



**Mwaura v Veterinary Laboratory Sports Club & 2 others (Constitutional Petition E289 of 2022)
[2023] KEHC 24109 (KLR) (Constitutional and Human Rights) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E289 OF 2022
LN MUGAMBI, J
OCTOBER 26, 2023**

BETWEEN

JOHN KAMAU MWaura PETITIONER

AND

VETERINARY LABORATORY SPORTS CLUB 1ST RESPONDENT

**VETERINARY LABORATORY SPORTS CLUB BOARD OF
DIRECTORS 2ND RESPONDENT**

THE HON ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Petitioners Case

1. The Petitioner seeks to have the decision by the Disciplinary Committee of the Respondents that expelled him from being a member of the 1st Respondent found to be unfair and unconstitutional for the failure to follow the due process in the disciplinary hearing.
2. He claimed that sometime in December 2021, he was given two letters dated 3rd and 8th December respectively in which formal complaints were made against him in respect to two incidents that had occurred on the 1st Respondent's premises. He was subsequently suspended from the 1st Respondent's premises and denied access to the club facilities.
3. The Petitioner contended that the hearing was conducted without abiding to the due process hence violated his right to fair administrative action. He listed the particulars of undue process under paragraph 3.12 of the Petition as:



- a. Failing to expeditiously deal with his issue while denying him access to the club's facilities in contravention of the club's constitution;
 - b. Failing to furnish him with the complaints and statements against him within a reasonable time;
 - c. Failing to disclose to him any prejudicial information or documents in their possession to allow him refute/address the allegations;
 - d. Failing to strictly adhere to the club's constitution;
 - e. Relying on and alluding to witnesses in support of the complaints against him but failing to furnish him with their statements with regard to the same or present them for cross-examination;
 - f. Relying on unsatisfactory evidence and the uncorroborated accounts of an employee at the club to expel him despite the allegations having been denied;
 - g. Failing to furnish him with the minutes and report arising from the Disciplinary committee within reasonable time so as to initiate appeal mechanisms;
 - h. Discriminating against him on account of his disability and political stance;
 - i. Allowing an improperly constituted board to adjudicate on his disciplinary issue; and
 - j. Generally failing to adhere to procedure.
4. The Petitioner averred that he had a legitimate expectation that the Respondents would furnish him with sufficient reasons whether written or otherwise before his expulsion or at the very least afford him a fair hearing as envisioned under Articles 47(2) and 50 of *the Constitution*. That to date he has never been supplied with the report and recommendations by the Disciplinary Committee which actions continue to violate his constitutional rights. He averred that the Respondent's actions are a foul to the rule of law and the due process hence seeks the intervention of this Court to uphold and protect his constitutional rights.
5. In the Petition dated 6th June, 2022 supported by the affidavit of even date, the Petitioner prays for the following RELIEFS:
- a. A declaration be and is hereby issued that the report and recommendations of the 1st Respondent's Disciplinary committee to expel the Petitioner and ratified by the 2nd Respondent is a nullity as the Respondents contravened Articles 20(2), (3), (4) of *the Constitution* of Kenya as far as application of Fundamental rights and freedoms of the Petitioner is concerned;
 - b. A declaration be and in hereby issued that the Respondent's act of failing to issue the Petitioner with the minutes, reports and recommendations of the 1st Respondents Disciplinary Committee as well as any proceedings by the 2nd Respondent was manifestly unreasonable and violated the Petitioner's right to fair administrative action as enshrined under Article 47 of *the Constitution*;
 - c. A declaration be and is hereby issued that the Petitioner's right to fair trial under Article 50 of *the Constitution* was infringed.
 - d. A declaration be and is hereby issued that the decision of the 2nd Respondent to expel the Petitioner from the 1st Respondent was opaque, egregious, capricious, whimsical and contrary



to Articles 10, 25, 41, 47 and 50(1) of the Constitution of Kenya, 2010 hence unconstitutional and consequently null and void;

- e. A declaration be and is hereby issued that the Respondents violated the Petitioner's right to human dignity under Article 28 of the Constitution and the right not to be subjected to any form of violence or be treated in a cruel, inhuman or degrading manner under Article 29 of the Constitution hence unconstitutional and consequently null and void;
- f. General damages for distress and mental anguish in the amount of K.Shs, 20,000,000;
- g. Exemplary and punitive damages;
- h. Costs of the Petition;
- i. Any other relief or further orders, writs and directions the Court considers appropriate and just to grant for the purpose of the enforcement of the Petitioner's fundamental rights and freedoms.

The Response

6. The Respondents' Replying affidavit is dated 3rd March, 2023 and sworn by Dick Omondi who was/is Honorary Secretary of the 1st Respondent. He confirmed that the Petitioner was a member of the 1st Respondent and outlined several incidents that led up to his suspension and ultimate expulsion from the 1st Respondent.
7. The first incident occurred on or on the 20th of November, 2021 when the Petitioner allegedly indecently exposed himself to the employees and some members of the Veterinary club. That the incident was reported by the Club Food and Beverage Supervisor vide a letter received by the Club's General Manager on the 3rd of December, 2021. The Respondents also refer to an earlier incident that occurred on the eve of 19th July, 2021 when the Petitioner allegedly made insolent and discourteous comments towards a Food and Beverage supervisor at the Club.
8. The Respondents refuted the Petitioner's assertions that he was not accorded fair hearing and stated that the Petitioner was issued with a letter dated 10th December, 2021 where complaints against him including sexual harassment and indecent behavior were conveyed together with the annexures of the specific complaints levelled against him. This is the letter that suspended the Petitioner for one month while he awaited the disciplinary hearing and advised him to respond to the allegations within seven days.
9. The Petitioner was equally notified through the said letter that the disciplinary hearing was scheduled for the 24th of February, 2022 and an official notice sent on the 19th of February, 2022.
10. The Respondent deponed that the hearing was conducted in accordance with the Club's revised constitution of 2017 and the bylaws and the Petitioner responded orally to the complaints levelled against him. They denied the allegations that the Petitioner's was discriminated due to his political stance with respect of the elected officials and his disability.
11. That the petitioner has not even proved disability if at all.
12. The Respondents urged this Court to dismiss the Petition with costs because the Club and the Board followed the requisite procedure and made a decision to expel the Petitioner from the Club due to his misconduct at the Club's premises.



Submissions

13. The Petitioner filed submissions dated the 2nd of December, 2022. He submitted on two issues, namely:
- i. whether the proceedings leading up to the exclusion of the Petitioner was done in accordance with the law; and,
 - ii) whether the court should grant the orders sought.
14. On the first issue, which the Petitioner emphasized as the paramount issue in the Petition, he relied on Clause 5A of the 1st Respondent's Constitution which provides that the Respondent is a quasi-judicial body with the core mandate of adjudication of complaints by and against members. This he said obligated the Respondent to adhere to the principles of natural justice and fair administrative action in discharging its mandate. The Petitioner contended that the Respondents denied him access to the 1st Respondent without any written explanation or reasons for the same. He argued that the expulsion infringed on his constitutional rights and is therefore null and void ab initio. He submitted that the following constitutional provisions were thus violated:
- a. Article 10: National Values and Principles: The Article incorporates inclusiveness and natural justice in governance. He stated that the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights and non-discrimination were the values that were disregarded by the Respondents. That the Respondents failed in their duty to facilitate equity and fairness thereby infringing on the rule of law and which determines the legality of any judicial action. That the Respondents like all other citizen are bound by the national values in *the Constitution*. He relied on the case of: Republic Vs. Returning Officer Of Kamukunji Constituency & The Electoral Commission Of Kenya HCMCA NO. 13 OF 2008.
 - b. Article 27: Equality and freedom from discrimination. The Petitioner submitted that from the said Article it is clear that it is prohibited to discriminate against any person directly or indirectly on the basis of their disability, conscience or belief. He buttressed the Article with the provisions of Article 26 of the International Covenant on Civil and Political Rights, Articles 2 and 18 (3) of the African Convention on Human and Peoples' Rights. He relied on the case of Hoffmann Vs. South Africa Airways (CCT17/00) (2000) ZACC 17; 2001 (1) BCLR 1235; (2000) 12 BLLR 1365 (CC). He argued that he is a person with a disability which is why he was discriminated against. That the Respondents decision to suspend him in December 2021 was in blatant disregard of the Club's constitution.
 - c. Article 28-Human Dignity; under this head the Petitioner submitted that the intrinsic worth of all human beings must be respected as recognized by *the Constitution* as core value. That the Respondent arbitrarily expelled him from the club was based on unsubstantiated allegations and subjected the Petitioner to ridicule, embarrassment and degrading treatment hence violating his inherent right to dignity. He contends that this made him a laughingstock amongst his peers, members of the 1st Respondent and reciprocating clubs. He quoted William Shakespeare and Thomas Mowbray and relied on the cases of Rosenblatt Vs. Baer (1966) 382(US) 75 at 92, Hill Vs. Church Of Scientology (1991) 126 DLR 129, and Reynolds Vs. Times Newspapers Ltd (1999) 4 ALL ER 609.
 - d. Article 29(f)-Freedom and Security of the Person; the Petitioner submitted that the procedure and implementation of the disciplinary decision was an infringement of this right and that the expulsion contravened Article 7 of the International Covenant on Civil and Political Rights and Article 5 of the African Charter on Human and Peoples' Rights. He urged this



Court to consider the particular vulnerability he has and the consistent target nature of the Respondents' actions and relied on the case of Republic Vs. Minister For Home Affairs And Other ex parte Sitazme (2008) 2 EA 323.

- e. Article 47(1) Fair Administrative Action: the Petitioner submitted that the disciplinary process and subsequent implementation of the decisions emanating therefrom violated his constitutionally guaranteed right to fair administrative action. That the process which was an administrative action should have been lawful, reasonable by observing procedural fairness. He reiterated that he was not granted an opportunity to file his defense in writing causing prior to conducting the disciplinary hearing thus denying him the opportunity to have a defense. Further that the accounts by the employees supported by evidence. That the disciplinary process failed for the distinct lack of evidence to support the allegations against him.
 - f. Article 35-Right to access to information: the Petitioner contends that the Respondents declined to give him any information he sought not only pertaining to the charges but also with regards to the decisions and recommendations informing his expulsion, That section 4 of the [Access to Information Act](#) 204 provides the procedure for access to information and submitted that had the Respondents been keen to conduct a fair, balanced and transparent process they would have furnished him with all the information he required. He relied on the cases of Benson Wachira Muthiga Vs. Nairobi City County Public Service Board & Another (2015) eKLR; Famy Care Limited Vs. Public Procurement Administrative Review Board & Another and Brummer Vs. Minister For Social Development & Others.
 - g. Article 36: Freedom of Association: The Petitioner submitted that this right covers every person and any kind of association and that it should only be limited in terms of law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. That the Respondents violate his constitutional right to freedom of association by withdrawing his membership from the club unnecessarily specifically after subjecting him to a dubious, opaque process that violated the rules of natural justice.
15. While relying on the case of Onyango Oloo Vs. Attorney General (1986-1989) EA 456, the Petitioner urged this Court to find that he had discharged his burden by carefully enumerating how his constitutional rights were violated by the Respondents. He prayed that the Court allow the Petition.
16. The Respondents filed submissions dated 24th March, 2023. Their submissions were directed at three issues, namely:
- i. whether the Petitioner disregarded the doctrine of constitutional avoidance;
 - ii. whether the disciplinary process that led to the expulsion of the Petitioner from the club was unlawful; and,
 - iii. whether the Petitioner is entitled to the reliefs sought.
17. On their first issue, the Respondents submitted that the institution of this suit in this Court amounted to the violation of the doctrine of constitutional avoidance. That in the case of Communications Commission Of Kenya & 5 Others Vs. Royal Medial Services Limited & 5 Others (2014) eKLR the Supreme Court held that:

“The principle of avoidance entails that a Court will not determine a constitutional issue when a matter may properly be decided on another basis...”



18. That further in the case of *KMM VS. SCM & 5 Others (2022) KEHC 289 (KLR)* the Court stated that
- “Constitutional avoidance has been denied as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, the doctrine of justiciability governs the limitation on the constitutional arguments that courts will entertain. It encompasses three main principles which are standing, ripeness and mootness...”
19. The Respondents contend that the Petitioner should have lodged judicial review proceedings and not a constitutional petition because his main concern was not with the merits of the decision sought to be reviewed but the propriety of the decision-making process. That judicial review applies to private bodies by virtue of section 2 and 3 of the Fair Administrative Act, 2015 and the Petitioner should have based his claim thereon and file the suit in the appropriate forum which is the Judicial Review Division. The Respondents place further reliance on the cases of *John C. Chelanga Vs. Minister For Lands & 3 Others (2021) eKLR* and *Republic Vs. National Land Commission & Another ex parte Hellen Kemunto Obaga (2018) eKLR*.
20. On the second issue, the Respondents submitted that the Petitioner was accorded a fair hearing as set out under Article 50 of *the Constitution* of Kenya, 2020. That the Petitioner subscribed to the Club’s law and its constitution and was bound by the same and especially the provision constituting the disciplinary forum. They reiterated that the proceedings were conducted in accordance within the process laid out in the Club’s constitution as well as Article 50(1) of *the Constitution* of Kenya. That the allegations of malice in the way the disciplinary process was carried out are baseless as no proof of the same has been adduced.
21. While relying on the cases of *Anarita Karimi Njeru Vs. Republic (1976-1980) KLR 154* and *Mumo Matemu Vs. Trusted Society Of Human Rights Alliance & 5 Others (2013) eKLR*, the Respondents submitted that the Petitioner makes a bare and broad allegation as to the improper constitution of the Disciplinary Committee but does not explain how the same was improperly constituted or how this occasioned him harm. That this makes it difficult for them to defend themselves against this allegation. They stated that although the Captain was absent with apologies during the hearing, nothing in the club’s constitution states that all members must be present during the hearing.
22. The Respondents disputed the allegations of discrimination of the Petitioner based on his disability and political stance and particularly that the club’s facilities did not accommodate his disability. They stated that the Petitioner did not set out with particularity how his freedom from discrimination was violated and neither his political stance too. That the burden of proof lies with him that asserts per sections 108 and 109 of the *Evidence Act*. They relied on the cases of *Independent Electoral And Boundaries Commission & Another Vs. Stephen Mutinda Mule & 3 Others (2014) eKLR* and *Mohammed Abduba Dida Vs. Debate Media Limited & Another (2018) eKLR*.
23. On the issue of violation of the Petitioner’s right to human dignity the Respondents submitted that the disciplinary process did not in any way infringe on this right. That the Petitioner failed to file a written response to the complaints brought against him and he was not penalized for the same and instead was allowed to proceed with oral evidence. That the Petitioner knowing the Club’s rules and by-laws and being well aware of his medical condition, should have exercised his right to human dignity. They stated that the Petitioner was treated with care and dignity during the disciplinary process and was expelled based on substantiated allegations, hence the Petitioner’s right to human dignity was not violated.



24. While submitting on whether the Petitioner's freedom of association was violated, the Respondents contend that they did not withdraw his membership from the Club unreasonably and submitted that this freedom is not absolute and can be limited as provided under Article 24 of *the Constitution* which informed the Club's rules and bylaws on the ways one may lose their membership to the Club. That the Petitioner's actions of harassment of both employees and members and despite the fact that he could have been suspended, there was a previous disciplinary case that he had been involved in, filed by one Anok Jai. That the Petitioner was no stranger to disciplinary incidents and that the only appropriate action to be taken for the gross misconduct was expulsion.
25. On the breach of the Petitioner's freedom and security of person, the Respondent denied that they treated him in any cruel, inhumane or degrading manner and stated that he has not brought out any evidence to prove the said allegations. That the reasons for the expulsion were stated clearly in the expulsion letter. That the Club and its management were also not aware of his medical condition and have learned about it from these proceedings.
26. The Respondents continued to submit that the Petitioner's right of access of information was never violated because vide the letter dated 10th December, 2021 he was informed of the complaints levelled against him. That the Petitioner did not send various requests for information as he claims but only sent a demand letter dated 31st March, 2022 and no other requests. That had the information not been given as requested, the Petitioner should have filed a complaint at the Commission for Administrative Justice before approaching this Court. He relied on the cases of Coast Legal Aid & Resource Foundation (Clarf) Vs. Coast Water Board Services & 2 Others (2021) eKLR and Geoffrey Muthinja & Another Vs. Samuel Muguna Henry & 1756 Others (2015) eKLR.
27. The Respondents submitted further that the Petitioner is not entitled to any general damages for breach of his rights nor exemplary and punitive damages because he has not discharged his burden of proof. He relied on the case of Obonyo & Another Vs. Municipal Council Of Kisumu (1971) E.A 91. They urged that the Petition be dismissed with costs.
28. The Petitioner filed Supplementary Submissions dated 19th May, 2023 which this Court has also considered.

Analysis and Determination

29. The Petitioner's claim revolves around the disciplinary process of the Respondent, and particularly, the lack of procedural fairness. The issues arise for determination:
 - a. Whether this Court is seized with jurisdiction to handle this matter;
 - b. Whether the disciplinary process was conducted fairly and in accordance with constitutional provisions;
 - c. Whether the Respondents infringed the Petitioner's rights and freedoms;
 - d. Whether the Petitioner is entitled to damages, general, exemplary or punitive;
 - e. Who bears the costs of this suit?

A. Jurisdiction of this Court

30. Jurisdictional question was raised by the Respondents hence it is imperative to dispose it first before dealing with the substratum of the petition. From the respondents point of view, the Petitioner ought



to have commenced a judicial review action instead of a constitutional petition as the most suitable mechanism in resolution of this dispute.

31. The jurisdiction of the High Court is donated to it by Article 165 (3) of *the Constitution* which provides that:

- (3) Subject to clause (5), the High Court shall have--
- a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and
 - e. any other jurisdiction, original or appellate, conferred on it by legislation

- (5) The High Court shall not have jurisdiction in respect of matters-
- a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - b. falling within the jurisdiction of the courts contemplated in Article 162 (2).

32. The Respondents claim is that the Petitioner is seeking to review their decision on procedural grounds and have it quashed hence the petitioner should have approached the court by way of judicial review. On the contrary, the Petitioner claims that several of his rights and fundamental freedoms were infringed upon by the Respondents during investigations and also during the disciplinary hearing.

33. Article 23 of *the Constitution* grants this Court authority to uphold and enforce the Bill of Rights in the following terms:

“ 23.

- (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights’



34. In fact, Article 23 (3) (f) provides that one of the reliefs that the Court may grant in a matter in which it finds there is a threat, violation, denial of a right or fundamental freedom is an order of judicial review.
35. In any event, the right to fair administrative action is also part of rights and fundamental freedoms that *the Constitution* under Article 47 recognizes, hence a violation or threat of violation can equally attract a Constitution Petition.
36. The Court of Appeal delved into the issue of the Court's constitutional jurisdiction in disputes involving private entities exercising administrative functions in the case of *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* [2014] eKLR and held as follows:
- “... What appears to be in contention is whether the Court has jurisdiction in the narrower sense, that is, power to enter into an inquiry into the dispute at hand, the question being whether affairs of private entities such as private members' clubs ought to be brought under the purview of our Courts, and to this extent, whether constitutional provisions can and ought to be infused into management and affairs of such private entities.
37. The respondents, particularly the 1st respondent and excepting the Attorney General, have contended that this Court lacks jurisdiction to entertain the petition; that the Club's rules are private affairs governed by private rules which this Honourable Court ought to steer away from. The petitioners and the Attorney General on their part contest this claim, their position being that the issues before the Court are amenable to this Court's jurisdiction.
38. Article 2(1) of *the Constitution* provides that 'This Constitution is the Supreme Law of the Republic and binds all persons and all state organs at both levels of the Government.' Further, Article 20(1) states that, “the Bill of Rights applies to all law and binds all state organs and all persons”. The definition of a state organ is found at Article 260 which states that a State Organ is; “a commission, office, agency or other body established under this Constitution”. Under the same provisions, the word “person” is defined to include “a company, association or other body of persons whether incorporated or unincorporated”. Finally, Article 21(1) spells out the duty of all persons to protect the Bill of Rights in the following terms:
- “It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.”
39. As a creature of *the Constitution*, the Court has a duty, like other State organs, to protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. In doing so, the Court must be guided by the principles set out in Article 159 which include, among other things, protecting and promoting the purpose and principles of *the Constitution*. The purpose includes those values recognized by the preamble to *the Constitution* as the aspirations of all Kenyans for “a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.”
40. Having regard to the Constitutional provisions aforesaid as well as the above authority of the Court of Appeal, I am emboldened in making the finding that this court possesses the requisite jurisdiction to hear and determine this Petition.

B. Whether the disciplinary process followed the due process

41. The Petitioner has disputed the entire disciplinary process that was conducted by the Respondents by stating that:
- a. the same was conducted by a improperly constituted Board;



- b. he was not informed of his charges and the complaints made against him;
 - c. he was not allowed to put in a written defense to the allegations;
 - d. he was not given an opportunity to cross-examine the complainants; and
 - e. he was suspended before the hearing of and denied using the Club's facilities.
42. The Petitioner was a member of the 1st Respondent under membership number of M. 372. His membership was suspended in December, 2021. According to the Petitioner, he received two complaints from the Respondents that were conveyed to him via the letter dated 10th December, 2021; namely the complaint in respect of an alleged incident on 20/11/2021 and the alleged incident of 3/12/2021; and by the same letter, the respondents informed him about his suspension with immediate effect pending a formal disciplinary hearing. In that letter, he was given 7 days to respond in writing. He was informed he would be invited for disciplinary hearing but before the disciplinary hearing, he made a request for information on the matter which did not bear any fruits in what he alleges was motivated by discrimination directed towards him.
43. The Respondents on the other hand brought forth the grievances raised against the petitioner and categorically asserted that they informed him of all the complaints against him regarding the incident of 10th of December, 2021 before conducting the disciplinary committee hearing on the 24th of February, 2022 where he was granted an opportunity for a hearing before the decision to expel him from the Club was arrived at, and even before then, he had been granted time to respond in writing but did not do so. That after the hearing and pursuant to the findings of the disciplinary committee, an official expulsion letter was sent to him on 24th March, 2022.
44. Clause 12(a) of the Club's Constitution provides for the disciplinary procedure for the Club and non-Golf related disciplinary cases. The clause states:
12. Discipline
- a. The procedure for handling Club and 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 any employees of the Club for unbecoming behavior. 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 the Club Notice Boards and communicated to all reciprocating clubs. The decision of the Board shall be final.
 - ii. 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.
45. Further, the members of the club are also governed by its Code of Conduct and the By Laws. Under the Club Rules and ByLaws, (VSC 6) Clause 2 on the Code of Conduct, elaborates on matters that constitute harassment, and provides for the code conduct by the members of the club and specifies the



sanctions that may be imposed on non-compliant members. On matters of complaints, discipline and loss of privilege, the said clause 2 of the Bye-Laws provides in its last paragraph:

“If any member or guest fails to act appropriately after a warning and persistently violates the spirit of these Bylaws, that person will be subject to suspension, limitation or loss of Club privileges, or such other measures as deemed appropriate by the Board of Directors and/or as provided by the Constitution.”

46. The Respondents' first letter to the Petitioner is dated the 10th of December, 2021(VSC-3). The letter informed the Petitioner of two complaints filed against him, one that was in respect of an incident on Saturday, 20th of November, 2021 and another in respect of the incident on Friday the 3rd of December, 2021. It informed him that the alleged actions constituted unbecoming behavior and were in breach of the Club's Constitution. Citing clause 12 of the Constitution, the Respondents informed the Petitioner that they intended to commence disciplinary proceedings against him. The Respondents then forthwith suspended the Petitioner from the Club pending formal disciplinary hearing, stating thus:

“Take notice that you are hereby suspended from the Club for one (1) month effective immediately from the date of this letter, pending a formal disciplinary hearing. The effect of the suspension means that you are forthwith banned from patronizing the Club and further are not entitled to any privileges accorded to a member of the club until this matter is heard and formally concluded- with a verdict issued by the Disciplinary Committee by order of the Board.”

47. Subsequently, the respondent dispatched the letter dated 19th February, 2022 (VSC-4) in which the Respondents appear to apologize for a disciplinary meeting that was slated to be held on the 10th of February, 2022 but which did not take off hence invited the Petitioner for a further disciplinary meeting on Thursday, 24th February, 2022 at 8.00am. The Petitioner attended the disciplinary meeting. The minutes of the meeting (VSC-7) provide an insight of how the disciplinary proceeding was conducted. The Petitioner was present during the process together with members of the disciplinary committee. After the Disciplinary Committee hearing, the Committee found that the allegations against him were established and that they amounted to gross misconduct hence a decision to withdraw the Petitioner's membership was passed.

iii. Did this Disciplinary Process adhere to the Club's constitution? The letter listing the complaints against the Petitioner cited two separate incidents constituting complaints against him, they were at least 12 days apart, i.e. the incident of 20/11/21 and the other incident of 3/12/2021. The Club's Constitution in Clause 12 a(ii) gave Members with pending complaints against them the benefit of enjoying the Club's facilities until a decision on complaints levelled against them was made and communicated. It provided in clause 12 (a) (ii)

‘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’

48. By dint of Clause 2 of the By laws that governed the code of conduct of the members, suspension, limitation or loss of club privileges or such other measures deemed appropriate by the Board of Directors was to be resorted after a warning and if the member, upon being so warned, persistently violated the spirit of the by-laws.



49. Moreover, under clause 12 of the Club’s Constitution the action of suspension could only be applied ‘after due consideration of accusations and defense’ that is when the Board could ‘take any appropriate measures as the Board deems fit. Such measures may take the form of warning, suspension or expulsion from the Club.’
50. Without any warning or consideration of the of any defence the Petitioner might have had, the Petitioner was suspended via the same letter that was apparently bringing to his attention the complaints against him for the first time. The suspension was contrary provisions of Clause 12 of the Club’s Constitution. It states ‘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’
51. In any case, the peremptorily withdrawal of all the previlges contravened clause 12 a) (ii) which provided that ‘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’.
52. In conducting these discliplinary proceedings, the Respondent did not abide by own rules as provided in the Club’s Constitution and its Bylaws as demonstrated above.
53. Further, it emerges that during the discliplinary proceedings, only the petitioner attended yet those who made allegations were not present to substantitiate them, yet the committee found the allegations proved. No evidence whatsoever was called against him yet he was asked to defend himself himself against the allegations and was found guilty. This was a fundamental flaw in the entire process.

C. Whether The Petitioner’s Rights And Freedoms Were Infringed By The Respondents

54. The Petitioner contends that several of his rights have been infringed against by the decision of the Respondents’ Disciplinary Committee to have him expelled from the Club. He contends that his right to fair administrative action, freedom from discrimination, his human dignity, his right not to be treated or punished in a cruel, inhuman or degrading manner, his right to access information and his freedom of association were infringed upon by the Respondents.
55. On the issue of discrimination, Article 27 of *the Constitution* forbids discrimination and in particular sub article (5) prohibits discrimination directly or indirectly against any person on any ground including disability among others. The Petitioner states that he is a person with disability and that the Respondents discriminated against him on that basis. He has however not provided any evidence to substantiate the fact he is a person with disability or the fact it was the basis of the Respondents’ decision. The Respondents have submitted that they were not aware of the Petitioner’s disability. Without, the evidence, the Petitioner could not establish this violation.
56. The right to fair administrative action is entrenched under Article 47(1) of *the Constitution* and is coached in mandatory terms that “every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
57. In *Dry Associates Ltd V Capital Markets Authority And Another*, [2012] eKLR the Court held that: -

“...Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the *Law Reform Act* (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by *the Constitution*...”



58. The Court of Appeal in the case of *Judicial Service Commission Vs. Mbalu Mutava & Another* [2014] eKLR reiterated thus:

“... Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights... The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

59. Having extensively discussed the disciplinary hearing process adopted by respondents and finding that it did not conform to its internal rules and rules on procedural fairness, it certainly cannot be said that process was in conformity with the constitutional standards on fair administrative action spelt out under Article 47 of *the Constitution*. That decision which was reached against the Petitioner cannot pass the test of being procedurally fair, reasonable or lawful.

D. Whether The Petitioner Is Entitled Damages

60. The Petitioner prayed for general damages of Kshs.20,000,000, exemplary and punitive damages. The decision by this court has only faulted procedural fairness in disciplining the Petitioner. It did not go into the merits or substance of the complaints made against him. I therefore decline to award damages, general, punitive or exemplary.

E. Costs of the Suit

61. All the Parties submitted that the costs should follow the event. Rule 26(1) and (2) of *the Constitution* of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) provides as follows :-

“Rule 26.

1. The award of costs is at the discretion of the Court.
2. In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”

62. In *Feisal Hassan & 2 Others V Public Service Board Of Marsabit County & Another* [2016] eKLR stated that:-

- “3. In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in *the Constitution*, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. However, a petitioner for constitutional enforcement need not present a case



that must succeed and it cannot therefore, be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria. Although developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with the same force in general constitutional litigation for interpretation and enforcement of the Constitution. Indeed, the rights of access to court under Article 22 and 258 of the Constitution for the enforcement, respectively, of the Bill of Rights and the other parts of the Constitution are in the same terms.”

63. The Petitioner has been successful in this petition to the extent aforesaid. I award him costs of this Petition. I also grant him the following reliefs:
- a. A declaration is hereby issued that the 2nd Respondent’s decision to expel the Petitioner from the 1st Respondent was in violation of the Petitioner’s right to fair administrative action under Article 47 of Constitution.
 - b. The Court under Article 23 (3) has the power to grant an appropriate relief it considers necessary for the ends of justice to be met. Consequently, this court orders that the decision of by respondents pursuant to the recommendation of its disciplinary committee passed against the petitioner on 24/2/2022 and communicated through the letter of 24th March, 2022 is hereby quashed for the reasons aforesaid.
 - c. The Petitioner is awarded the costs of the Petition.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 26TH DAY OF OCTOBER, 2023

L. N. MUGAMBI

JUDGE

