) M.A. Chidambaram v. The Board of Control for Cricket in India rep. by its Secretary and N. Srinivasan, Secretary, The Board of Control for Cricket in India, decided on 13th July, 2009

[64]Supra

[65] Cap 2, Laws of Kenya

[66] Administrative Law, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000

[67] {2014}eKLR

[68] Civil Appeal No. 210 of 2012

[69] {2017}eKLR

[70] {2015}eKLR

[71]{2012}eKLR

[72] Article 47(1) of the Constitution of Kenya, 2010

[73] Article 47(2) of the Constitution of Kenya, 201

[74]The Supreme Court of Philiphines in the case of Senator Jinggoy Ejercito Estrada, vs. Office of the Ombudsman, Field Investigation Office, Office of the Ombudsman, National Bureau of Investigation and ATTY. Levito D. Baligod, G.R. Nos. 212140-41, January 21, 2015

[75] Ibid

[76] Act No. 4 of 2015

[77] See Charanjit Lal Chowdhury Vs. the Union of India and others AIR 1951 SC 41 : 1950 SCR 869

[78] **(CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**