Ingram v Secretary, Malindi Golf and Country Club & 2 others (Constitutional Petition 1 of 2022) [2023] KEHC 3437 (KLR) (24 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3437 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CONSTITUTIONAL PETITION 1 OF 2022

SM GITHINJI, J

APRIL 24, 2023

IN THE MATTER OF CHAPTER 4 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 2, 3, 19, 20, 21 (1), 23 (1) & (3), 27, 33, 36, 47 AND 165 OF THE CONSTITUTION OFKENYA, 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE PETITION BY GEOFFREY INGRAM CHALLENGING INFRINGEMENT OF HIS CONSTITUIONAL RIGHTS AND FUNDAMENTAL FREEDOMS

AND

IN THE MATTER OF VIOLATION OF THE RULES AND BY LAWS OF MALINDI GOLF & COUNTRY CLUB

BETWEEN

GEOFFREY INGRAM ..... PETITIONER

AND

SECRETARY, MALINDI GOLF AND COUNTRY CLUB ..... 1ST RESPONDENT

CHAIRMAN, VICE CHAIRMAN, TREASURER, GOLF CAPTAIN, VICE CAPTAING, HOUSE MEMBER AND LADY CAPTAIN (SUED AS OFFICIALS OF THE MANAGEMENT COMMITTEE OF MG&CC) ..... 2ND RESPONDENT

MALINDI GOLF & COUNTRY CLUB ..... 3RD RESPONDENT

RULING

1. This Ruling is in respect of a Notice of Preliminary Objection filed by Malindi Golf & Country Club, the 3rd Respondent herein. The objection is dated 18th May, 2022. (Hereinafter 'the objection')

2. The objection is detailed as follows: -

    a. Article 159 (2) (c) of the *Constitution* of Kenya, 2010 provides that this Honourable Court in exercising judicial authority shall be guided by the principle that alternative forms of dispute resolution and traditional dispute resolution mechanisms shall be promoted.

    b. Rule 16 of the Malindi Golf & Country Club Rules and By Laws provide the Petitioner the right to Appeal to the General Meeting of the 3rd Respondent.

    c. The doctrine of constitutional avoidance deals with instances where a constitutional court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize.

    d. The Petitioner has not exhausted the internal appeal mechanism as provided for by the Malindi Golf & Country Club Rules and By-Laws.

3. The Petitioner is opposed to the objection.

4. The objection was canvassed by way of written submissions. In their written submissions filed on 7th December 2022, counsel for the 3rd Respondent argued that Rule 16 and 40 of the Malindi Golf & Country Club ousts the jurisdiction of this Court over this matter at this stage for failure to exhaust all the available remedies. The counsel added that the Petition as framed did not raise any constitutional issues thus contravening the doctrine of constitutional avoidance.

5. On the issue of a court's jurisdiction, counsel relied on the cases of *Re the Matter of the Interim Independent Electoral Commission*, S.C Constitutional Application No 2 of 2011 [2011] eKLR; and *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR.

6. To explain the doctrine of exhaustion where statute establishes a dispute resolution mechanism, counsel for the 3rd Respondent cited the case of *Francis Gitau Parsimei & 2 others v National Alliance Party & 4 others* [2012] eKLR.

7. Counsel further submitted that the issues raised in the Petition are devoid of merit and non-justiciable. It was their argument that the court is precluded from interfering with the internal affairs of voluntary associations by virtue of the doctrine of constitutional avoidance as it was discussed in the case of *Kiriro wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR.

9. Counsel urged the Court to dismiss the Petition on the given grounds.

10. On his part, the Petitioner relied on the submissions filed by his advocates on 21st November 2022 where counsel argued that the objection fails to meet the threshold of a preliminary objection as enunciated in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] E.A. That

the Respondent's objection is not confined to pure points of law and it is raised on disputed facts such as the manner and procedure of the Petitioner's expulsion.

11. Counsel submitted that this court's jurisdiction to hear and determine matters on violation of the *Constitution* is granted by Article 23(1) as read with Articles 22 and 165 (3) of the *Constitution* of Kenya.

12. Counsel added that the availability of alternative remedies could not interfere with that jurisdiction and especially where continued violation of fundamental rights is an issue, in this case, the Petitioner's attempts to mediate the issues through special general meetings continue to be frustrated and ignored.

13. On the issue of constitutional avoidance, exhaustion and or ripeness, Counsel was guided by the respective definitions of those terms outlined in the Black's Law Dictionary, 10th Edition. Counsel submitted that those doctrines were not applicable in this case since the Petitioner approached this court for a determination of the question of continued violation of his fundamental rights and that the relationship between the 3rd Respondent and its members having irredeemably broken down for any possible amicable resolution, there was no other proper forum capable of adequately adjudicating on the issues raised except this Court.

14. Counsel relied on a series of cases- *Night Rose Cosmetics [1972] Limited v Nairobi County Government & 2 others* [2018] eKLR; *Republic v Independent Electoral and Boundaries Commission, ex-parte National Super Alliance [NASA] Kenya & 6 others* [2017] eKLR; *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR; *Chief Justice and President of the Supreme Court of Kenya & another v Bryan Mandila Khaemba* [2021] eKLR; *William Odhiambo Ramogi & 3 others v AG & 4 others, Muslims for Human Rights & 2 others (Interested Parties* [2020] eKLR; *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* [2014] eKLR; and *E.W.A & 2 others v Director of Immigration & Registration of Persons & another* [2018] eKLR.

15. Counsel further submitted that the 3rd Respondent's rules were clear on the procedure to be followed. That before a member is suspended or expelled, they ought to be given an opportunity to be heard. Having failed to do so, the Petitioner then is justified to approach this Court to seek redress for violation of his right to fair administrative action. Reliance was placed on the case of *John Githui v Trustees, Nakuru Golf Club* [2019] eKLR; and *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR.

16. In the ultimate, counsel urged the Court to dismiss the objection.

Analysis and Determination

17. I have carefully considered the material presented before Court by the parties including the submissions and the decisions referred to. I will, in the first instance, consider whether the objection meets the threshold of a pure point of law.

18. Law, J.A. in *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* (1969) EA 696 had the following to say on preliminary objections: -

> "So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration..."

19. This was followed up by the judgment of Sir Charles Newbold in the same case:-

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

20. Similarly, Ojwang, J (as he then was) in *Oraro v Mbaja* [2005] eKLR went on to state that: -

> " A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point ... Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence ..."

21. Interrogating the objection, the contents of the Petition and the law on preliminary objections, I am satisfied that the objection on the doctrine of exhaustion meets the threshold of a pure point of law. The objection is clear on the rules contravened and if successful, the objection is capable of disposing the suit.

22. The question that follows therefore is whether the objection is sustainable.

23. The gist of the Petitioner's grievance is captured in paragraphs 4 and 5 of the Petition, and is as follows: -

> " 4. The Petitioner avers that on 04.02.2022 he received a letter from the 3rd Respondent expelling him from the club citing conduct unworthy and/or injurious to the club. Prior to this letter, he had not been served with any notice convening a meeting or the agenda thereof in line with the rules and by laws of the club.
>
> 5. The Petitioner avers that he just received the letter expelling him from membership at the club but he was not notified of any meeting requiring him to appear before the disciplinary committee or when the Committee passed a resolution to suspend his membership. Therefore, the resolution according to the Petitioner was illegal and contrary to the *Constitution*, the *Fair Administrative Action Act*, rules of natural justice and the Club's Rules and By-laws."

24. It is not in dispute that the Petitioner was at some point a member of the 3rd Respondent. That there was a scheduled Annual General Meeting on 6th January 2022 which ended in chaos necessitating the

3rd Respondent to expel the Petitioner following a letter of complaint filed by other members of the Club.

25. A copy of the Malindi Golf and Country Club Rules and By-Laws annexed to the Petition, provide under rule 16 that: -

> " If any member shall willfully refuse or neglect to comply with the provisions of the Rules or by –laws of the Club, or shall be guilty of any conduct unworthy of a member of the Club, or likely to be injurious to the Club, as the case may be, such a member shall be liable to expulsion by a resolution of the committee; provided that at least one week before the meeting at which such a resolution is passed he/she shall, at such meeting, and before the passing of such resolution, have had an opportunity of giving, orally or in writing, any explanation or defence he/she may think fit. A member expelled under this rule shall forfeit all right in claim upon the Club and its property. Any member so expelled shall have the right of appeal to a General Meeting..."

26. The objection is anchored on this Rule. The Respondent's objection is that the Petitioner has failed to adhere to the doctrine of exhaustion. That as per the said rule, the Petitioner ought to have first appealed to a General Meeting and in the spirit of Article 159(2) (c) of the *Constitution*.

27. In *Boniface Akusala & another v The Law Society of Kenya & 12 others* Nairobi High Court Constitutional Petition No E260 of 2021 the Court discussed the origin of the doctrine of exhaustion as follows: -

> " 25. The doctrine of exhaustion in Kenya traces its origin from Article 159(2)(c) of the *Constitution* which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -
>
> 159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-
>
> (a) ...
>
> (b) ...
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.
>
> 26. Clause 3 is on traditional dispute resolution mechanisms."

28. Similarly, in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (*supra*), cited to me by the Petitioner, the Court reasoned as follows: -

> " 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* and was aptly

elucidated by the High Court in *R v Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR, where the Court opined thus:

> 42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:
>
> Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
>
> 43. While this case was decided before the *Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.
>
> This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:
>
> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution."

29. The learned judges in that case also dealt with the exceptions to the doctrine as follows:

> "(89) .....that there are constitutionally permissible situations where this Court may interfere in the policy decisions of the Government, and particularly if a policy decision is in actual or threatened violation of the fundamental rights guaranteed under the *Constitution*, or in violation of other provisions of the *Constitution*. The necessity of vindicating constitutionally secured personal liberties and fundamental freedoms is the principal justification for the anti-majoritarian power that judicial review confers upon the Courts, and we are therefore reluctant to find that a claim of fundamental rights, such as the one presented by the Petitioners is non-justiciable, even though it may concern the political process, or the internal workings of other government branches."

This reasoning was upheld on appeal.

30. My understanding therefore is that a court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize except in certain circumstances as pronounced in the *William Odhiambo Case* [*supra*]. Similar to this doctrine is the doctrine of

constitutional avoidance and ripeness as it was discussed in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* Pet. 14A, 14B & 14C of 2014 of [2014] eKLR. The Supreme Court observed: -

> " [105]. We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. *Black's Law Dictionary*, 10th Edition at page 377 defines it as:
>
> > "The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion"
>
> [106]. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition...
>
> [107]. The doctrine focuses on the time when a dispute is presented for adjudication. The *Black's Law Dictionary* 10th Edition, [*supra*] at page 1524 defines ripeness as:
>
> > The state a dispute has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.
>
> [108]. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies."

31. As already established, the Petitioner was a member of the 3rd Respondent Club prior to his expulsion and therefore bound by the provisions of the 3rd Respondent's Rules and in turn bound to pursue remedies as provided for under the said Rules.

32. The main issue raised by the Petitioner is that the 3rd Respondent failed to inform him of the disciplinary proceedings, and neither was he given an opportunity to be heard. This is not true because the Petitioner acknowledged in his supporting affidavit that he was aware of the disciplinary proceedings against him and that the expulsion letter even gave him an avenue to appeal.

33. The reversal of the decision by the committee being the gist of the Petition, and having in mind that the Petitioner is yet to utilize the available resolution mechanisms of which is an appeal to a General Meeting, capable of granting him what he is seeking before this Court, I find that the Petitioner has failed to demonstrate any of the exceptions to the doctrine of exhaustion to warrant this Court to exercise it's jurisdiction in his favour.

34. The outcome is that the objection is merited and is hereby upheld.

35. Each party to bear own costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 24TH DAY OF APRIL, 2023.

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S.M. GITHINJI

JUDGE

In the presence of; -

Munai for the Respondent

Ms Chepkwony for the Petitioner