

Reflections on the Structure and Leadership of the Senior Bar in Kenya: Some Thoughts

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(2003); “Terrorism: Justifying Terror in Kenya?” published in *The East African Lawyer*, Issue No. 5 at pages 18-22; “Land Law and Tenure Reform in Kenya: A Constitutional Framework for Securing Land Rights”; “A Commentary on Understanding the East African Court of Justice” published in the *East African Lawyer*, Issue No. 6 at pages 52-56; “Where Medicine Meets the Law: The Case of HIV/AIDS Prevention and Control Bill 2003” published in *The Advocate* at page 36-40; “The Advocates Disciplinary Process-Rethinking the Role of the Law Society” published in *The Lawyer*, Issue No. 78 at pages 15-16; “Ramifications of a Customs Union for East Africa” published in *The East African Lawyer*, Issue No. 4 at pages 17-25; “Gender Question: Creating Avenues to Promote Women Rights after the Defeat of the proposed Constitution” published in the *Moi University Journal* Vol. 1 2006 No.1, pages 82–92; “Of Mare Liberum and the Ever Creeping State Jurisdiction: Taking an Inventory of the Freedom of the Seas” published in the *Moi University Journal* Vol. 1 2006 No. 1, pages 105 – 131; “Legal and Ethical Issues Surrounding HIV and AIDS: Recommending Viable Policy and Legislative Interventions” published in *The East African Lawyer*, Issue No. 12 at pages 19-24; “Implementing the New Partnership for Africa’s Development (NEPAD): Evaluating the Efficiency of the African Peer Review Mechanism” published in the *Kenya Law Review*, 2007 Vol. 1, pages 81-119; “Protection and Restitution for Survivors of Sexual and Gender Based Violence: A case for Kenya.” (with R. A. Ogwang and R. Aura) 90 Pages, ISSN:1812–1276; “Legal and Institutional Framework of the TJRC - Way Forward” published in the *Law Society of Kenya Journal* Vol. 6 2010 No. 1, pages 61 – 95; “A Critical Look at the Land Question in the New Constitution” published in *Nairobi Law Monthly*, Vol. 1, Issue No. 1 of 2010 at pages 76 – 81; and a Book Chapter entitled “Land Law in the New Dispensation” in a book edited by P.L.O. Lumumba and Dr. Mbondenyi Maurice.

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1. Introduction

The prestigious rank of Senior Counsel in Kenya’s legal profession is an enviable one. Having regard to the privileges accorded to the recipients of this award and the respect they command, both junior and senior advocates desire to attain such rank. However, the award is a preserve of those who have attained a mark of excellence in the legal profession, having distinguished themselves as legal practitioners and made significant contribution to the development of the legal profession in Kenya. The honorary accolade attracts general public importance because it is rationalized as a trademark of quality for the consumers of legal services.¹ Besides, the highly sought after pre-eminent award attracts individual gravity since it offers a quantum leap in the amount of legal fees charged by the bearer.²

The award targets advocates with a right of audience in superior courts, exemplary in advocacy in those higher courts, and who have demonstrated the stipulated competencies to a standard of excellence.³ This calls for an appointment process that serves the public interest by offering a fair and transparent means of identifying excellence in advocacy in the higher courts, rigorously and objectively providing for the identification of the very best advocates, and ultimately promoting fairness, excellence and diversity.⁴

¹ Lord Chancellor, Lord Falconer of Thoroton’s written statement announcing his decision to retain the rank of Queen’s Counsel: HC Deb vol 661 WS54 dated 26 May 2004 cited in Michael Blackwell, Taking silk: an empirical study of the award of Queen’s Counsel status 1981-2015, (2015) LSE Research Online, p 1 <http://eprints.lse.ac.uk/62942/1/lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_Blackwell,%20Michael_Taking%20silk_Blackwell_Taking%20silk_2015.pdf> (Accessed on 17 May 2020).

² The Law Society, ‘The Law Society’s response to the consultation paper on ‘Constitutional reform: the future of Queen’s Counsel’ published by the Department for Constitutional Affairs’ (2003) p 8 <<https://webarchive.nationalarchives.gov.uk/20040722104904/http://www.dca.gov.uk/consult/qcfuture/responses/qc312.pdf>>

³ Jenny Crewe Consulting Ltd, Queen’s Counsel Appointments: assessment process validation (2018) p 4 <<http://www.qcappointments.org/wp-content/uploads/2018/12/External-Validation-Report-2018.pdf>> (Accessed on 17 May 2020).

⁴ Queen’s Counsel Competition for England and Wales 2019 Guidance for Applicants, p 1 <<http://www.qcappointments.org/wp-content/uploads/2019/05/Final-Guidance-to-Applicants-2019.pdf>> (Accessed on 17 May 2020).

Meaning, the process should be free of unjustified discrimination claims in favour of some ethnic groups, unpredictable nomination process, sentimentalism and norms.⁵ However, despite the benefits that flow from this near-perfect rank, questions have been raised regarding its validity⁶; transparency of the nomination process; the benefits the bearers of the accolade enjoy; the impact the bearers have on the society; and the interplay between the legal profession and politics. Most importantly, why is it that the Senior Bar has no legitimate leadership structure?

This paper adopts both the doctrinal and comparative methodology to assess if some of these questions are well founded, and if so, propose reforms to ensure that the highly admired rank retains the reverence it deserves. This it does by first establishing the evolution of the legal profession in Kenya, a historical overview of the rank of Senior Counsel and how the first Senior Counsel were nominated. Secondly, the paper will analyse the legal

⁵See e.g., Donald B. Kipkorir's letter to the Attorney General, Hon Justice Kihara Kariuki dated 23 September 2019, seeking a response and/or advise on, inter alia, whether the nominating committee in arriving at its decision restricted itself to the criteria set out in the Advocates (Senior Counsel Conferment and Privilege) Rules, 2011; whether the Committee had a matrix that was applied to all; the weighting process; composition of the Committee; discrimination against truly commercial law firms in favour of criminal law litigators; etc.

⁶ The word validity as used in this case means inferences which can be reasonably drawn by stakeholders about the process given its aims. For instance, what is the applicants' confidence level as far as fair treatment of all applicants is concerned? Besides, how confident are the other members of the legal profession that the people appointed as Senior Counsel have the right competencies? The issues raised in this context include;

a). Cognitive validity: what are the aims of the pre-nomination assessment? Have those objectives been achieved?

b). **Context validity**: Can the nomination process be said to be fair and transparent? Have the applicants from the marginalized sectors in the society been considered? Does the selection panel reflect the face of the wider legal profession?

b)**Scoring validity**: How are the scores weighted? How reliable is the scoring and decision-making process? Does the Committee have a matrix that it applies to all?

c) **Test taker characteristics**: Do other applicants have an unfair advantage over the other applicants? Do these factors relate to an individual's capacity to perform the functions of a particular role? If the discrimination is permissible, is the same communicated to all applicants before their commencement of their individual applications?

framework governing the rank of Senior Counsel in Kenya and evaluate whether the set criteria are wholesomely met. The paper will then compare the Kenyan model to the United Kingdom's (UK) and Nigeria's in a bid to draw lessons from the UK's and Nigeria's appointment process and leadership structure. The final part of the paper will summarise the research findings, tentatively recommending reforms that should be considered to ensure the continued existence of the Rank of Senior Counsel meets its objectives.

2 Evolution of The Legal Profession in Kenya

The history of legal education can be traced back to the pre-colonial period and it developed as follows:

- a) Pre-colonial period which embodied the traditional set up of communities before the colonization;
- b) As a colony whereby legal education entailed various developments through ordinances that were enacted; and
- c) Post-independence period when legal education entailed development through Acts of Parliament.

2.1 Pre-colonial Legal Education

Legal education during this period was based solely on customs. It was ethno-centric with its jurisdiction limited to the geographical boundaries of each ethnic community. Teachers of the law included kings, chiefs, orderlies, diviners and witch doctors. Although not codified, the substantive law was binding. Legal education during this era focused on private legal issues such as marriage and inheritance.

2.2 Colonial and Post-Colonial Period

Formal legal education was introduced by the British. It had two facets: judiciary and colonial legal service. In 1901, the private legal profession was introduced but only Indians were allowed to practice. Disciplinary issues were handled by the High Court. Entry into the profession required that the advocates had to qualify as barristers for admission to practice as advocates. Later, senior judges had the authority to license the lay who had proven to be of good character. However, this practice stopped in 1911 and practicing lawyers from other Commonwealth countries were allowed to practice. Organization within the profession began with the inception of the Mombasa Law Society, however, its membership was voluntary. With the establishment

of a High Court in Nairobi and the city declared a centre of commerce and administration, legal practitioners in Nairobi also formed the Nairobi Law Society whose membership was equally voluntary. The two Law Societies merged in 1920s to form the Law Society of Kenya, whose membership is mandatory.

In 1949, the Advocates Act and the Law Society of Kenya Act were enacted. The two Acts, which are still in force till date, institutionalized the Law Society of Kenya. Several amendments have however been effected on the two Acts. In the recent past, the Council of Legal Education Act, 1995 Cap 16A (Repealed under the Legal Education Act, No, 27 of 2012, section 47) was enacted establishing the Council of Legal Education, a body which exercises general supervision and control over legal education in Kenya and offers advice to the Government in relation to all aspects thereof.⁷

3. Historical Development of the Senior Counsel Rank in Kenya

Until 2003, the status of Senior Counsel, which was cemented in the then Constitution, was unheard of. Thanks to the former Chief Justice Bernard Chunga's alleged acts of misconduct, the first nominees to this revered rank were honoured by the former President Mwai Kibaki. They were appointed in a bid to fulfil the Presidents campaign promise of performing a radical surgery as a way of cleaning up the Judiciary.⁸ The then Chief Justice Bernard Chunga had been accused of corruption, interfering with judges, and planning, condoning and carrying out torture, thus bringing the Judiciary into ridicule and disrepute by subverting the constitutional review.⁹ In the event the Chief Justice was unable to exercise the functions of his office or that his conduct ought to be investigated, section 62 of the 1963 Independence Constitution required the President to appoint a tribunal consisting of a person who holds or has held the office of the Speaker of the National Assembly who shall be the chairman, two persons who hold or have held office as judges of appeal,

⁷ Council of Legal Education Act, Cap 16A, Section 6(1).

⁸ Paul Ogemba, 'The race against time as lawyers fight to join exclusive club of Senior Counsel,' Standard Digital, 11 January 2018) <<https://www.standardmedia.co.ke/article/2001265570/race-against-time-as-lawyers-fight-to-join-exclusive-club-of-senior-counsel>> (Accessed on 17 May 2020).

⁹ Njeri Rugene, 'Kibaki suspends Chunga over corruption claims,' (Daily Nation, 22 February 2003) <<https://www.nation.co.ke/news/1056-294576-lprt92z/index.html> (Accessed on 17 May 2020).

the chairman of the Public Service Commission, and one person upon whom the rank of Senior Counsel has been conferred by the President.¹⁰

Given that the law required a Senior Counsel to sit in the tribunal yet there were no Senior Counsel in the country, the President had to appoint all past chairmen of the Law Society of Kenya and gazette them as Senior Counsel.¹¹ There were 19 recipients.¹² The Benard Chunga tribunal, being the first tribunal in the history of the country set up to probe a Chief Justice, comprised of Francis Ole Kaparo (the then House Speaker), Majid Cockar (former Chief Justice), Richard Kwach (then Court of Appeal judge), Abdullahi Sharawe (former PS and chairman of the Public Service Commission), and Gibson Kamau Kuria, SC (former LSK chairman who was conferred the rank of Senior Counsel prior to his conferment).¹³ Bernard Chunga resigned after the tribunal had been set up.¹⁴

The second conferment was in June 2013 when the President conferred upon some Government officials and other former chairmen of LSK the prestigious

¹⁰ 1963 independence Constitution of Kenya, section 62(7) and (8).

¹¹ Paul Ogemba, 'The race against time as lawyers fight to join exclusive club of Senior Counsel' (Standard Digital, 11 January 2018) <<https://www.standardmedia.co.ke/article/2001265570/race-against-time-as-lawyers-fight-to-join-exclusive-club-of-senior-counsel>> (Accessed on 17 May 2020).

¹² The first recipients of the rank of Senior Counsel were honoured by President Kibaki in 2003. They were all past Presidents of the Law Society and included: the then Attorney General Amos Wako, the then Members of Parliament Paul Muite and Mutula Kilonzo, Dr. Gibson Kamau Kuria, Dr. Willy Mutunga, George B. M. Kariuki, Nzamba Kitomba, Lee Muthoga, Fred Ojiambo, Peter Le Pelley, Achhroo Ram Kapila, Joe Kwach, Mohammed Zahir Malik, Stewart Mackenzie Thompson, Samuel Njoroge Waruhiu, Ramnik Shah, Simani Sangale and Paul Mathari Wamae. In contrast, in Australia, if the holder of the rank of Senior Counsel took office as a judicial officer of a superior court, such barrister automatically lost the title of Queen's Counsel. However, the rank could be regained only if new letters patent are issued after such judicial officer of the superior court leaves office. See Justice Cummins P.D. 'Reflections on Judicial Office' presented on 1 September 2009, p 11.

¹³ Paul Ogemba, 'The race against time as lawyers fight to join exclusive club of Senior Counsel,' Standard Digital dated 11 January 2018 at <https://www.standardmedia.co.ke/article/2001265570/race-against-time-as-lawyers-fight-to-join-exclusive-club-of-senior-counsel> accessed on 17 May 2020

¹⁴ BBC News, 'Kenya's Chief Justice resigns,' dated 26 February 2003 at <http://news.bbc.co.uk/2/hi/africa/2800413.stm> accessed on 27 September 2019

rank.¹⁵ The year marked a paradigm shift in the manner in which the nominations were held. The rules on nomination changed in October 2008 requiring interested senior advocates of inter alia, fifteen years standing post-admission to apply for consideration for the award. The then Attorney General Prof. Githu Muigai and Director of Public Prosecutions Keriako Tobiko were among the recipients.¹⁶ Prof. Ojienda, Ms. Omamo, Mr. Abdullahi, Mr. Akide and Mr. Omogeni had rendered their services to the LSK as Chairpersons of the Society.¹⁷

The third nomination which was in 2019, attracted 90 applicants with only 24 being successful.¹⁸ Contrary to the norm, post-2013 LSK chairpersons were not on the list of those successful for conferment. Among those successful were the former Vice President Kalonzo Musyoka, former Minister of Justice Martha Karua¹⁹ and Member of National Assembly Hon. Dr. Otiende Amollo,²⁰ all of whom are advocates in active politics.²¹ However, the nomination of

¹⁵Galgalo Fayo, 'Fifteen lawyers elevated to Senior Counsel position,' Business Daily dated 17 June 2013 at <https://www.businessdailyafrica.com/news/Fifteen-lawyers-elevated-to-Senior-Counsel-position-/539546-1886330-eehv5qz/index.html> accessed on 17 May 2020

¹⁶Other recipients of the award were Prof Tom Ojienda, Defence Cabinet Secretary Raychelle Omamo, the then Judicial Service Commission commissioner Ahmednasir Abdullahi, Siaya Senator James Orengo, Patricia Kameri-Mbote, Pheroze Nowrojee, Kenneth Akide, Okong'o Omogeni, Kenneth Fraser, George Oraro, Joyce Majiwa, Lucy Kambuni and Omesh Kapila

¹⁷Law Society of Kenya, *Senior Counsel Members* at <https://lsk.or.ke/about-lsk/senior-council-members/> accessed on 17 May 2020

¹⁸ They include the former Vice President Kalonzo Musyoka, former Minister for Justice Martha Karua, Deputy DPP Dorcas Oduor, former DPP Philip Murgor, former CEO of the defunct TJRC Patricia Nyaundi, family lawyer Judy Thongori, Prof. Albert Mumma, renowned arbitrator John Ohaga, Kioko Kilukumi, Fred Ngatia, Rautta Athiambo, Waweru Gatonye, Wilfred Nderitu, John Chigiti, Kiragu Kimani, Abdikadir Hussein Mohamed, Rarieda Constituency Member of Parliament, Hon. Dr. Otiende Amollo, Zerhabanu Janmohamed, Tail Ali Taib, Mohammed Nyaoga, Pravin Bowry, Fackson Kagwe and Parkash Nagpal.

¹⁹ Martha Karua served as the Minister for Justice and was in office during President Kibaki's controversial re-election in 2007. She is the only candidate among the list of 24 who has openly come out to criticize the revocation of her nomination for the Rank of Senior Counsel on Twitter; *see*

²⁰ <https://twitter.com/marthakarua/status/1261164266285039617?s=21>.

²¹ Hon. Dr. Otiende Amollo is an Advocate of the High Court of Kenya who served as the Chairperson of the Commission on Administrative Justice of the Republic of Kenya between 2011 and 2017. He has also served as one of the experts in the Committee of Experts that drafted the Constitution of Kenya, 2010, Chair of the

the 24 nominees has since been recalled by the incumbent active LSK Council through a letter dated 13th May 2020, a drastic move aimed at correcting the mistake made by the Selection Committee.²²

International Jurists (Kenya-Section), Chair of the Action Aid International (Kenya), Secretary General of the East African Law Society, and Council Member of the LSK. He has developed the legal profession by way of active litigation where he successfully petitioned against the presidential election of 8th August 2017, leading to a fresh presidential election on 26th October 2017. In addition, he has researched and presented on the areas of Constitutional law, theory and practice, the African Human Rights System, and on the question of HIV/AIDS and the law.

²² The letter reads thus:

Re.: Conferment of Senior Counsel: 2019 and 2020

*The Law Society of Kenya (Society) is mandated by **Section 17** as read together with **Section 81** of the **Advocates Act, Cap 16 of the Laws of Kenya** to formulate rules for and recommend to the President of the Republic of Kenya, outstanding Advocates suitable for conferment of the rank and dignity of Senior Counsel.*

*On 26th August, 2019, the Committee on Senior Counsel (Committee) recommended twenty-four (24) Advocates out of ninety (90) applicants for conferment of the rank and dignity of Senior Counsel. A majority of members expressed dissatisfaction in the manner of composition of the Committee and the impartiality of its members in particular, the three (3) Judges. Two cases were filed in Court challenging the decision of the Committee on various grounds. Concerns were and continue to be raised on the validity of the **Advocates (Senior Counsel Conferment and Privileges) Rules, 2011**. The Rules are indicated to have been*

amended twice in 2012 and 2014 without public participation. All these issues impact negatively on the process of recommendation for conferment made in 2019 and intended to be made in 2020, a call for applications in respect of which was made to members on 24th February, 2020.

The Council deliberated on this matter in a meeting held on 11th May, 2020. It was resolved that the decision of the Committee made on 26th August, 2019, be set aside. The recommendation for conferment of the twenty-four Advocates was therefore revoked. The applications for 2019 shall be considered together with those made in 2020.

To ensure good governance, integrity, transparency and accountability of future recommendations for conferment, the Council further resolved that legal opinions be sought from three (3) Advocates appointed by the Council, two (2) of which are Senior Counsel. The three (3) will advise the Council on what changes should be made in the Rules to guarantee fairness and integrity of the process. Lastly, it was resolved that the Senior Counsel should urgently consider reconstituting its leadership and

3.1 The Political Question?

In tandem with section 17(3) of the Advocates Act, Cap 16 of the Laws of Kenya, the Committee on Senior Counsel comprises three Senior Counsel elected by the Society, a Judge of the Supreme Court nominated by the Chief Justice, a Judge of the Court of Appeal nominated by Judges of the Court of Appeal, a Judge of the High Court nominated by the Kenya Magistrates and Judges Association, the Attorney General, two Advocates (elected by the Society) who shall have at least five years' experience in practice, and the chairperson of the Society.²³ It considers applications made for elevation to the rank of Senior Counsel and also upon conferment, considers any application for the removal of a person from the Roll of Senior Counsel, making such recommendations to the President.²⁴ Despite such clarity in the

membership to the Committee, in preparation for the conferment set to commence as soon as the Society elects its representatives to the Committee in an Annual General Meeting to be held in due course.

*We undertake to ensure that henceforth, the conferment process meets the requirements of **Section 17 of the Advocates Act, The Constitution of Kenya** and best practice in the Commonwealth. The process should be fair and transparent. Recommendations must be made upon identifying excellency in applicants through meritocracy in a rigorous and objective exercise.*

Yours

Nelson Andayi Havi,

President, Law Society of Kenya

²³ **Advocates (Senior Counsel Conferment and Privileges) Rules, 2011, Rule 3(1)(e).** The 2019 nomination process raises several issues, among them, conflict of interest on the part of the Committee members because the Chairman of the Society, who is yet to be a Senior Counsel, submitted his application for consideration of the elevation. It can be arguably deduced that the chairman of the Society has some influence on the other members of the Committee on Senior Counsel. Even if he doesn't and/or didn't, any reasonable right thinking member of the society would be tempted to imply an instance of conflict of interest on the part of the other members of the Committee.

²⁴ *ibid* Rule 4; In Saskatchewan, appointments to the rank of Queen's Counsel are made by a selection committee comprising the Justice Minister and Attorney General, Chief Justice of the Court of Appeal or the Chief Justice of the Court of the Queen's Bench, and former presidents of the Canadian Bar Association, Saskatchewan branch and the Law Society of Saskatchewan. See Saskatchewan, *Outstanding lawyers honoured with Queen's Counsel designation*, 16 December 2016 <<https://www.saskatchewan.ca/government/news-and-media/2016/december/16/qc-appointments>> (Accessed on 17 May 2020).

composition of the Committee on Senior Counsel, little is known regarding its leadership and structure. It is rather disconcerting to note that since the appointment of the first batch of Senior Counsel, no election has ever been held to elect the leader of the Committee on Senior Counsel and its leadership structure thereof. Instead, Fred Ojiambo, SC single-handedly assumed de facto leadership and slipped into the power gap for the last seventeen years because there was no leader at the time. However, a time has come when the Committee and the Senior Bar at large need a clear structure and leadership framework to ensure that the Senior Bar retains its almost lost glory. In addition, does conferment of the award automatically exempt Senior Counsel from following the instructions of the LSK Council? In other words, can the President of the Law Society of Kenya legally summon a Senior Counsel?

4. Legal and Institutional Framework Governing the Selection of Senior Counsel in Kenya

As previously stated, the rank of Senior Counsel was a decorative provision that never saw its realization until the need to set up a Tribunal to probe the then Chief Justice arose. In the event the Chief Justice's conduct was to be investigated, the 1963 Independence Constitution of Kenya required the President to set up a Tribunal that would inter alia investigate the veracity of the claims levelled against the then High Court Judge.²⁵As a mandatory requirement, a Senior Counsel had to be a member of the Tribunal.²⁶

Currently, the language of the Constitution of Kenya, 2010 does not restrict such membership of the Tribunal probing the Chief Justice to a Senior Counsel, but to as broadly a term as 'an advocate of fifteen years standing.'²⁷ However, article 10 of the Constitution of Kenya, 2010 gives a cemented status to national values and principles which include non-discrimination, transparency, accountability, equality, inclusiveness, and protection of the marginalized. In addition, in the spirit of Caesar's wife being above suspicion, public service ought to be conducted in a manner that it attracts high standards of professional ethics, accountability for administrative acts, transparent, fair competition and merit as the basis of appointment, representation of Kenya's diverse communities, and adequate and equal opportunities for appointment of inter alia, men, women, persons with disabilities, and members of all ethnic

²⁵ Constitution of Kenya, 1963 section 62(7).

²⁶ *ibid* sec 62(8)(c).

²⁷ *Constitution of Kenya*, 2010 article 168(5)(a)(iii).

groups.²⁸ The Advocates Act, Cap 16 of the Laws of Kenya forms the legal foundation of the rank of Senior Counsel in Kenya. The Act empowers the President to grant a letter of conferment to any person of irreproachable professional conduct who has rendered exemplary service to the legal and public service in Kenya conferring upon him (or her) the rank and dignity of Senior Counsel.²⁹ To be eligible for such conferment, one must be duly enrolled as an advocate of the High Court with at least fifteen years' standing; or if the person is eligible to act as an advocate under section 10, they must hold, and has held for a continuous period of not less than fifteen years, one or other of the qualifications specified in section 13(1) of the Act relating to professional and academic qualifications.³⁰ Such grant of letter of conferment should be made within sixty days upon receipt of a list of names submitted by the Committee on Senior Counsel via the Chief Justice.³¹

Upon appending their signature on the Roll of Senior Counsel, the Chief Justice must publish in the Gazette the names of the advocates upon whom such conferment of the rank of Senior Counsel has been conferred.³² Just like the Attorney General, the Director of Public Prosecutions and the Solicitor-General, the Senior Counsel takes precedence of other advocates.³³ As far as discipline is concerned, unlike the other advocates, a Senior Counsel faces a Disciplinary Committee of three instituted in each case by the Chief Justice.³⁴ The Committee of three, which is chaired by the Attorney General or Solicitor General, consists of the Attorney-General or the Solicitor General as the case may be, and two other Senior Counsel.³⁵ Unlike the Disciplinary

²⁸ *ibid* article 232(1).

²⁹ Advocates Act, Cap 16, Laws of Kenya, section 17(1); *See* Barreau du Quebec, *Lawyer Emeritus Distinction* <<https://web.archive.org/web/20160304053422/http://www.barreau.qc.ca/en/barreau/reconnaissance/avocats-emerites/>> (Accessed on 17 May 2020) (In Quebec, the award of the honorary accolade stopped in 1975. However, three decades later, the Barreau of Quebec established the award of distinction of *Lawyer Emeritus* whose cognitive validity was to give recognition to lawyers who “gain distinction as a result of their outstanding professional career, outstanding contribution to the profession or outstanding social and community standing that has brought honour to the legal profession.”)

³⁰ Advocates Act, Cap 16, Laws of Kenya, section 17(2).

³¹ *ibid* section 17(3).

³² *ibid* section 18(4).

³³ *ibid* section 20.

³⁴ *ibid* section 19(a).

³⁵ *ibid*.

Tribunal under section 57 of the Advocates Act, the Committee of three cannot have a temporary or retired member who was not re-elected but opted to remain in office pending the final determination of a complaint brought before the Tribunal before such retirement.³⁶

Section 81(1)(ee) of the Advocates Act empowers the Council of the Society, upon approval of the Chief Justice, to make rules relating to the procedure for the conferment of, and the privileges attached to, the rank of Senior Counsel. In tandem with this proviso, the Council of the Law Society of Kenya, with the approval of the Chief Justice, made the Advocates (Senior Counsel Conferment and Privileges) Rules of 2011 to establish the procedural law governing such conferment. The application for conferment process involves an advertisement calling for applications that is made at least thirty days before the 31st of March in each year or on such date determined by the Committee.³⁷ The conferment is made upon one who, besides meeting the conditions in section 7 of the Advocates Act,³⁸

- a) is also an active legal practitioner and undertakes training of other members in the legal profession;
- b) holds a valid practising certificate or is entitled to act as an advocate under section 10 of the Act;
- c) has not been found guilty of professional misconduct by the Disciplinary Committee for a period of at least seven years preceding the application for conferment;
- d) possesses sound knowledge of law and professional competence;
- e) has argued at least five substantive appeals before the Supreme Court or Court of Appeal and at least ten substantive cases at the High Court within a period of ten years preceding the applicant's application for conferment, or in the case of an applicant who does not ordinarily

³⁶ *ibid* section 19(c).

³⁷ **Advocates (Senior Counsel Conferment and Privileges) Rules of 2011, Rule 5.** Such advertisement should be published in the electronic media and sent to the members of the Law Society of Kenya, inviting the eligible and willing contestants to make applications for such conferment.

³⁸ In Saskatchewan, to be eligible for appointment one must be a resident of Saskatchewan and must have at least ten years post-admission experience in the superior courts of any territory of Canada, United Kingdom or Ireland. See *supra n.* 24.

undertake litigation, has shown outstanding performance in the area of practice of the applicant;

- f) is a person of integrity, irreproachable professional conduct and good character;

has actively served the Society or other association whose membership consists of advocates; and

has contributed to the development of the legal profession through scholarly writings and presentations.³⁹

Members of the public can comment or object to any application made.⁴⁰ Irrelevant factors not to be considered by the Committee include age, tribe, gender, race, political belief or association of the applicant or any other factor constituting discrimination within the meaning of the Constitution.⁴¹ Communication from the Committee regarding the status of the applicant should then be communicated in writing and copies of the same submitted to the Council. Such a decision cannot be appealed against except where the appeal is based on a ground of discrimination. The appeal lies in the High Court. Upon conferment, the Committee submits the list of the recommended persons to the Chief Justice within thirty days from the date of its decision, who then submits it to the President.

³⁹Closely related to Kenya's eligibility criteria for conferment is Canada's Prince Edward Island whose eligibility for conferment is dependent on:

- a) A lawyer having at least ten years' standing at the bar of Prince Edward Island;
- b) Learned in the law;
- c) Consistency in exhibiting highest attainable standards of professional integrity; and
- d) Being in possession of very good character.

- a) reputation for excellence in the legal practice;
- b) Recognition as a leading lawyer;
- c) Great expertise in their area of specialization;
- d) Exhibit exceptional leadership qualities in the profession;
- e) Performance of outstanding work in the legal arena, including legal
- f) scholarship; or Contributing greatly to community issues and public service.

See Law Society of Prince Edward Island, *Honours and Awards* <<http://lawsocietypei.ca/honours-awards>> (Accessed on 17 May 2020).

⁴⁰Advocates (Senior Counsel Conferment and Privileges) Rules 2011, Rule 10(1).

⁴¹*ibid* Rule 10(2).

A Senior Counsel ceases to hold the status of Senior Counsel if a member of the Society petitions the Committee for their removal from the Roll of Senior Counsel and the Committee, upon inquiry on such removal of Senior Counsel, is of the decision that such removal should be effected and consequently communicating the same to the Chief Justice.⁴² The Chief Justice effects the same by causing to be published in the Gazette a notice revoking the Conferment of the rank of Senior Counsel.⁴³

The benefits the rank of Senior Counsel bestows upon the bearer are largely blurry. The law vaguely provides that other than use of designation of Senior Counsel, the rank of Senior Counsel shall bestow upon holder such other duties, powers and privileges as the Council may consider appropriate.⁴⁴ Over

⁴²*ibid* Rule 15(4).

⁴³ *ibid* Rule 15(7).

⁴⁴ *ibid* Rule 19; In the English legal system, the Queen's Counsel status is associated with formal privileges and fees charged. The privileges include wearing a distinctive uniform wear the Queen's Counsel wear a short wig, wing collar and bands and silk gown over a special court coat. Another privilege, save for the Attorney-General or Solicitor-General and the Director of Public Prosecutor, is being accorded a formal right to address in precedence. The third privilege relates to having special and preserved seats in courts. As far as legal fees are concerned, the Queen's Counsel is allowed to charge hefty fees for the legal services they render. This is so because a Queen's Counsel is expected to specialize in certain areas that are more complex thus the higher legal fees. As Baker J.H. quips, rightly so, '...the holders benefitted financially from the valuable right to be heard in the courts before junior barristers and it is known that Francis Winnington enjoyed a tenfold increase in his professional income after becoming King's Counsel in 1672.' Another consequence of being a Queen's Counsel is that they are exempted from the "cab-rank rule".

Certain disadvantages related to the prestigious rank of Queen's Counsel include prohibition to appear in court against the Crown without a special licence. In addition, they were not to draft pleadings without the assistance of junior counsel, neither were they to appear in court without the company of a junior barrister. More restrictively, they had to establish their chambers in London. *See All Answers Ltd, 'The Role of Queens Counsel' (Lawteacher.net, September 2019) <<https://www.lawteacher.net/free-law-essays/english-legal-system/the-role-of-queens-counsel.php?vref=1>> (Accessed 17 May 2020).*

Besides, according to Lord Brightman, "No doubt retention of the rank (of Queen's Counsel) may enable a barrister to raise his level of fees. But it can also deprive him of his living. I know of two cases where a barrister with a flourishing junior practice applied for and was granted silk, but failed as Queen's Counsel. He thereby lost most of his junior practice, gained no worthwhile silk's practice, and the public was

the years, the Society has been extending courtesies to the holders of the status like charging higher fees,⁴⁵ having special seats preserved for them in front of the judges,⁴⁶ putting on special robes, and precedence in court. These advantages, however well intended, have been the subject of criticisms in most jurisdictions.⁴⁷

deprived of the services of a competent and inexpensive junior barrister. I also know of two cases where, I understand, a junior barrister applied for silk with some hesitation, in case he should be left with no practice. In both cases he overcame his misgivings and reached very high judicial office. But he might have opted out, to the disadvantage of the judicial bench. To sum the matter up, the QC system in my opinion confers no benefit on the public and can be a damaging hurdle” See Brightman J, ‘Response to the consultation paper on ‘Constitutional reform: the future of Queen’s Counsel’ (UK Government Web Archive, 10 May 2003)

<<https://webarchive.nationalarchives.gov.uk/20070521230000/http://www.dca.gov.uk/consult/qcfuture/responses/qc041.pdf>> (Accessed on 17 May 2020).

⁴⁵According to Matrix Chambers, in *supra* n 44, ‘Silks can charge a premium in the marketplace simply for being silks’ because the cost assessment rules expressly recognise that and that makes the appointment to silk more enticing. See also *R v. Robinson* (SCTO Ref 209/97) where the Chief Taxing Master quipped thus “the acquisition of the status of QC brings with it the ability to command higher fees.”

⁴⁶A Senior Counsel sits in the front seats in courts as a recognition of their pre-eminence and in fulfilment of precedence rules in tandem with the Advocates Act, Cap 16, Laws of Kenya, section 20.

⁴⁷For example, when responding to the 2003 consultation on whether the rank of Queen’s Counsel should be abolished or not, the City of London Law Society had this to say, “...*There is clear, perceived, competitive advantage to QCs from their distinctive position in courtrooms...It is wrong in principle for advocates to be perceived in court to have a different status whether by reason of dress, position or otherwise.*” See

<<https://webarchive.nationalarchives.gov.uk/20070521230000/http://www.dca.gov.uk/consult/qcfuture/responses/qc058.pdf>>.

Others, like the Matrix Chambers, noted that “Silks are sometimes instructed simply to ‘get the ear’ of the judge (because some judges undoubtedly listen more attentively to submissions from a silk).” See

<<https://webarchive.nationalarchives.gov.uk/20070508230000/http://www.dca.gov.uk/consult/qcfuture/responses/qc211.pdf>> p 6.

5. Comparative Study of the Conferment Process and Leadership Structure in other Jurisdictions

5.1 Eligibility Criteria for Conferment of the Rank of Queen's Counsel in the United Kingdom

There was a radical paradigm shift in 2004 to the manner in which Queen's Counsel were appointed in the United Kingdom.⁴⁸ The appointment process shifted from the pre-2005 'secret soundings'⁴⁹ to an establishment of an independent Queen's Counsel Appointment panel. The pre-2005 annual (appointment) process was considered highly nebulous and difficult to define with intricate precision. It entailed barristers submitting applications which contained very shallow information since it was confined to their biographical and financial details. Lord Mackay summarised the process thus:

The lists of applicants are sent to the Law Lords, to all members of the Court of Appeal and to all High Court judges, as well as certain senior and specialist Circuit Judges in London and the Provinces. The list also goes to the Chairman of the Bar and the Leaders of the Circuits and specialist Bars. I ask for views from each on as many of the candidates as possible and I encourage them, where appropriate, to take discrete soundings among other leading Silks in their field... The application form contains a request for judges before whom the candidate has appeared in cases of substance over the last year, or senior members of the Bar who will be familiar with their practice and professional standing. I do not automatically approach those named... However, if by January, when a large number of views are to hand,

⁴⁸ Michael Blackwell, *Taking silk: an empirical study of the award of Queen's Counsel status 1981-2015*. (2015) LSE Research Online, p 2 <http://eprints.lse.ac.uk/62942/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_Blackwell,%20Michael_Taking%20silk_Blackwell_Taking%20silk_2015.pdf> (Accessed on 17 May 2020).

⁴⁹ This was a system where Queen's Counsel were appointed upon advice of the Lord Chancellor who took secret soundings from judges and senior barristers. The process was criticized for lacking credibility due to lack of transparency raising concerns on the numerous instances of discrimination especially on the minorities including women, other ethnic groups, and barristers who practiced outside London.

there appears to be less information than is needed about a particular individual, my staff will then write to those named...⁵⁰

What can be deduced from the process was the role the senior judicial officers played, which could, on the face of it, be seen as mere generalities. However, in reality, an applicant's good connection with the judiciary and the judicial officer's support was a key consideration for appointment as a Queen's Counsel.⁵¹ Other factors that determined whether or not one would be appointed as Queen's Counsel were political affiliation⁵² and the need to avoid flooding the market.⁵³ The composition of the body of consultees also determined whether or not an applicant would be appointed.⁵⁴ As earlier on stated, the process was criticised and its credibility and validity questioned. For instance, while responding to the 2003 Government's consultation paper on whether or not to abolish the rank of Queen's Counsel, the Association of Women Barristers proffered to wit:

In its current form the selection process perpetuates discrimination against solicitors, women and ethnic minorities. The system of great weight being given to automatic judicial soundings instead of references is unacceptable and probably in breach of the Sex Discrimination Act 1975 and European Equal Treatment Directives... The AWB considers that the manner of selection has

⁵⁰J. Mackay, 'The myths and facts about Silk' *Counsel* (1993) p 11.

⁵¹ Michael Blackwell *Supra n.* 48 p 5.

⁵² P. Plowden 'The legal professions' in W. Cornish et al *The Oxford History of the Laws of England: 1820-1914* (2010) vol XI 1059-1060.

⁵³Director General of Fair Trading, Competition in professions (OFT, 2001) para 275 <<https://webarchive.nationalarchives.gov.uk/20070508230000/http://www.dca.gov.uk/consult/qcfuture/responses/qc236.pdf>> (Accessed on 17 May 2020).

⁵⁴ The 2003 report of the Commission for Judicial Appointments noted that "The apparent lack of diversity among Silk cannot be attributed solely to the appointment procedure... Nevertheless, there is a risk that a selection process which relies almost entirely on consultation with a body of consultees who are overwhelmingly white, male and from a narrow professional background will tend to have a 'cloning' effect which will act against increasing diversity." See Annual Report (2003) Great Britain Commission for Judicial Appointments para 4.30 and 4.31 <<http://terment.ru/en/?q=Annual+report+2003+-+Great+Britain.+Commission+for+Judicial+Appointments>> (Accessed on 17 May 2020).

fallen behind acceptable equal opportunities policy procedure and practice applicable in other professions and walks of life.⁵⁵

Responding to the numerous calls for reform, the Lord Chancellor commissioned an enquiry led by Sir Leonard Peach to look into the appointment process of Queen's Counsel and judges and make recommendations as to whether or not the rank of Queen's Counsel should be abolished.⁵⁶ The Leonard-led commission of enquiry recommended that, inter alia, a Commission for Judicial Appointments be established to investigate allegations of 'unfairness, discrimination and maladministration in the appointment process of Queen's Counsel.'⁵⁷ The Commission found 'severe flaws in the way that the competition was administered in that year notably due to ...lack of a useful audit trail.'⁵⁸ Further, the Office of Fair Trading criticised the process by noting thus:

...the appointments system...does not appear to operate as a genuine quality mark. The system is secretive and, so far as we can tell, lacks objective standards. It also lacks some of the features of a genuine accreditation system, such as examinations, peer review, fixed term appointments and quality appraisal to ensure that the quality mark remains justified.⁵⁹

The Office of Fair Trading concluded thus:

...the existing QC system does not operate as a genuine quality accreditation scheme. It thus distorts competition among junior and senior barristers. Our evidence indicates that clients do not generally need the assistance of a quality mark, but if there is to be such a scheme, it should be administered by the profession itself on transparent and objective grounds.⁶⁰

⁵⁵ Association of Women Barristers, Response to the Consultation paper on Constitutional reform: the future of Queen's Counsel' *UK Government Archive* <<https://webarchive.nationalarchives.gov.uk/20070521230000/http://www.dca.gov.uk/consult/qcfuture/responses/qc018.pdf>> (Accessed on 17 May 2020).

⁵⁶ L. Peach, 'Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel' (Lord Chancellor's Department, 1999) p 39 in Michael Blackwell *supra* n 48 p 8

⁵⁷ Lord Chancellor's Department, *Judicial Appointments: Annual Report 2000-2001* Cm 5248 (2001) para. 4.13

⁵⁸ Commission for Judicial Appointments, *Annual Report 2003* (2003) para 4.1.

⁵⁹ Director General of Fair Trading *supra* n 53.

⁶⁰ *ibid* para 278.

As a way to instigate reforms, the Department for Constitutional Affairs published a consultation paper and an analysis of the responses to the paper. A year later, it published a further consultation paper titled Constitutional reform: the future of Queen's Counsel. Appointment of Queen's Counsel was suspended during this time. Appointments resumed in 2004, with the Lord Chancellor announcing the dissociation of his office with the appointment process.⁶¹ The Queen's Counsel Selection Panel, an independent and self-funded body, now makes recommendation for appointment of Queen's Counsel. The Panel comprises an independent lay as its chair, two solicitors, two barristers, a senior member of the judiciary, and four other lay members.⁶² It operates a competency based selection process where recommendations for appointments are based on evidence of:

- a) Understanding and using the law;
- b) Written and oral advocacy;
- c) Working with others;
- d) Diversity; and
- e) Integrity.⁶³

A clear demonstration of what the competencies are and how they are assessed is intricately set out in the Competency Framework,⁶⁴ thus making the outcome valid and more reliable.⁶⁵

⁶¹ Lord Falconer of Thoroton's written statement dated 26 May 2004 announcing the decision to retain the rank of Queen's Counsel.

⁶² Michael Blackwell *supra n* 48 p 9.

⁶³ QC Selection Panel, 'Queen's Counsel Competition for England and Wales 2019: Competency Framework' <<http://www.qcappointments.org/wp-content/uploads/2017/02/The-Competency-Framework-2017.pdf>> (Accessed on 17 May 2020).

⁶⁴*ibid.*

⁶⁵ Reliability refers to the stability of the assessment, for example, whether on different occasions or using different markers the same outcomes are rated in the same way. However, for QC appointments, extremely high levels of reliability are not expected since professional judgement is largely subjective. Nonetheless, the aim should still be to achieve the highest attainable level of consistency and predictability compatible

Upon conferment, the Queen's Counsel are still represented by the Bar Council (if they are barristers) or by the Law Society (if they are Solicitors). This means that the award of silk does not exempt them from fulfilling their obligations under their respective regulatory bodies and as such are still regulated by the regulatory arms of those bodies, that is, the Bar Standards Board and the Solicitors Regulatory Authority respectively.

5.2 Eligibility Criteria for Conferment of the Rank of Senior Advocate of Nigeria

Just like any other jurisdiction, the conferment of the award of Senior Advocate of Nigeria (SAN) is not as of right. Certain requirements have to be met and an application has to be made to the Legal Practitioners' Privileges Committee.⁶⁶ The Guidelines for the Conferment of the Rank of SAN provide *inter alia* for the guiding principles and requirements for the conferment. Fulfilment of the stipulated criteria for eligibility as defined and published from time to time by the Legal Practitioners' Privileges Committee is the primary basis for appointment.⁶⁷ Under eligibility, a candidate eyeing the award of SAN must be a legal practitioner called to the Nigerian Bar and practising in Nigeria as an advocate and must have been in active current legal practice for at least 10 years immediately preceding the date of application.⁶⁸ Meaning that the minimum post-call qualification is 10 years and the legal practitioner must have been in active legal practice as an advocate and must have achieved distinction in the legal profession.⁶⁹

As proof of competence, the focal points include full time legal practice, having distinguished themselves as an advocate by demonstrating excellence in advocacy skill, having made significant contribution to the development of the legal profession in Nigeria, possessing sound knowledge of the law and

with the style of assessment. See Cambridge Approach to Assessment '*Principles for designing, administering and evaluating assessment*' (2009) <www.cambridgeassessment.org.uk/Images/cambridge-approach-to-assessment.pdf> (Accessed on 17 May 2020).

⁶⁶ Guidelines for the Conferment of the Rank of Senior Advocate of Nigeria and All Matters Pertaining to the Rank, 2018, para 9.

⁶⁷ *ibid* para 2(f).

⁶⁸ *ibid* para 22(1).

⁶⁹ Legal Practitioners Act (Cap. L 11) Laws of the Federation of Nigeria 2004 section 5(2).

using such knowledge for the advancement of the administration of justice, having appeared in contested cases of significance coupled with demonstrating a high professional and personal integrity while complying with the etiquette at the Bar.⁷⁰ Other considered factors include professional and personal integrity, good character and reputation, relation with clients, colleagues, court as well as contribution to the profession, community, enhancement of law office and development of human capital. In addition, a candidate for the award of SAN should demonstrate clear qualities of leadership and loyalty to the legal profession by inter alia providing at least three (3) pro bono legal services to indigent persons.⁷¹

For clarity purposes, the Guidelines provide a specific number of cases that a candidate must have contested in the different court hierarchies to be eligible for conferment. An Applicant shall provide particulars of cases as follows:-

- a) 20 final judgments of the High Court or Superior Court of Records provided that in respect of such cases conducted at the High Court or Superior Court of Records, an Applicant shall provide certified true copies of complete record of trial proceedings and processes signed and filed by the Applicant... and a soft copy in at least twelve contested cases from trial stage to judgment, showing that the Applicant as counsel substantially conducted the trial. In addition, an Applicant shall provide letters of instruction from the client(s) as well as a letter from the Head of Court or Judge that delivered the judgment, confirming/verifying the Applicant as counsel that conducted the case from trial stage to judgment;
- b) 5 final judgments of the Court of Appeal supported by briefs along with valid notices of appeal duly settled and argued by the Applicant; and
- c) 4 final judgments of the Supreme Court supported by briefs along with valid notices of appeal duly settled and argued by the Applicant; however, where it is manifest that the Applicant himself has conducted the case from the High Court up to the Supreme Court, he will be required to submit 3 final judgments of the Supreme Court supported by Appellant/Respondent briefs along with valid notices of

⁷⁰ Guidelines for the Conferment of the Rank of Senior Advocate of Nigeria and All Matters Pertaining to the Rank, 2018, para 1, 14, and 23.

⁷¹ *ibid* para 23(7)(a) & (c).

appeal duly settled at appellate courts and argued at the three tiers of courts.⁷²

Thus, a candidate who is applying for the award of SAN (that is, non-academic SAN) is expected to have conducted to full conclusion 20 cases at the High Court or Superior Court of Record, 5 cases at the Court of Appeal, and 4 cases at the Supreme Court or 3 Supreme Court cases if the candidate (applicant) conducted the cases from the High Court to the Supreme Court. All these cases must have been conducted to full conclusion within a period of 10 years immediately preceding the date of application. Thus, substantial participation as counsel in the conduct of the cases is vital in order to qualify for the rank of SAN. More so, such cases must be considered ground breaking, or landmark decisions were made in respect of them. The cases should involve issues of significant legal or public interest, decide novel points of law and are frequently cited in the Law Courts.⁷³

As regards the leadership and structure of the Legal Practitioners' Privileges Committee, Nigeria offers very important lessons that Kenya can learn from. The Legal Practitioners Act⁷⁴ comprises the following:

- 1) Chief Justice who is the chairperson of the Committee;
- 2) Attorney-General;
- 3) One Justice of the Supreme Court chosen by the Chief Justice and the Attorney General for a period of two years renewable once;
- 4) President of the Court of Appeal
- 5) Five of the Chief judges of the states chosen by the Chief Justice and the Attorney-General for a term of two years renewable once;
- 6) Chief Judge of the Federal High Court; and
- 7) Five legal practitioners who are Senior Advocates of Nigeria. They are chosen by the Chief Justice and the Attorney General for a term of two years renewable once only.⁷⁵

As established, unlike the situation in Kenya, membership to the Legal Practitioners' Privileges Committee is not a lifetime opportunity. Those

⁷² *ibid* para 14(1) and (5).

⁷³ *ibid* para 23(5).

⁷⁴ Legal Practitioners Act, Cap 207, section 5(1).

⁷⁵ *ibid* section 5.

chosen by the Chief Justice and the Attorney General have a term limit of two years, which is renewable only once. In addition, the members to this Committee are chosen by the Chief Justice and the Attorney-General, save for the Chief Justice, the Attorney-General, President of the Court of Appeal and the Chief Judge of the Federal High Court.

Quite commendably, the Senior Advocates of Nigeria together form the Body of Senior Advocates of Nigeria (BOSAN), a body that is chaired by a Secretary who is a SAN and is elected by the other SANs. BOSAN has a fully functional secretariat.

Based on the above analysis, the following section suggests recommendations that should be (re)considered to ensure the rank of Senior Counsel in Kenya is devoid of politics and retains its validity and consequently its reliability.

6 Recommendations

This paper makes the following recommendations to offer more insight on how a better structure and leadership of the Senior Bar in Kenya can be achieved.

6.1 Democratization of the Senior Bar

Unlike the situation in Kenya, membership to Nigeria's Legal Practitioners' Privileges Committee is not a lifetime opportunity. Those chosen to the Committee have a term limit of two years, which is renewable only once. In addition, the members to this Committee are chosen by the Chief Justice and the Attorney-General, save for the Chief Justice, the Attorney-General, President of the Court of Appeal and the Chief Judge of the Federal High Court. Meaning Nigeria has a clear outline on how its Legal Practitioners' Privileges Committee is structured and led. Besides, all the Senior Advocates of Nigeria have a Body of Senior Advocates of Nigeria (BOSAN), a body that is chaired by a Secretary who is a SAN and is elected by the other SANs. BOSAN also has a fully functional secretariat.

However, the same cannot be said of Kenya's Senior Bar. The de facto leader, Fred Ojiambo, SC has served the Senior Bar for the past seventeen years. Going forward, the first task of Senior Counsel should be to elect the leader of the Senior Bar to serve for a term of two years renewable once. The second task should be to reconstitute the Committee of Senior Counsel and elect three

Senior Counsel. Therefore, it is imperative that membership to the Committee on Senior Counsel is restricted to a definite period of time, preferably two years. This applies to all members of the Committee except the Attorney-General, who will be a member of the Committee for as long as he or she holds the office.

This will, therefore, call for an amendment of the Advocates (Senior Counsel Conferment and Privileges) Rules, 2011 to redefine the Committee's composition to have the two advocates, not being Senior Counsel, under Rule 3(1)(g) replaced with two other Senior Counsel so the Committee can be comprised of five Senior Counsel. Besides, the amendment should incorporate the election of the Chairperson of the Committee by all Senior Counsel on the Roll of Senior Counsel. Moreover, the term of the Chairperson and the other members, save for the Attorney-General, should be limited to two years, renewable only once.

6.2 Anchor the Committee on Senior Counsel in the Law Society of Kenya Act

The LSK Act makes no mention of Senior Counsel. This paper proposes that the Committee on Senior Counsel should be institutionalised and anchored in the LSK Act. This will synergise the functions of the LSK Council and the Committee on Senior Counsel on matters touching on public interest. This will also create a legitimate public interest function of the Committee on Senior Council and define its mandate.

In addition, on the issue of whether Senior Counsel can be summoned by the LSK Council, it is important to note that despite the privileges flowing from being a member of the Senior Bar, Senior Counsel are not independent of the Council. Just like the Queen's Counsel who are subject to the Bar Standards Board and the Solicitors Regulatory Authority for barristers and solicitors respectively, it is important for the Senior Counsel to still fulfil their obligations under the LSK Act. Consequently, the meeting convened by the President of the Law Society is done in accordance with section 4(i), 5, and 7(1) of the LSK Act. Indeed Dr. Kamau Kuria in his letter confirming his attendance to the meeting, has set out various issues that should be of concern to the Senior Bar, including but not limited to finding a working formula with the Chief Justice and the Courts.

6.3 Mandatory Distinct Dress Code

In England, there is a distinct dress code that is an identification unit for a Queen's Counsel. Barristers who have been appointed as Queen's Counsel wear a silk gown with a flap collar and long closed sleeves (the arm opening being half-way up the sleeve). They also wear a court coat, similar to a black morning coat, instead of an ordinary suit jacket. On ceremonial occasions, and when appearing before the bar of the House of Lords, Queen's Counsel wear ceremonial dress.

Likewise, members of the Senior Bar need to be distinct in their dress code. They should have a unique gown (of an acceptable colour) and wig made of prestigious fabric. This will distinguish members of the Senior Bar from the other members of the Bar.

6.4 Distinct Senior Counsel Remuneration Order

The honorary accolade attracts general public importance because it is rationalized as a trademark of quality for the consumers of legal services. Besides, the highly sought after pre-eminent award attracts individual gravity since it offers a quantum leap in the amount of legal fees charged by the bearer, as already indicated above. This means that members of the Senior Bar can charge fees higher than what is stipulated in the Advocates Remuneration Order. For consistency purposes, it is imperative that the Advocates Remuneration Order be amended to include minimum amounts of what a Senior Counsel can charge, which ordinarily should be at least twice the minimum amount stipulated in the Advocates Remuneration Order as it currently is.

In the alternative, an amendment of the Advocates (Senior Counsel Conferment and Privileges) Rules, 2011 should be effected to provide for minimum amounts a Senior Counsel can charge.

6.5 Rigorous Nomination Process to the Senior Bar

The UK has a fairly predictable and reliable Queen's Counsel appointment process. Its Competency Framework lays down in good detail the standards of excellence in each eligibility criterion. For example, the 2019 Competency Framework (Guidance for Applicants) explains further what 'understanding of the law', 'written and oral advocacy', 'working with others', 'diversity', and 'integrity' mean. These can be pointers for the current Committee on

Senior Counsel to come up with better details on what they mean by ‘active legal practitioner’, ‘sound knowledge of the law’, ‘irreproachable professional conduct’, ‘active service to the Society’, and ‘contribution to the development of the legal profession’.

Moreover, the appointments should not be seen as automatic trophies awarded to undeserving candidates. Factors, like political affiliation, that do not necessarily relate to the applicant’s capacity to perform the roles associated with the Rank of Senior Counsel should not be reasons for conferment since in so doing the legal profession risks having people who are incompetent and with questionable and doubtful credentials as Senior Counsel. Such people do not inspire confidence to the members of the Law Society and the legal services’ consumers.

Therefore, the appointment process to the Rank of Senior Counsel should be extremely rigorous in order to award only the most deserving candidates. The focal points for conferment should include full time and active legal practice, the candidates having distinguished themselves as advocates by demonstrating excellence in advocacy skills, having made significant contribution to the development of the legal profession, possessing sound knowledge of the law and using such knowledge for the advancement of the administration of justice, having appeared in contested cases of significance coupled with demonstrating a high professional and personal integrity while complying with the etiquette at the Bar.⁷⁶ The candidates should preferably appear before the Committee and make a presentation before appointment. It is imperative that the Committee on Senior Counsel considers these criteria in a mutually inclusive manner.

7 Conclusion

Several reasons have been established as to why the advocate who holds the rank of Senior Counsel is a matter of general public importance. These reasons were that the rank is justified as a trademark of quality thus inspiring confidence to the consumers of legal services; it is a quantum leap for the Senior Counsel to charge higher fees; the Senior Counsel dresses in a special robe comprising a sleeved waistcoat like those worn by Court of Appeal

⁷⁶ 2018 Guidelines for the Conferment of the Rank of Senior Advocate of Nigeria and All Matters Pertaining to the Rank para 1, 14, 23.

judges; the Senior Counsel sits in front of the judges and magistrates in courts; and takes precedence of the other advocates who are not Senior Counsel. Be that as it may, the Senior Bar in Kenya has for far too long lacked a clear structure and leadership outline of its Committee. As such, to ensure that the rank of Senior Counsel retains its worth, as previously suggested, the following measures, inter alia, should be taken: a) democratize the Senior Bar; b) anchor the Committee on Senior Counsel in the LSK Act; c) a mandatory distinct dress code in Court for Senior Counsel;

a distinct Senior Counsel Remuneration Order; and e) a rigorous nomination process to the Senior Bar.