



**Githui v Samuel Munyua, Fr D. Munyeki and Irene Wamithi Being sued as Chairman,  
Secretary and Treasurer of the Board of Management of Nyahururu Sports Club  
(Constitutional Petition 12B of 2021) [2022] KEHC 10356 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10356 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CONSTITUTIONAL PETITION 12B OF 2021**

**CM KARIUKI, J**

**JULY 28, 2022**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ENFORCEMENT  
AND INTERPRETTION OF THE CONSTITUTION RULES 2013**

**-AND-**

**IN THE MATTER OF ARTICLES 1,  
2(1),10,19,20,22,23,35,36,47,50,165,232,258 OF THE CONSTITUTION  
OF KENYA,2010**

**-AND-**

**IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE  
ACTIONS ACT**

**-AND-**

**IN THE MATTER OF NYAHURURU SPORTS CLUB**

**BETWEEN**

**ISSAC N GITHUI ..... PETITIONER**

**AND**

**SAMUEL MUNYUA ..... RESPONDENT**

**RULING**

1. The Petitioner through the Notice of Motion dated 3<sup>rd</sup> December 2021 sought the following orders:-
  - I. Spent.



- II. Spent.
  - III. That pending the hearing and determination of the Amended Petition, the honorable court be pleased to stay, set aside and or quash the decision of the board meeting suspending the Petitioner from accessing and enjoying services and further reinstate the Petitioner as the suspension has not taken away his membership.
  - IV. Spent.
  - V. That pending the hearing and determination of the Amended Petition, the honourable court be pleased to issue an injunction restraining the Respondents whether by themselves, their servants or agents or howsoever otherwise for interfering with the Petitioner/Applicant's membership and enjoyment of the amenities of Nyahururu Sports Club.
  - VI. That costs of this application be in the cause.
  - VII. That the honourable court be pleased to make such further orders as it may deem just and expedient in the circumstance of this case.
2. The application is supported by the affidavit deposed by the Petitioner of even date and the following grounds as laid out on the face of the application: -
- I. That on the 6<sup>th</sup> of June 2021 the Petitioner/Applicant was suspended from the membership of Nyahururu Sports Club by the board which decision was ratified by its members through a special general meeting held on 17<sup>th</sup> August 2021.
  - II. That the Respondents issued the Petitioner/Applicant with a notice to show cause letter dated 12<sup>th</sup> June 2021 in which they resolved to suspend him for a period of 30 days requiring him to show cause why disciplinary action should not be taken against him.
  - III. That no disciplinary proceedings were conducted by the Respondent and if at all they were, the same were conducted in the Petitioner/Applicant's absence which amounts to a breach of his fundamental right to be heard.
  - IV. That the Petitioner/Applicant was not afforded an opportunity to defend himself and neither were investigations carried out to ascertain the extent of the allegations made against him before the Respondents decided to suspend him and or have their decision ratified by members.
  - V. That the Petitioner/Applicant has been paying all the requisite fee for membership as they fall due as such any allegations on fee arrears are baseless and misplaced.
  - VI. That the membership of the club is governed by the club's constitution and the members are only duty bound to pay membership fee and any other invoiced amount, the alleged arrears of Kenya Shillings Seven Thousand Eight Hundred (kshs. 7,800) was never invoiced to the Petitioner/Applicant as such he was under no obligation to pay.
  - VII. That the Respondents have chosen to target the Petitioner/Applicant solely because he asks hard questions when the Respondents exercise their power arbitrarily and above their power and act with impunity to the detriment of the members.
  - VIII. That the suspension was calculated to interfere with the Petitioner/Applicant's enjoyment of the club services and a scheme to completely deny him membership of the club without according him fair opportunity to make a representation on the allegation levelled against him.



- IX. That the Respondents have continually been coercing, forcing and or intimidating the Petitioner/Applicant to either withdraw the matter from court and pay costs or stay suspended without a reasonable justification and or cause.
  - X. That the Petitioner/Applicant is at the verge of losing membership of Nyahururu Sports Club based on malicious and unsubstantiated grounds which will be great infringement of his rights.
  - XI. That the Respondents being in an administrative position are expected to act in line with the principals of natural justice.
  - XII. That the actions by the Respondents are unconstitutional and have blatantly violated the Petitioner/Applicant's legitimate expectation to a fair administrative action as envisaged in *the Constitution* of Kenya, 2010.
  - XIII. That the Respondent will suffer no prejudice should the application herein be allowed.
3. The Petitioner/Applicant further filed submissions dated 22nd February 2022 and a further affidavit dated 17<sup>th</sup> March 2022.
  4. The application is opposed by the Respondents vide the replying affidavit sworn on 25/2/2022 by David Munyeki.

#### **Petitioner's Submissions**

5. The Petitioner stated that he was not afforded an opportunity to defend himself when the Respondent made the decision and or ratification by members to suspend him and that he has been paying all requisite fees for membership as they fall due as such any allegations on fee arrears are baseless and misplaced. Reliance was placed on *Kay Swee Pin v Singapore Island County Club* [2008] 2 SLR 802.
6. It was stated that the Respondents suspended the Petitioner's membership of the club without following the due procedure as provided for by *the constitution* and without giving him an opportunity to be heard. Therefore, the Respondents actions were unconstitutional and against the rules of natural justice. Reliance was placed on the decision in *Republic vs The Honourable Chief Justice of Kenya & Others Ex-Parte Lady Justice Nambuye*, High Court Misc. Application No. 764 of 2009, *Judicial Service Commission vs Mbalu Mutava & Another* [2015] eKLR & *R vs Vice Chancellor JKUAT* Misc. Appl. No. 30 of 2007.
7. The Petitioner asserted that the Respondents after being served with the pleadings gave conditions coercing, forcing and or intimidating the Petitioner to either withdraw the matter from court and pay costs or stay suspended. That the Petitioner is at the verge of losing membership of Nyahururu Sports Club based on malicious and unsubstantiated grounds which will be a great infringement of his rights.
8. The Petitioner submitted that he has satisfied the threshold for granting of an injunction as he has demonstrated that he would suffer irreparable injury if a temporary injunction is not granted. That they are ready to deposit in court the amount in dispute being kshs. 7,800/-.
9. It was alleged that the Respondents will not suffer any prejudice if the application is allowed on the hand the Petitioner has suffered and continues to suffer loss and damage as he has for a long time not participated in the activities of the club and or enjoyed its amenities.



## Respondents' Submissions

10. The Respondents asserted that the Petitioner was suspended from the club for nonpayment of a sum of kshs. 7800/- being course maintenance fees and for abusing the club manager and the staff responsible for golf course entry when the money was demanded from him on 6/6/2021.
11. It was explained that during the closure of sports facilities and restriction of movement to curb the spread of Covid 19, the Nyahururu Sports Club Management Committee resolved to charge a fee of kshs 600/- per week per golfer to be used for course maintenance and payment of employed attached to the golf department as the club was not attracting an income from the sport as before.
12. The Respondents supplied extracts of copies of the minutes of the Annual General Meeting held on 15/8/2020 where the issue was raised and discussed and it was resolved that the decision by the board to charge fees was for the benefit of the club and the payment was confirmed. They averred that the Petitioner was present in the AGM and his name tops the list of members present.
13. They asserted that the Petitioner complied by making payments as confirmed through his statement marked as annexure "DM2". The Petitioner stopped paying in June 2020 and by November 2020, he owed the club a sum of kshs. 13,200/- and an invoice dated 28/11/2020 marked as annexure "DM4 (b)" was drawn giving a breakdown of the debt of kshs. 13,800 including the due dates, months and year. The Petitioner paid a sum of kshs. 13,200 on 29/4/2020 leaving a balance of kshs. 600/-.
14. According to the Respondents the Petitioner thereafter failed to pay the course maintenance charges and between the period 19/2/2021 and 28/5/2021, he had an outstanding balance of kshs. 7800/- and that contrary to his assertions an invoice dated 6/6/2021 and marked as annexure "DM5" was drawn giving a breakdown of the debt.
15. It was stated that a decision was reached by the Management Committee that any member with an outstanding course maintenance fee be denied entry to the golf course and the manager was mandated to enforce the decision. On 6/6/2021, the Petitioner defied this decision and forcefully gained entry to the golf course where he played golf after he insulted the manager and the matter was brought to the Management Committee's attention.
16. The Respondents argued that the Petitioner does not seek to challenge the decision on payment of course maintenance fee in the petition. He does not deny owing the club a sum of kshs. 7,800/- neither has he demonstrated that he has made the payment or an attempt to pay and the same was rejected.
17. They relied on Clause (d) of the Club's Constitution on member suspension.
18. The Respondents submitted that the committee vide a letter dated 12/6/2021 which letter itemized 5 violations or offences committed by the Petitioner called upon him to show cause why disciplinary action should not be taken against him within 30 days and to pay the outstanding course maintenance fees of kshs. 7,800/-
19. They argued that the Petitioner was accorded a fair hearing and responded to the show cause letter vide a letter dated 14/6/2021 which was a demonstrating that he understood the charges against him and he was willing to submit himself to the disciplinary process by the committee.
20. It was stated that the Petitioner's defence was considered and the Petitioner's suspension was lifted on the conditions that a written apology is received by the board within 7 days with an undertaking that the Petitioner shall abide by the resolutions and rules made and passed by the board and AGM and on payment of the outstanding course maintenance fee of kshs. 7,800/-



21. The Respondents asserted that there is nothing unconstitutional with the decision that was arrived at by the board vide the letter dated 27/7/2021 but instead of the complying the Petitioner rushed to court and filed the present suit.
22. It was alleged that the Petitioner had not demonstrated that he has a prima facie case in his petition. That he was accorded a fair hearing and he did not respond or appeal against the decision of the board. That the suspension in the letter dated 12/6/2021 was lifted vide the letter dated 22/7/2021 and all that remains is for the Petitioner to comply with the conditions set out there in which he has not challenged. Reliance was placed on the case of *Arun Kumar Jain & Another v Board of Trustees Nairobi Gymkhana* (2020) eKLR. Herein
23. They contended that the suit herein does not raise any constitutional issues as the issues complained of are purely on management of a private club. Further that granting the prayers sought shall automatically bar the club from questioning the Petitioner on his conduct on matter pertaining to the club and shall incite other members into violating rules and regulations and *the constitution* of the club.
24. In addition, the Respondent averred that the Petitioner has not demonstrated that he stands to suffer any irreparable loss if he complies with the decision of the board contained on the letter dated 22/7/2021. He has not sought for nullification of the payment of the course maintenance fees or disputed owing the debt. The unpaid debt is not a subject of litigation and the same cannot be deposited in court as suggested by the Petitioner.
25. In conclusion, the Respondent asserted that the balance of convenience tilts in the Respondents favour as there is need to maintain order and decorum in the management of the club. They cited the case of *Yellow Horse Inns Limited vs Nduachi Company Limited & 2 Others*.

### **Analysis And Determination**

26. Having considered the application by the Applicants and the grounds thereof as well as the affidavits filed herein, annexures and the responses by the Respondent together with the written submissions, the issues for determination herein are: -Whether the honorable court should stay, set aside and or quash the decision of the board meeting suspending the Petitioner from accessing and enjoying services and further reinstate the Petitioner? Whether the Petitioner/Applicant has made out a case for the granting of orders of injunction restraining the Respondents whether by themselves, their servants or agents or howsoever otherwise for interfering with the Petitioner/Applicant's membership and enjoyment of the amenities of Nyahururu Sports Club.
27. In granting the orders to stay, set aside and or quash the decision of the board meeting in suspending the Petitioner, this court's primary concern is preserving the rights of both parties pending the final determination of the petition. It is the mandate of the court to ensure that justice is delivered without favoritism and most importantly prejudicing the issue pending determination. The central dispute emanates from the suspension of the Petitioner from the Nyahururu Sports Club by its Board who allege that the Petitioner had failed to pay a course maintenance fees of kshs. 7,800/- and abused the club manager and the staff responsible for golf course entry when the money was demanded from him on 6/6/2021. The Board then reinstated him but on the basis that he complied with certain conditions; the Petitioner did not comply with the same and so he remained suspended. On the other hand, the Petitioner contends that the Respondents suspended the Petitioner's membership of the club without following the due procedure as provided for by *the Constitution* and without giving him an opportunity to be heard claims that were denied by the Respondents.



28. As previously mentioned, the Respondents argued that the Applicant was heard by the Management Committee and reinstated subject to fulfilment of certain conditions including writing an apology letter to and paying the outstanding course maintenance fee. Subsequently, the Applicant failed to do so and so he remains suspended.
29. The Respondents asserted that the Applicant was accorded a fair hearing and he did not respond or appeal against the decision of the board. That the suspension in the letter dated 12/6/2021 was lifted vide the letter dated 22/7/2021 and all that remains is for the Petitioner to comply with the conditions set out there in which he has not challenged.
30. In consideration of all the relevant matters and the parties' interests, I find that in the interest of justice, staying the suspension of the Petitioner would be tantamount to imposing him upon the Respondents when the Petitioner/Applicant seems to have little or no regard for the Management Committee which had the requisite mandate to determine issues between Club Members and the Club. Moreover, it appears that the suspension has only persisted because of the Applicant's failure to abide by the Management Committee's conditions as set out by the letter dated 27/7/2021 which sought to reinstate him. I associate myself with a similar holding by the court in Republic v Chairman, Secretary and Treasurer of Nyanza Club (Sued as the Officials of the Management Committee) Ex parte Sultan Ali Khan [2020] eKLR.
31. It is my considered opinion that the Applicant cannot be granted the orders to stay, set aside and or quash the decision of the board meeting suspending the Petitioner from accessing and enjoying services and further reinstate him as prayed.
32. Flowing from the aforementioned and as quoted by the parties, the conditions for consideration further in granting an injunction is now well settled in the case of *Giella vs Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction:-
- “First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”
33. The law governing the granting of interlocutory injunction is set out under Order 40(1) (a) and (b) of The Civil Procedure Rules 2010 which provides that: -
- “Where in any suit it is proved by affidavit or otherwise—
- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;
  - b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or



disposition of the property as the court thinks fit until the disposal of the suit or until further."

34. Further, the test for granting of an interlocutory injunction was considered in the *American Cyanamid Co. v Ethicon Limited* [1975] 1 All ER 504 where three elements were noted to be of great importance namely: -

There must be a serious/fair issue to be tried,

- ii. Damages are not an adequate remedy,
- iii. The balance of convenience lies in favour of granting or refusing the application

35. I associate myself with the decision in *Nguruman Limited V. Jan Bonde Nielsen & 2 Others*, CA No. 77 of 2012, as cited in the case of *Peter Kairu Gitu v KCB Bank Kenya Limited & another* [2021] eKLR, where the Court expressed itself on the importance of satisfying all the three requirements for an order of injunction as follows: -

"In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;

- a. Establish his case only at a prima facie level,
- b. Demonstrate irreparable injury if a temporary injunction is not granted, and
- c. Alleviate any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the Applicant to injunction directly without crossing the other hurdles in between."

36. The Petitioner submitted that he has satisfied the threshold for granting of an injunction as he has demonstrated that he would suffer irreparable injury if a temporary injunction is not granted and that he is ready to deposit in court the amount in dispute being kshs. 7,800/-. However, from my perusal of the petition the substratum of the same is the constitutionality or lack thereof of the Applicant's disciplinary process by the Management Committee as advanced by the Petitioner/Applicant. The central issue is therefore not the charging of golf course maintenance which the Applicant's arguments appear to revolve around in the application herein as asserted by the Respondents. At this stage, the court is not called upon to make a definite finding on facts or the law but instead is required to evaluate the material placed before it and decide whether the Applicant has made a prima facie case with likelihood of success and further whether by declining to grant the orders the Applicant will



be prejudiced Accordingly, I find that the Applicant has failed to establish a prima facie case with a probability of success.

37. Further, it is my view that the Applicant has not demonstrated what irreparable loss he will suffer if the orders sought are not granted. It is my view that as long as the orders for suspension stand as per the Management Committee, it would be contradictory then for this court to grant the injunction orders sought by the Applicant. I have not seen any evidence as alleged by the Petitioner that the Respondents after being served with the pleadings gave conditions coercing, forcing and or intimidating the Petitioner to either withdraw the matter from court and pay costs or stay suspended and that he is on the verge of losing membership of Nyahururu Sports Club based on malicious and unsubstantiated grounds which will be a great infringement of his rights.
38. In view of the foregoing, I find the application by the Applicant to be unmerited and the same is dismissed costs in the main cause.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 28<sup>TH</sup> DAY OF JULY 2022.**

**CHARLES KARIUKI**

**JUDGE**

