



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & M'INOTI JJ.A.)

CIVIL APPLICATION NO. NAL. 28 OF 2018 (UR 26/2018)

BETWEEN

NELSON ANDAYI HAVI.....APPLICANT

AND

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

ATTORNEY GENERAL..... 2ND RESPONDENT

APPOLO MBOYA (HSC)..... 3RD RESPONDENT

FRED OJIAMBO (MBS, SC).....4TH RESPONDENT

(Application for injunction pending the hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mativo, J.) dated 5th February 2017 in HC Const. Petition No. 607 of 2017)

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RULING OF THE COURT

The *applicant, Nelson Andayi Havi*, is an advocate of the High Court of Kenya and a member in good standing, of the *1<sup>st</sup> respondent, the Law Society of Kenya (LSK)*. LSK is a statutory body established by the *Law Society of Kenya Act, (the Act)* and is responsible for, among other functions, regulation of the legal profession in Kenya. The applicant signed the Roll of Advocates on *12<sup>th</sup> June 2003* and obtained his first practicing certificate on *19<sup>th</sup> June 2003*. The affairs of LSK are run and managed by a council comprising a president, a vice president and 11 other members, all elected by members of LSK for a term of two years. The next elections of president and members of council for the period 2018 to 2020 are scheduled for *Thursday, 22nd February 2018*.

The qualifications for election as president of LSK are set out in *section 18(1)* of the Act, which provides as follows: -

“18(1)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.”

It is common ground that the applicant is not a member or a former member of the council. As regards the qualifications of a judge of the Supreme Court, the pertinent provision, *Article 166(3)* of the *Constitution*, provides thus: -

“166 (3) The Chief Justice and other judges of the Supreme Court shall be appointed from among persons who 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 aggregate, to fifteen years.”

As regards qualification to contest the office of member of the council, *section 18 (2)* of the Act is in the following terms: -

“18(2) A person is eligible for election as a member of the Council if the person-

- a. is a member of the Society;
- b. has been (in) practice for at least two years, from the date of admission;
- c. has not been found liable for professional misconduct by the Disciplinary Committee established by the Advocates Act, in the three years immediately preceding the election; and
- d. meets the requirements of Chapter Six of the Constitution.”

Convinced that he was qualified to contest the election of the office of the president of LSK, the applicant, on 5th November 2017, submitted his nomination paper. However, on 13th December 2017, LSK put a damper on his ambitions by rejecting his nomination on the basis that he did not meet the qualifications prescribed by the Act. The applicant was aggrieved and on 20th December 2017 filed in the High Court a petition seeking, among other remedies, an order of *certiorari* to quash the decision of LSK declaring him unqualified to contest; a declaration that sections 18(1) (a) and (b) and 18 (2) a. and (b) of the Act are irrational, unreasonable, discriminatory, violative of Articles 24, 25 and 27 of the Constitution and therefore unconstitutional, null and void; and an injunction to restrain LSK from conducting the scheduled elections without his participation as a candidate for president.

On 5th February 2018, the High Court, (*Mativo, J.*) dismissed the applicant’s petition after holding, in the main, that the impugned provisions of the Act were consistent with the Constitution. The learned judge found that the qualification requirements set by the Act were not inconsistent with the right of members of LSK to vote or contest in its elections and neither were they discriminatory, irrational, unreasonable, or unproportional. He further held that the applicant had not attained the statutory and constitutional requirements to vie for president of LSK because in computing his years of practice, the period before 19th June 2003, when he was not in the Roll of Advocates, did not count. He concluded therefore that the applicant attains 15 years of practice only on 18th June 2018, a date *after* the scheduled election.

The applicant was aggrieved by the judgment and on the same day it was delivered, lodged a notice evincing his intention to appeal to this Court. Now he is before us under *rule 5(2)(b)* of the *Court of Appeal Rules*, seeking an injunction whose effect is to stop, pending the hearing and determination of his intended appeal, the forthcoming LSK elections, scheduled to be held on 22nd February 2018.

It is trite that at this stage, our remit does not extend to determining the merits or otherwise of the applicant’s intended appeal. (See *Njuguna S. Ndungu v. EACC & 3 others*, [2015] eKLR). It is restricted to determining on the basis of the material on record, first, whether his intended appeal is arguable and second, whether, absent an order of injunction, that appeal will be rendered nugatory if it succeeds. (See *Jaribu Holdings Ltd v. Kenya Commercial Bank Ltd* [2008] eKLR). In an effort to demonstrate that his intended appeal is indeed arguable, the applicant’s learned counsel, to wit, *Dr. Khaminwa, Prof. Ojienda, SC, Prof Sihanya* and *Mr. Sakwa* impugned the decision of the High Court on the basis of a memorandum of appeal raising 11 grounds.

They submitted that the learned judge erred by holding, firstly, that the applicant had not satisfied the requirements of section 81(1) of the Act as read with Article 166(3)(b) of the Constitution whereas he had produced 15 practicing certificates for each year of practice and further that under Article 166(2)(a) of the Constitution, anyone with a law degree and who is not a legal practitioner, is qualified for appointment of judge of the Supreme Court. Secondly, by failing to hold that sections 18(1)(a) and (b) and 18(2)(a) and (b) of the Act are inconsistent with section 12 (e) and (f) because the former are later enactments that constrict the rights of LSK members granted by the latter provision, which is earlier in time. Thirdly, by holding that the applicant’s rights as an individual member cannot override those of the majority of the members of LSK. And lastly, by failing to hold that the requirement of 15 years post qualification experience, as a condition precedent to running for office of president, was unreasonable, irrational and unconstitutional because it was unilaterally imposed on LSK members by the National Assembly without their participation; was inconsistent with the practice elsewhere in the Commonwealth; and constitutes a violation of Articles 24 (limitation of rights and fundamental freedoms), Article 27 (equality and freedom from discrimination), Article 36(1) (freedom of association) and Article 38 (2) and (3)(c) (political rights), of the Constitution.

The applicant cited the ruling of this Court in *Stanley Kang’ethe Kinyanjui v. Tony Ketter & 5 others* [2013] eKLR and submitted that even a single *bona fide* arguable point, which may not succeed on appeal, is adequate to constitute an arguable appeal

The applicant urged us to find that without an order of injunction, his appeal will be rendered nugatory if it succeeds because he will be excluded from vying in the forthcoming elections and qualified members of LSK will be excluded from contesting and voting in those elections; the elections will have been null and void having been conducted on the basis of an unlawful legal framework; and his constitutional and statutory rights and those of members of LSK will have been violated and compromised irredeemably. On the basis of the same authority of *Stanley Kang’ethe Kinyanjui v. Tony Ketter & 5 others* (supra), he urged us to find that an election held without his participation is irreversible. He also relied on the rulings of the Supreme Court in *Gatirau Peter Munya v. Dickson Mwenda Kithijni & 2 others* [2014] eKLR and *Zacharia Okoth Obado v. Edward Akong’o Oyugi & 2 others* [2014] eKLR and of this Court in *Chris Munga N. Bichage v. Richard Nyagaka Tongi & 2 others* [2013] eKLR, where injunctions were issued to stop various elections pending the hearing and determinations of intended appeals because it was in public interest to do so.

LSK opposed the application on the basis of a replying affidavit sworn on 13th February 2018 by *Mercy K. Wambua*, its Chief Executive Officer and Secretary to the Council. Through its learned counsel, *Paul Muite, SC*, and *Mr. Ogolla*, LSK submitted that the applicant’s

intended appeal was neither arguable nor capable of being rendered nugatory were it ever to succeed. Emphasis was laid on the fact that the jurisdiction of this Court under rule 5(2)(b) is discretionary and that the Court grants or refuses an injunction depending on the facts and circumstances of each individual case.

On whether the intended appeal was arguable, LSK submitted that under section 24(1) of the Advocates Act, a practicing certificate is valid from the date it is issued and that section 24 (2) defines a practice year to be from 1st January to 31st December. In its view, the applicant's first practicing certificate issued on 19th June 2003 was valid from the date of issue and was not retrospective. To hold otherwise, it was urged, would result in an absurd proposition that the applicant was in practice before he had even signed the Roll of Advocates. As regards the alleged violation of the Constitution and discrimination, LSK submitted that the requirement of a number of years experience to contest for the office of president was reasonable, rational and legitimate, particularly for a professional society, and that such requirements are commonplace.

On whether the applicant's intended appeal would be rendered nugatory if it succeeded, LSK was of the view that it would not because a repeat election for the office of president would be conducted and the applicant would have the opportunity to contest. Submitting further that the totality of the case did not justify grant of the injunction sought by the applicant, LSK contended that it had already engaged the **Independent Election & Boundaries Commission (IEBC)** to conduct the elections and expended Kshs 4 million in the process. It added that an injunction would impinge on its ability to discharge its functions because of statutory timelines for the elections, the general meeting, and termination of the tenure of the current council. Lastly, it was submitted that the applicant's interest, as only member challenging the election, should not be allowed to override those of the majority of members of LSK.

The **2nd respondent, the Attorney General**, who was represented by **Mr. Obura**, learned counsel, opposed the application and adopted the submissions made by LSK whilst **the 3rd respondent, Apollo Mboya**, and **the 4th respondent, Fred Ojiambo, SC**, did not participate in the hearing of the appeal.

We have anxiously considered this application, the submissions by learned counsel, and the authorities that they cited. On the first question whether the intended appeal is arguable, we must reiterate what this Court has stated time and again, namely, that an arguable appeal is not one that must necessarily succeed when it is ultimately heard. It is simply an appeal that is not frivolous, one that raises even a single *bona fide* point that deserves to be considered fully by the Court. (See ***Kenya Railways Corporation v. Edermann Properties Ltd., CA No. Nai. 176 of 2012***).

The applicant intends to raise a number of issues before this Court, among them whether in computing time for the purposes of section 18 of the Act, what counts are calendar years (what the applicant calls "physical years", whatever that means) or practice years; whether the rights granted by section 12 (e) and (f) of the Act to members of LSK to vie for an office and vote in an election are denuded and negated by the limitations imposed by section 18; whether those limitations can pass muster under the matrix provided in Article 24 of the Constitution and Commonwealth practice; whether the High Court erred by refusing to deploy in the applicant's favour, its supervisory jurisdiction under **Article 165(6)** of the Constitution; whether LSK elections can validly be held without regulations under its current constitutive statute and absent an Elections Board; and whether the determination by the LSK that the applicant was not qualified to run for president, without first affording him an opportunity to be heard, was in violation of his rights under **Article 47** of the Constitution and the **Fair Administrative Action Act**.

In our view, those are not open and shut issues to which the answers are so plain and obvious. We are satisfied that they are legitimate and *bona fide* issues that this Court should have an opportunity to interrogate in full. We would accordingly answer the first issue in the affirmative and hold that the applicant's intended appeal is arguable.

On the second issue, whether or not an intended appeal will be rendered nugatory depends on the circumstances of each case. The purpose of this inquiry is, as explained in ***Kenya Airports Authority v. Mitu-Bell Welfare Society & another, CA No. 114 of 2013***:

**"to obviate the spectre of a meritorious appeal, when successful, being rendered academic, the apprehended harm, loss or prejudice having come to pass in the intervening period."**

In ***Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others*** (supra), this Court observed as follows regarding the second consideration in rule 5(2)(b) applications:

**"Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved."**

The applicant contends that if the forthcoming elections are held without his participation, and his appeal ultimately succeeds, he will suffer irreversible loss and damage because he will have been unlawfully excluded from presenting himself as a candidate. The LSK counters that if the appeal succeeds after the elections have taken place and this Court is satisfied that they are null and void, it will simply order a repeat, in which the applicant will participate, if he so wishes. In its view, the applicant will not suffer any irreversible loss or damage, which cannot be remedied by an award of damages.

Having carefully considered the rival contentions we are not persuaded, in the circumstances of this case, that the holding of the forthcoming elections will negate the applicant's intended appeal, if it ultimately succeeds. Those elections are not immutable; this Court can nullify them if it finds that they were conducted on the basis of an illegal and unconstitutional framework that among other things discriminated against or disenfranchised the applicant and other members of LSK. The applicant will then have an opportunity to contest if it is determined with finality that indeed he is eligible to run for the office of president of LSK. The determination of this Court after hearing the intended appeal will have two possible consequences. If the appeal is dismissed and we have in the meantime stopped the elections, it will mean losses that are not petty cash for a professional society that is financed primarily by members' subscriptions. It will also throw into confusion the

prescribed statutory calendar and disrupt or undermine the discharge of critical statutory and national functions vested in LSK such as regulation of the legal profession, resolution of complaints against practitioners, and assisting in the administration of justice and the practice of law in the country. If on the other hand the appeal succeeds, the applicant will have an opportunity to contest in the ensuing bye-election. The primary prejudice that he will suffer is a delay in the realization of his ambition to lead the LSK, which we think can be mitigated or reduced substantially by fast-tracking the hearing and determination of his appeal. In our view that scenario is not synonymous with rendering the appeal nugatory. If he really wished, the applicant could be adequately compensated for any delay that is entailed, by award of damages.

What all this means is that even when we consider the respective hardships that each party stands to suffer arising from the decision we ultimately make in this application, the balance tilts strongly in favour of not stopping the forthcoming elections. (See **Reliance Bank Ltd v. Norlake Investments Ltd [2002] 1 EA 227** and **Nation Media Group & 2 others v. John Joseph Kamotho & 3 others, CA No. 108 of 2006**).

Award of a remedy under rule 5(2)(b) is dependent on the applicant establishing both considerations and it will not suffice to establish only one.

(See **Republic v. Kenya Anti-Corruption Commission & 2 others [2009] KLR 31**). While the applicant has satisfied us that he has an arguable appeal, he has not persuaded us that it will be rendered nugatory if we do not grant an interim injunction pending its hearing and determination. Accordingly we have no choice but to dismiss this application. We however direct that the applicant's appeal be listed for hearing on priority basis.

As regards the issue of costs, taking into account that this is a dispute pertaining to a professional society whose membership is made compulsory by statute as well as the nature of the dispute which raises matters of interest, not only to the applicant but other members of LSK as well, we direct each party to bear its own costs. It is so ordered.

**Dated and delivered at Nairobi this 20th day of February, 2018**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**