



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 85 OF 2016**

**JENNIFER SHAMALLA.....PETITIONER**

**VERSUS**

**THE LAW SOCIETY OF KENYA.....RESPONDENT**

**AND**

**INDEPENDENT ELECTORAL & BOUNDARIES**

**COMMISSION .....1<sup>ST</sup> INTERESTED PARTY**

**FAITH WAIGWA.....2<sup>ND</sup> INTERESTED PARTY**

**GERTRUDE ANGOTE.....3<sup>RD</sup> INTERESTED PARTY**

**ISAAC EDWIN NICHOLAS OKERO.....4<sup>TH</sup> INTERESTED PARTY**

**ALLAN KOSGEY .....5<sup>TH</sup> INTERESTED PARTY**

**ANNETTE NYUKURI.....6<sup>TH</sup> INTERESTED PARTY**

**GODFREY KITIWA.....7<sup>TH</sup> INTERESTED PARTY**

**GRACE OKUMU .....8<sup>TH</sup> INTERESTED PARTY**

**EDWIN SIFUNA.....9<sup>TH</sup> INTERESTED PARTY**

**ALEX GATUNDU.....10<sup>TH</sup> INTERESTED PARTY**

**CHARLES KANJAMA.....11<sup>TH</sup> INTERESTED PARTY**

**PAULA NYAGUTHIE NJUGUNA.....12<sup>TH</sup> INTERESTED PARTY**

**RULING**

## Introduction

1. At the conclusion of the oral arguments by the parties on the application for conservatory orders sought by the Petitioner, I was convinced that all the prayers sought, save for one prayer, were not meritorious. I consequently exercised my hermetical jurisdiction and immediately dismissed the application dated 4<sup>th</sup> March 2016, save for the one prayer. I reserved my reasons. That was on 23<sup>rd</sup> March 2016.
2. My conviction still stands. The conservatory orders sought by the Petitioner save for one were not merited.

## Background facts

3. It may be necessary to give a factual background. This may be easily retrieved from the Petition as well as the various affidavits filed by the parties. I may state the same shortly as follows.
4. The Petitioner is a lawyer. She is an advocate of High Court of Kenya. She runs her own legal practice in Nairobi.
5. The Respondent is Kenya's premier Bar Association. It is established as a body corporate under the Law Society of Kenya Act, 2014. The 1<sup>st</sup> Interested Party is an Independent Commission established under Articles 88 and 248 of the Constitution. Its primary mandate is as stated under Article 88(4) of the Constitution; to conduct or supervise referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament.
6. The 2<sup>nd</sup> through 12<sup>th</sup> Interested Parties are also, members of the Respondent. They are all qualified legal practitioners. They are not innominate parties to these proceedings having been partly impleaded pursuant to my orders for directions of 11<sup>th</sup> March 2016.
7. At the time of filing this Petition, the Petitioner was a serving member of the Respondent's governing council while the 2<sup>nd</sup> Interested Party and the 4<sup>th</sup> Interested Party were the vice president-elect and president-elect of the Respondent respectively.
8. The genesis of this Petition hits the elections of the Respondent's governing council held on 25<sup>th</sup> February 2016. The elections were conducted and supervised by the 1<sup>st</sup> Interested Party. The Petitioner was a candidate for the position of vice-president. At the conclusion of the polls, the 2<sup>nd</sup> Interested Party was declared the winner of the vice- president's position. The other Interested Parties were also candidates for various posts. Save for the 3<sup>rd</sup> Interested Party, all the other Interested Parties were declared elected to the positions they contested. The declarations were made on the 26<sup>th</sup> day of February 2016.
9. The Petitioner was dissatisfied with the manner the elections had been conducted and supervised. The Petitioner was also dissatisfied with the counting and scrutiny of the ballots. So on 29<sup>th</sup> February 2016 and 1<sup>st</sup> March 2016, the Petitioner wrote to the Respondent and urged for the empanelment of an arbitral tribunal. Prior to the letters to the Respondent, the Petitioner had also written to the 1<sup>st</sup> Respondent and laid out an array of complaints.
10. The Petitioner apparently received no substantive riposte from either the Respondent or the 1<sup>st</sup> Interested Party. Promptly, the Petitioner on 4<sup>th</sup> March 2016 launched the Petition and also sought the following orders, in the interim:
  - i. ...[spent]
  - ii. ***THAT pending the hearing and determination of this application and petition inter partes, this Honorable court do issue a temporary injunction against the Respondent, its agents and/or servants from swearing in and/or allowing assumption of office of all supposedly elected candidates who were declared winners in a swearing in set to take place on or before the 24<sup>th</sup> of March 2016.***
  - iii. ***THAT pending the hearing and determination of this application and petition inter partes, this Honorable court do issue a temporary stay against the Respondent, its agents and/or servants from taking any action on disputes emanating from its just concluded election of February***

26<sup>th</sup>, 2016.

- iv. ***THAT pending the hearing and determination of this application and petition inter partes, this Honorable court do issue an order directing the Respondent and Interested Party to preserve the integrity of all records inclusive or the voter Registers and all used and unused Ballot paper booklets and to provide the serialization numbers of all the booklets pending the determination of the Application and Petition.***
- v. ***THAT pending the hearing and determination of this application and petition inter partes, this Honorable court do issue an order directed at the Respondent and the Interested Party to conduct a re-count and scrutiny of all votes cast and the remainder of votes not cast for the President, Vice President and all other candidates together with a concise tally of all voters registers country wide to establish any instances of double voting in the 2016 Law Society of Kenya elections with respect to all the polling centers across the country, in the presence of the candidates and/or their agents within 4 days of the order of this court.***
- vi. ***THAT the report following the re-count and scrutiny be filed in court and circulated by email to all members of the Law Society of Kenya by the Chief Executive officer of the Law Society of Kenya on the 5<sup>th</sup> day after the order of the court for recount and scrutiny.***
- vii. ***THAT a separate report indicating the names of any advocates who may have voted more than once be filed in court and circulated by email to all members of the Law Society of Kenya by the Chief Executive Officer of the Law Society of Kenya on the 5<sup>th</sup> day after the order of the court for recount and scrutiny.***
- viii. ***THAT this Honorable court do order that the information availed be used during the hearing of the Petition that should be heard on priority.***
- ix. ***THAT this Honorable court do order Safaricom Limited, Airtel Kenya and Orange Kenya Limited to provide the phone records for the last three months prior to 26<sup>th</sup> February 2016 in respect of the following persons:***
  - a. ***Arnold Wekesa- Returning officer***
  - b. ***Benjamin Kimwei-Deputy Returning Officer***
- x. ***THAT this Honorable court be pleased to issue any other or further reliefs that it may deem fit and just and also enjoin affected or interested parties.***
- xi. ***THAT this being public spirited litigation, parties do bear their own costs.***

11. Save for the 3<sup>rd</sup> Interested Party all the other parties opposed the application.

### **The path**

12. I took the path of immediately pronouncing my determination whilst reserving my reasons for the simple reason that the Petitioner had sought to have all the newly elected officials of the Respondent restrained from assuming office until the Petition was heard. The newly elected officials were scheduled to assume office at the Respondent's General Meeting which was slated for 24<sup>th</sup> March 2015, just some hours after the parties concluded their arguments. There was need to avoid any confusion or any anxiety. There was need for the parties to go home, knowing the result and await reasons.

13. I would have taken the same path had I been satisfied that the application was wholly merited.

### **The Petitioner's case**

14. Stripped to detail, the Petitioner's case may be simply stated as follows.

15. That as a citizen entitled to participate in free and fair elections, the election of the council members of the Respondent society were completely compromised resulting in a voter turnout exceeding the registered number of electors. The Petitioner further contended that the 1<sup>st</sup> Interested Party did not conduct or supervise the elections properly and that there were instances when electors voted twice as the 1<sup>st</sup> Interested Party had negligently used fleeting ink instead of an indelible one to help identify electors who had already voted. The Petitioner further contended that in most voting centers disarray was rife and most records especially the electors' registers were in shambles. The Petitioner also faulted the fact that the 1<sup>st</sup> Interested Party had several of its

- officials who are also members of the Respondent participating in the conduct and supervision of the impugned elections.
16. From a constitutional stand point the Petitioner contended that her right to equal protection of the law and to have her dignity respected as provided under Articles 27 and 28 respectively had been violated. The Petitioner also stated that her right of access to information as guaranteed by Article 35 of the Constitution had been curtailed as both the Respondent and the 1<sup>st</sup> Interested Party, had refused to avail information to the Petitioner despite demands.
  17. The Petitioner's case is roundly supported by the 3<sup>rd</sup> Interested Party who also contended that the elections were not free and fair and the process was riddled with malpractices. The 3<sup>rd</sup> Interested Party's case could be gathered from the Replying Affidavit which she swore and filed herein on 23<sup>rd</sup> March 2016.

### **The Respondent's case**

18. The Respondent's case, at the risk of being accused of oversimplification, is that the elections were generally free and fair and were conducted under the keen supervision of the 1<sup>st</sup> Interested Party. The Respondent stated that the 1<sup>st</sup> Interested Party had been appointed by the council of the Respondent and a Memorandum of understanding signed between the Respondent and the 1<sup>st</sup> Interested Party on the conduct and supervision of the elections. The Respondent further contends that the elections were conducted in a professional and responsible manner.
19. While noting that all candidates were allowed to engage agents and that indeed the Petitioner engaged agents, the Respondent contended that neither the Petitioner nor her agents contested the vote counting or scrutiny of ballots during counting and further that the Petitioner did not at all seek a recount in any one of the voting centers or even at the tallying center.
20. The Respondent stated further that the Petition had been drawn in an omnibus manner and was based on speculative and not factual evidence. The Respondent added that it was unclear whether the Petitioner was challenging the elections of the vice-presidency or all the contested posts .

### **Interested Parties' cases**

#### *1<sup>st</sup> Interested Party*

21. Mr. Arnold Wekesa swore a Replying Affidavit on behalf of the 1<sup>st</sup> Interested Party on 23<sup>rd</sup> March 2013.
22. The affidavit was to the effect that the 1<sup>st</sup> Interested Party conducted and supervised the subject elections in accordance with local and international best practices with respect to the conduct of elections. The 1<sup>st</sup> Interested Party contended that it delivered its mandate and also a credible election as envisaged under Section 19 of the Law Society of Kenya Act, 2014. The 1<sup>st</sup> Interested Party further contended that the Petitioner had not availed any evidence to show that the elections were a sham and that apart from an error in computing the total number of votes cast in favour of the coastal representative to the Respondents council the elections were generally free, fair and credible.
23. The 1<sup>st</sup> Interested Party accused the Petitioner of mere conjecture and speculation in her attack on the conduct of the elections.

#### *Other interested Parties*

24. With the exception of the 3<sup>rd</sup> Interested Party, all the other interested parties who filed Replying Affidavits were in unison that the elections had been free, fair and credible and further that the Petitioner's case was premised on generalities and speculation.

### **Arguments in court**

25. The application was urged through the medium of oral submissions.

### *The Petitioner's submissions*

26. The Petitioner proceeded *propria persona*.
27. It was the Petitioner's submission that there were several irregularities which went to the root of the elections. The irregularities, insisted the Petitioner were outlined in the Petition as well as the affidavit in support of both the application as well as the Petition. The Petitioner added that the lack of any post-election audit despite her demands was a demonstration that the elections were flawed.
28. The Petitioner whilst submitting that she was contesting the entire election exercise, further submitted that the elections had been conducted and supervised by a body which was not legally mandated as the Respondent had not formally appointed the 1<sup>st</sup> Interested Party by way of a resolution pursuant to and as required by Section 20 of the Law Society of Kenya Act, 2014.
29. The Petitioner finally submitted that she was deserving of the orders sought as one of those elected during the allegedly sham elections was going to be the Respondents representative in a Constitution Commission and it would be impossible to remove the nominee once she took the oath of office.

### *Respondent's submissions*

30. Mr. Paul Muite SC, appearing together with Ms. Julie Soweto submitted that the Petitioner had not made out a case for the grant of a conservatory order. Relying on the case of **Engineer Michael Sistu Mwaura Kamau Vs E.A.C.C & 3 Others [2015] eKLR**, Counsel submitted that the Petitioner who failed to establish a prima facie case with a probability of success and further that if the orders sought were not granted the Petitioner would suffer no prejudice. In the respects, counsel stated that there was no evidence at all that the impugned elections were flawed. Counsel also submitted that it would not be in the interest of the public to have a statutory body like the Respondent operate without officials would be harmful to the general public as well as the membership given the statutory mandate of the Respondent.
31. Mr. Muite concluded by stating that the Petition would not be rendered a nullity as in the fullness of time, once the alleged malpractices were tested through a trial the elections could always be nullified and the office-bearers ordered to vacate office if the court found for the Petitioner.

### *1<sup>st</sup> Interested Party's submissions*

32. Mr. Edwin Mukele appeared for the 1<sup>st</sup> Interested Party.
33. Counsel submitted that the conservatory orders sought could not be granted as the Petition was premised on "beliefs and suppositions" only and no clear evidence. Noting that the Petitioner never sought a recount or made any protestations at the tallying centers, Mr. Mukele submitted that the 1<sup>st</sup> Interested Party employed the international best practices to ensure that free, fair and credible elections were achieved.
34. For completeness, Mr. Mukele stated that the Petition was absolutely lacking in specificity and suitable evidence.

### *2<sup>nd</sup> Interested Party's submissions*

35. Mr. Dennis Mureithi urged the 2<sup>nd</sup> Interested Party's case.
36. Mr. Mureithi submitted that the Petition raised no Constitutional question as it was pegged on Article 38 yet the Law Society of Kenya is not a political outfit. Counsel also added that there was no indication that the right to information had been violated or under threat of violation by the Respondent or any of the Interested Parties. Critically, continued counsel, the relief as to right of access to information was being sought against parties who had not been impleaded.
37. Counsel concluded by stating that the Petitioner had failed to lay any basis for scrutiny or recount at this stage of the proceedings.

### *3<sup>rd</sup> Interested Party's submissions*

38.Mr. A. Masika appeared for the 3<sup>rd</sup> Interested Party.

39.Mr. Masika submitted in support of the application that there was a case made out for a scrutiny and re-count of the votes. Counsel stated that there was the danger that an illegitimate process could be legitimized by the court if the conservatory orders were not granted. According to counsel the elections were flawed.

#### *4<sup>th</sup> Interested Party's submissions*

40.The 4<sup>th</sup> Interested Party is the President-elect of the Respondent. His case was urged by Mr. Chacha Odera.

41.Mr. Odera submitted that the Petitioner had not met the threshold for grant of a conservatory order as there was a total lack of evidence to demonstrate any prima facie case.

42.Counsel also submitted that the Petitioner together with the 3<sup>rd</sup> Interested Party could not contest the appointment of the 1<sup>st</sup> Interested Party to conduct and supervise the impugned elections and at the same time also seek a recount or scrutiny of the votes. Counsel added that the two (the Petitioner and 3<sup>rd</sup> Interested Party) had been part of council members who caused the appointment of the 1<sup>st</sup> Interested Party and they could now not possibly be heard to question the appointment.

43.Relying on the cases of **Charles Oigara Mogere –v- Christopher Mogere Obure & 2 Others [2013]eKLR** and **Joho –v- Nyange & another [2008] 3 KLR 500**, Mr. Odera submitted that no basis had been established for the recount or scrutiny of votes.

#### *5<sup>th</sup> & 6<sup>th</sup> Interested Parties' submissions*

44.Mr. D. Mabeya advocating for Mr. Allan Kosgey, submitted that there was no adequate evidence before the court to warrant the orders sought. Mr. Olando who acted for the 6<sup>th</sup> Interested Party, Ms. Annette Nyukuri, associated himself with the submissions made by the Respondent and 1<sup>st</sup> Interested Party.

#### *7<sup>th</sup> & 8<sup>th</sup> Interested Parties' submissions*

45.Both the 7<sup>th</sup> and 8<sup>th</sup> Interested Parties retained by Mr. Issa Mansour.

46.Mr. Mansour, associated himself as well with submissions of the Respondent's counsel but added that even Constitutional office holders like the Respondent's representative to the Judicial Service Commission could vacate office, if their appointment or election was ultimately declared null and void by the court. Counsel also added that if there was no defect through the non-compliance with the provisions of Section 20 of the Law Society of Kenya Act, 2014, then the same could be cured by invoking the transitional provisions of Section 43 of the same Act.

#### *9<sup>th</sup> Interested Party's submissions*

47.Mr. Edwin Sifuna who also proceeded in propria persona wholly adopted the submissions of Mr. P.K Muite SC, made on behalf of the Respondent.

#### *10<sup>th</sup> Interested Party's submissions*

48.Also appearing in person was Mr. A. Gatundu, the 10<sup>th</sup> Interested Party.

49.His prolific submissions may be put in summary as follows. That the Petition was premature as the Petitioner ought to have moved to arbitration as per the electoral code of conduct to which the Petitioner was a signatory.

50.Mr. Gatundu also submitted that the Petition had been filed as an afterthought and in bad faith as the Petitioner ought to have moved to court much earlier and challenged the appointment of the 1<sup>st</sup> Interested Party. Counsel then urged the court to dismiss the application and ensure that there was no vacuum.

## *Petitioner's rejoinder*

51. In a pithy rejoinder, the Petitioner insisted that she had made a case for the conservatory orders. Counsel also submitted that the court could not close its eyes to the fact that lawyers were themselves flouting the law.

### **Discussion and Determination**

52. The core issue was whether the Petitioner had made out a case for the issuance of the conservatory orders sought in the Motion dated 4<sup>th</sup> March 2016. The answer was in the negative save for one prayer.
53. The sole prayer in question which I had allowed on 4<sup>th</sup> March 2016 was for the preservation of all electoral records including voter registers and ballots, both used and unused and for the provision of serialization numbers of all booklets.
54. The Petitioner is contesting the elections of 25<sup>th</sup> February 2016. The Petitioner is also seeking for a recount and scrutiny of the votes cast. It would have made no sense if the prayer for the safe preservation of the electoral material was not allowed. Any scrutiny or recount if ordered at the end of or mid-stream the hearing of the Petition, would be defeated in the absence of the electoral materials. In the absence of any specific regulatory framework on how to treat and handle electoral material for such bodies as the Respondent after any elections, the better reason dictates the court intervention and a consequent order for preservation.
55. Besides, as of 23<sup>rd</sup> March 2016 as the parties argued their respective cases, there was evidence on record through affidavit of both the Respondents Chief Executive Officer Mary Wambua sworn on 14<sup>th</sup> March 2016 and the 1<sup>st</sup> Interested Party's representative sworn on 23<sup>rd</sup> March 2016, that the electoral material had been secured and preserved and further that the serialization numbers of the ballots as had been sought by the Petitioner had been availed. The prayer and consequent order would serve the purpose as an interim measure of protection once the parties' dispute is slated for resolution either through the court or even through an arbitral forum.
56. That takes me back to the question of whether the Petitioner satisfied the criteria for the grant of a conservatory order, which the court has jurisdiction to grant under Article 23(3) of the Constitution.
57. It is to be noted that much more is required of a Petitioner who seeks conservatory orders. The principles for the grant of a conservatory order have been well laid out in a series of cases. They were well summarized by this court in the case of **Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education Science and Technology & 5 Others HCCP No 399 of 2015[2015]eKLR**. There will be little benefit to be derived in rehashing the same here in detail. The criteria are clear. In short, the Petitioner needs to demonstrate a prima facie with a likelihood of success and not merely a potentially arguable case while also showing that he will suffer prejudice and the petition rendered nugatory if the orders are not granted. There is also need to establish whether granting the orders would enhance constitutional values and objects specific to the rights or freedoms sought to be protected. Finally, the court in exercising its discretion must consider the wider public interest and also invite the doctrine of proportionality where appropriate.
58. It is always for the Petitioner to satisfy the criteria. I hasten to add that this stage of the proceedings, the court is not expected to make any definitive or conclusive definitions of fact or the law.
59. If I understood the Petitioner's case correctly, it rested on two main limbs.
60. First, the elections of all the officials to the Respondent's council were flawed and were neither free nor fair. The same, contended the Petitioner, also applied to the election of the Respondent's representative to the Judicial Service Commission as the latter election was conducted at the same time by the same electors. Secondly, the Petitioner contended that the 1<sup>st</sup> Interested Party was not regularly appointed to conduct and supervise the impugned elections. The Petitioner, with the support of the 3<sup>rd</sup> Interested Party, contended that the Respondent had acted illegally and in contravention of Section 20 of the Law Society of Kenya Act, 2014.
61. With the Respondent and the other interested parties contending otherwise, the Petitioner attempted to establish her case by reference only to her affidavit filed in court. I held and still hold

- the view that the affidavit evidence by the Petitioner as well as the 3<sup>rd</sup> Interested Party did not succinctly and sufficiently demonstrate a prima facie case with a likelihood of success. The Petitioner could have a potentially arguable case but has not established one with a likelihood of success to satisfy the requirement for the issuance of conservatory orders.
62. The evidence by the Petitioner at this stage of the proceedings needed to be more specific than had been availed and tendered. General statements like discovery of unusual number of visiting advocates to polling stations and voting halls in disarray without identifying such stations and voting halls did not help much. I would in these respects agree with both Mr. Mukele and Mr. Gatundu that the Petition appeared to be based on conjecture and speculation. As it was admitted that the Petitioner had various agents, perhaps it would have helped the court better if the agents, identified by the Respondent had themselves sworn affidavits and specified the irregularities.
63. The essence of representative democracy is that individuals seeking elective posts must be allowed to freely contest such posts. They may then be elected where voting takes place a party contesting the process and alleging any irregularity must be ready to avail specifics. It is true that an order for further and better particulars may always be sought and made, but where a party in the intermediary seeks to prevent those declared to have been elected from taking office specific evidence in support ought to be given. The affidavit evidence which is currently before me is somewhat wanting to help establish a prima facie case.
64. On the second limb of the Petitioner's case as to the 1<sup>st</sup> Interested Party not having been regularly appointed at an annual general meeting, specific reference was made to section 20 of the Law Society of Kenya Act 2014. Section 20 reads as follows:

***“20. Supervision of elections***

***The elections for the membership of the council shall be conducted by such body as the council may propose and approved by the general meeting preceding the election”.***

65. The Petitioner contended that no general meeting of the Respondent ever approved of the 1<sup>st</sup> Interested Party conducting and supervising the impugned elections. The Petitioner stated that the absence of a resolution appointing the 1<sup>st</sup> Interested Party was clear evidence that the elections were consequently illegally and could not be approved by the court. The Respondents as well as the Interested Parties countered that the impugned elections were the first to be held under the recently enacted Law Society of Kenya Act. According to the Respondent and the Interested Parties, it was a case of transitional elections and also tradition. It was customary to utilize the services of the 1<sup>st</sup> Interested Party.
66. A quick reading of Section 20 of the Law Society of Kenya Act would reveal that the body to conduct the Respondent's election was to be appointed by the council and approved by the general meeting. The Act came into force on 14<sup>th</sup> January 2015.
67. The Respondent was obliged to comply and observe the provisions of the Act, including Section 20 thereof. The reference by the Respondent and some of the Interested Parties to the transitional provisions would not help as the actions or activity expected under Section 20 is not a continuing one to be deemed capable of transit. I have also not been referred to any provision of the repealed Law Society of Kenya Act (Cap 18) which approved the appointment of the 1<sup>st</sup> Interested Party as the body to supervise the elections of the Respondent, to enable me reflect on a transition. Likewise, the mere fact that the Respondent has in the last few years utilized the services of the 1<sup>st</sup> Interested Party to conduct and supervise elections would not bring such a practice under the transitional provisions of the statute.
68. The Petitioner may appear to have a prima facie case on this front. However two critical questions would need to be answered in the circumstances of this case.
69. First, even if the 1<sup>st</sup> Interested Party was not approved by a general meeting preceding the impugned elections and given that the Respondent had not held a general meeting under the Law Society of Kenya Act, 2014, could a subsequent general meeting ratify the Respondent council's action to appoint and enter into a memorandum of understanding with the 1<sup>st</sup> Interested party? Secondly, and more critically, it is not lost to the court that the elections also involved the election of the Respondent's female representative to the Judicial Service Commission pursuant to Article

- 171(1) of the Constitution. Under Article 88(4) of the Constitution, all elections to elective bodies or offices established by the Constitution are to be conducted and supervised by the 1<sup>st</sup> Interested Party. The question would then be whether the Respondent had any other choice of a body to conduct the impugned elections, given that there was also the election of a representative to the Judicial Service Commission being undertaken at the same time and by the same electorate?
70. It would appear at this initial stage that the Respondent would have had no choice on the body to conduct and supervise the elections in view of the constitutional provision under Article 88(4). I would consequently not fault the Respondent at this stage for not having obtained approval of the preceding general meeting in appointing the 1<sup>st</sup> Interested Party to supervise the elections, whilst also noting also that the preceding general meeting was conducted prior to the commencement of the Law Society of Kenya, 2014.
71. In the end, I return the verdict that the Petitioner did not establish a prima facie case with a likelihood of success.
72. I also see no prejudice the Petitioner is likely to suffer if the orders sought are not granted. If ultimately, the Petitioner is vindicated at the hearing of the Petition all the persons who had been elected through a proven flawed election will have to vacate office through an order of the court. On the other hand, it would be proportionate to allow the elected members of the Respondent's council as well as the representative of the Respondent to the Judicial Service Commission to take office. This should see to it that values of representative democracy are enhanced as there will be no vacuum in the statutory offices of the Respondent or constitutional office of the Judicial Service Commission.
73. Finally on the issue of scrutiny and recount of the votes cast, I was not particularly convinced that the Petitioner had laid down an evidential and foundational basis for such an order to be issued at this stage of the proceedings. The court may order the same once better and further evidence come to light and the court is satisfied that there is a need for scrutiny and recount. There should be no issue in such cases for a plea of collateral estoppels or issue estoppels, as the matter has not been finally determined. I note too that the electoral material has already been secured.

## **Epilogue**

74. For now, I deem it unnecessary to make any preliminary findings on whether the Petition raises constitutional questions as I was invited to by Mr. Dennis Mureithi who appeared for the 2<sup>nd</sup> Interested Party. Suffice to point out that the Petitioner was perfectly entitled to seek to advance her associational, rather than political, rights. The Petition in these respects can always be amended.
75. I also do I deem it appropriate to make a finding, as I was invited to do by Mr. Gatundu, that the Petition is premature as there was provision for an alternate mode to resolve the Petitioners alleged grievances. Suffice only to note that even where a matter is only suitable for arbitration the court always has the remit to grant interim measures of protection and at this stage of the proceedings, the core question was whether the Petitioner was entitled to the conservatory orders sought. As was stated by Braithwaite JA in **AG vs Surmair Bansraj (1985) 38 WIR 286**, conservatory an order

***“... would direct both parties to undertake that no action of any kind to enforce their respective rights would be undertaken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact.”***

76. For all the foregoing reasons, I still return the same verdict. The application dated 4<sup>th</sup> March 2016 still stands dismissed save for prayer no four which is reconfirmed as granted as prayed to subsist until the hearing of and determination of the Petition.
77. The costs of the application will abide the decision on costs as may be made upon determination of the Petition.

**Dated, signed and delivered at Nairobi this 5<sup>th</sup> day April, 2016**

***J.L.ONGUTO***

**JUDGE**