



Republic v Kenya Railway Golf Club; Kilonzo (Exparte) (Judicial Review Application E015 of 2024) [2024] KEHC 16478 (KLR) (Judicial Review) (27 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E015 OF 2024**

J NGAAH, J

DECEMBER 27, 2024

BETWEEN

REPUBLIC APPLICANT

AND

KENYA RAILWAY GOLF CLUB RESPONDENT

AND

EUNICE WAIRIMU KILONZO EXPARTE

JUDGMENT

1. The application before court is a motion dated 1 February 2024 filed under articles 10 and 186 of *the Constitution*; sections 8 and 9 of the *Law Reform Act*, cap. 26; and, Order 53 Rule 1, 2 and 4 of the Civil Procedure Rules. The applicant seeks the order of certiorari in the following terms:

“1. An order of certiorari to remove and bring to this Honourable Court for purpose of quashing the respondent’s letter dated 5th December, 2023 suspending the exparte applicant.”

2. The application is based on a statutory statement dated 4 January 2024 and an affidavit verifying the facts relied upon sworn by the applicant on even date.

3. According to these documents, the applicant is a long-time member and director of the respondent. She states that she is in good standing and has at all times acted in line with the respondent’s constitution. Her two children also benefit from her membership.

4. As at the time of filing her application, the applicant had expressed interest in running for the position of vice chair of the respondent in the elections that were scheduled for March, 2024. However,



on 5 December 2023, the applicant received a letter from the respondent informing her that the respondent's board had decided to suspend her membership for a period of six months; the suspension was to commence on 7 December, 2023 and end on 6 June, 2024.

5. The applicant's suspension stemmed from an incident that occurred between herself and a guest of the club and who, by that very fact, was a non-member. The said guest had not been signed in by a member and had not paid what the applicant has described as "green fees". The applicant, therefore, considered the said guest a stranger, trespassing on the respondent's property.
6. According to the applicant, her suspension was contrary to clause 13(a)(i) of the respondent's constitution according to which the respondent's disciplinary committee can only discipline a member who has been reported in writing by another member or employee of the respondent. Yet the show-cause letter dated 13 November 2023 addressed to the applicant referred to a complaint lodged by a guest of a member.
7. Nonetheless, the show cause letter required the applicant to file her written defence and submit it to the respondent's secretary within two days. By a letter dated 16 November, 2023 the applicant asked to be furnished with the complaint itself and the pertinent information and particulars related to the allegations in the complaint. However, the information and particulars, including witness statements, were never availed to the applicant.
8. On Monday the 4 December 2023, the applicant was informed of the hearing of her case that was to take place on the same day in the afternoon. The applicant claims that this was barely enough time to clear her schedule and attend the hearing. Although the applicant applied for postponement of the hearing, her application was declined. It is the applicant's position that this was unfair and unprocedural.
9. The applicant has sworn that, at the hearing, she was merely asked to state what transpired during the incident in question. She was not allowed to cross-examine any witnesses whose witness statements were relied on to suspend her. As a matter of fact, there were no witnesses at all.
10. Further, according to clause 5 of the respondent's constitution on board committees, the disciplinary committee ought to be chaired by the secretary. However, during the purported hearing, the committee was chaired by the respondent's vice chairman, one Jonathan Marucha. It is the applicant's that there is no provision of delegated authority in the respondent's constitution; the vice chairman would only have sat as one of the two co-opted member of the committee.
11. Again, there is no provision in the respondent's constitution that gives the disciplinary committee the power to suspend the applicant based on an incident between her and a non-member of the club. Since a non-member of the respondent has no legal basis upon which to file a complaint against a member of the respondent before the respondent's board or its disciplinary committee, the respondent's board did not have the capacity to entertain a complaint from a non-member and purport to act on it. Accordingly, the respondent acted ultra vires clause 13 of its constitution.
12. The applicant has urged that in view of these infractions, the only reason why she was suspended was to stop her from contesting in the elections that were scheduled to take place in March, 2024. In other words, the suspension was for ulterior motives and, in bad faith. In summary the applicant has impeached the respondent's decision on the grounds that:

- "a. The ex-parte Applicant was suspended based on the complaint of a non member/non-employee of the Respondent despite its Constitution's Article 13 restricting disciplinary process to complaints by members and



employees. The Respondent's Board did not have the capacity to entertain a complaint from a non member/non-employee and purport to act on it.

- b. The ex-parte Applicant was not availed with the sufficient particulars of the complaint against her;
 - c. The ex-parte Applicant was not availed the five witness statements relied on to suspend her.
 - d. The ex-parte Applicant was not availed all the information, materials and evidence to be relied upon in making the decision or taking the administrative action.
 - e. The ex-parte Applicant was not accorded a proper opportunity to be heard and to make representations;
 - f. The ex-parte Applicant was not given notice of the right to cross-examine.
 - g. The ex-parte Applicant was not granted an opportunity to avail any witnesses of her own.
 - h. The ex-parte Applicant was not granted an opportunity to cross-examine witnesses.
 - i. The ex-parte Applicant was not given notice of the right to legal representation.
 - j. The ex-parte Applicant's request for an adjournment of the proceedings, necessary to ensure a fair hearing, was denied.”
13. The respondent opposed the application and a replying affidavit to this effect was sworn by Mr. Onyango Obiero who has introduced himself in the affidavit as the immediate former secretary of the respondent's management committee. He also states that he has previously served as the chairman of the respondent's disciplinary committee.
 14. Mr Obiero has admitted that the applicant is a member of the respondent and at the time material to this suit, she was also a board director of the respondent's management committee.
 15. On or about 10 November 2023, Mr. Obiero received a complaint from one David Warui against the applicant. He reported having been physically and verbally abused. He also received statements from members of the respondent on the events leading to the incident out of which the complaint arose.
 16. Through a letter dated 13 November 2023, the applicant was asked to show cause why disciplinary action should not be taken against her. She was required to file and serve her written defence in response to the show cause letter. In her letter dated 16 November 2023, the applicant requested for the written complaint of the complainant. Mr. Obiero shared with the applicant the complaint together with the members' statements through an email dated 20 November 2023.
 17. The applicant responded to the allegations vide a letter dated 21 November 2023. On 22 November 2023, the applicant was invited for a disciplinary hearing that was set to held on 28 November 2023 at 1800hrs. The hearing could not, however, take place because of what the respondent has described as “respondent's activities involving the club's committee members”. Nonetheless, the applicant was notified of the new date of 4 December 2023 at 2.30 PM but the applicant requested the hearing proceeds on the evening of the material date or, alternatively, on the following day. The meeting was thus rescheduled to 5.00 PM on 4 December 2023.



18. According to Mr. Obiero, the hearing proceeded smoothly; the applicant stated her case and even requested to file a further statement in support of her case. Her application was allowed and she filed her statement on 5 December 2023.
19. Upon considering the evidence before the committee, the latter resolved to suspend the applicant for a period of six months commencing 7 December 2023. The suspension was to lapse on 6 June 2024. The applicant filed an appeal against the suspension through a letter dated 19 December 2023. However, the club constitution only provides for an appeal on golf related disciplinary issues. The applicant's case was considered a non- golf related disciplinary issue as provided under clause 13 of the club constitution.
20. Mr. Obiero has sworn further that the incident between the applicant and Mr. David Warui, whom he has described as a guest of the respondent's member, occurred within the respondent's premises and that it is the responsibility of the club to protect its guests within its premises. The applicant's conduct, especially within the respondent's premises, was subject to disciplinary processes of the respondent.
21. The respondent's position is that the applicant's right to be heard and the rules of natural justice were upheld during the applicant's disciplinary proceedings and, therefore, this application ought to be dismissed with costs.
22. I gather from the applicant's application that the two judicial review grounds upon which her application is grounded and for which the relief of certiorari is sought, are the grounds of illegality and procedural impropriety. These grounds, amongst other judicial review grounds, were enunciated in the English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review".
23. These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation



[1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

24. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and may grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed.
25. In the instant application, the court is concerned, as earlier, noted with the grounds of illegality and procedural impropriety. As far as the ground of illegality is concerned, the applicant's case is narrowed to clause 13 of the respondent's constitution. It deals with, inter alia, the procedures for disciplinary cases arising at the respondent club. It reads as follows:

13. DISCIPLINE

- (a) The procedure for handling Club & non-Golf related disciplinary cases will be as follows: -
 - i) The Board through the Club & non-Golf related Disciplinary Committee shall have powers to discipline any member who has been reported in writing by another member or members or by any employees of the Club for unbecoming behavior.
 - ii) The Board shall write to the accused member to file his/her defense in writing and after due consideration of accusations and defense, take any appropriate measures as the Board deems fit. Such measures may take the form of warning, suspension, or expulsion from the Club. Such suspended or expelled member's name shall be exhibited on Club Notice Boards and communicated to all reciprocating clubs. The decision of the Board shall be final.
 - iii) Pending investigation by the Board of the matters referred to above or any other matter of indiscipline or breach of the Club Constitution, the member shall be eligible to enjoy the services of the Club until such time when The Board communicates its disciplinary action report.



- (b) All golf-related disciplinary issues and disputes shall be dealt with by the Golf Disciplinary and Disputes Committee, which shall have powers to issue warnings, to suspend the handicap of any Member or take such other action as may be necessary to protect the integrity of the game of golf.

A Member dissatisfied with the decision of the Golf Disciplinary and Disputes Committee may appeal to the Board within Fourteen (14) days from the date of the decision, and the Board's decision on any such appeal shall be final.

Any member of either of these two committees who is the subject of or has any interest in any dispute or complaint referred to them shall recuse/remove himself/herself from all proceedings relating to that dispute or complaint and his/her position in the subject committee during such proceedings shall be taken over by another Member co-opted by the remaining members of that Committee.”

26. There is no dispute that in suspending the applicant, the respondent invoked this provision of its constitution, particular clause 13(i) and (ii) thereof. This is apparent from the respondent's letter dated 5 December 2023 addressed to the applicant and captioned, “Gross misconduct-suspension from Kenya Railway Golf Club.”
27. The letter reads in part as follows:
- “ At its sitting on 04/12/23, the select board committee, considering the voluntary service you have rendered to the club in the past, passed a resolution to suspend you from the Club premises for a period of Six(6) months. This letter therefore informs you that you have been suspended from the Club with effect from 07/12/2023, until 6/6/2024, both days inclusive, in line with section 13 sub sections i & ii of the Club constitution.”
28. But the powers of the Board through the Club & non-Golf related Disciplinary Committee to discipline a member of the respondent are limited to cases reported in writing “by another member or members or by any employees of the Club for unbecoming behavior”.
29. Going by Mr. Obiero's affidavit, he received the complaint which formed the basis of the disciplinary proceedings against the applicant from one David Warui whom he has described in the same affidavit as a guest. Thus, it is not in dispute that Warui was not a member of the respondent and neither was he the respondent's employee.
30. I agree with the applicant's submission that since Warui was neither a member nor an employee of the respondent, the disciplinary committee could not purport to invoke clause 13(i) of the respondent's constitution to adjudicate upon his complaint and punish the applicant. None of the provisions in clause 13 of *the constitution* gave the respondent such powers. To the extent that the respondent acted without jurisdiction, the purported disciplinary proceedings and subsequent punishment of the applicant was ultra vires the respondent's constitution and, in particular, clause 13(i)(a) thereof.
31. For this reason, the applicant's application would succeed on the judicial review ground of illegality because it is apparent that the respondent did not understand correctly the law that regulates its decision-making power and neither can it be said that it gave effect to it.
32. Based on the same facts, the respondent's decision would also be impeached on the ground of procedural impropriety. This is because, first, the applicant was subjected to disciplinary proceedings under clause 13 (i) (a) of *the constitution* when such proceedings were not open to the respondent at the instance a complainant who was neither a member of the respondent nor the latter's employee.



33. Second, and related to the first reason, the respondent failed to observe procedural rules that are expressly laid down in its own constitution by which its jurisdiction is conferred. The procedural rules are clear as to who the proper complainant in disciplinary proceedings under clause 13(i)(a) is and, by that very fact, the extent of the respondent's jurisdiction on adjudication of disciplinary cases.
34. I do not agree with the respondent's argument that merely because an issue of indiscipline involving one of the respondent's members arose within the respondent's premises, the respondent could effectively assume jurisdiction specifically conferred for a certain category of cases that do not include a complaint by a person whose complaint is not covered under clause 13(i)(a) of the respondent's constitution.
35. Having held as I have done, it is not necessary to delve into other aspects of procedural impropriety such as the right to be supplied with the statements, or call witness or cross examine the complainant's witness for the simple reason that the purported disciplinary proceedings, having been invoked and conducted without the requisite jurisdiction were a nullity ab initio. There were no proceedings or no valid proceedings in which the applicant could insist on procedural propriety or fairness.
36. For the forgoing reasons, I hereby allow the applicant's application. The respondent's letter dated 5 December, 2023 is hereby removed into this Honourable Court and quashed accordingly. The applicant will have costs of the application. Orders accordingly.

SIGNED, DATED AND UPLOADED ON THE CTS ON 27 DECEMBER 2024

NGAAH JAIRUS

JUDGE

