



Kiptoo & another v The Club Management Committee – Eldoret Club (Constitutional Petition E023 of 2021) [2022] KEHC 14085 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14085 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CONSTITUTIONAL PETITION E023 OF 2021
RN NYAKUNDI, J
OCTOBER 21, 2022**

BETWEEN

MARY J KIPTOO 1ST PETITIONER

ANGELA MORGEN CHEMUTAI 2ND PETITIONER

AND

THE CLUB MANAGEMENT COMMITTEE – ELDORET CLUB RESPONDENT

JUDGMENT

1. The Petitioners approached this court seeking the following orders;
 1. A declaration that the 2nd Petitioner’s right to be uplifted from junior membership to adult member of the Eldoret Club has been infringed.
 2. The decision made on 10th August 2019 denying the uplift be annulled and or set aside and the Respondent be compelled to uplift the 2nd Petitioner’s junior membership to adult membership fourth upon payment of the requisite fees.
 3. Costs of this petition be borne by the Respondent.
 4. Any other relief that this Honourable Court may deem fit to grant.
2. The brief facts underlying the petition are that the first Petitioner is a bona fide member of Eldoret Club and the second Petitioner has been a junior member of the said club. Eldoret Club is registered under the Society’s Act contrary to what has been alleged by the Respondent that it has a memorandum and articles of association. The first Petitioner joined the club as a member in the year 2014 together with her two children. But prior to that, she was a temporary member for a period of two years or thereabout. The controversy leading to the present petition can be traced back to the decision that was passed by the club membership committee on 3rd August 2020. On 15th December 2019, a letter was written to the first Petitioner notifying her that the second Petitioner was due for uplifting



upon necessary application being made. The said letter was sent via the post and reached the first Petitioner until 17th May 2020. Upon receipt of the letter, she wrote to the club membership committee immediately for the uplift and the same was rejected.

3. The first Petitioner immediately thereafter made an appeal by writing to the main club committee, but the same was also rejected. The Petitioner then approached this court seeking the orders contained in the petition.
4. There is also a preliminary objection dated 4th November 2021 filed by the Respondents. The preliminary objection is raised on the following grounds;

That the Honourable court lacks jurisdiction to entertain the instant application and the petition in view of the memorandum, articles of association and the by-laws of the Respondent.

That the cause is premature given that the Petitioner has not exhausted the dispute resolution mechanism envisaged under the Respondents' by laws.

That the suit herein is incompetent, scandalous, vexatious, abuse of the court process, does not disclose any reasonable cause of action and the same offends the provisions of Order 2 Rule 15 of the Civil Procedure Rules 2010.

That the Petitioners are guilty of material non-disclosure and have breached section 1A 1B and 3A of the *Civil Procedure Act*.

PETITIONERS' CASE

5. The Petitioner's advocates filed submissions dated 10th December 2021. It is the Petitioners' case that the second Petitioner turned 24 years on 7th September 2019 but the letter/notice issued to the first Petitioner is dated 15th December 2019. The letter by the first Petitioner requesting to uplift is dated 20th May 2020. According to the rules and by-laws of Eldoret Club, Sec. 8:5:4 states;

“A junior member shall cease to be a member of the club on attaining the age of 21 years (unless still in receipt of full-time education when the upper limit shall be 24 years).” The rules are silent on when exactly the age of 24 commences and ends. If the intention of the club rules on uplifting was meant to be applicable upon attaining the age of 24, then the letter/notice to the first Petitioner should have been dated on or before 7th September 2019. Since this was not complied with the first Petitioner submitted that the second Petitioner was within the age bracket of uplifting.

6. Counsel for the Petitioner contended that there was no inordinate delay in responding to the said notice as the same had been sent to her fathers' post office box and she responded promptly. For such a crucial notice, the same should have been sent either by registered post or by hand delivery. It has been the practice of the club to hand over notices/letters to members by hand or email. The first Petitioner has always received her letters/notices by hand and she therefore reads malice in the manner the matter was handled from the very word go.
7. As she was not given a fair chance to appear before the committee the Petitioner contended that her right to a fair trial under article 50 of *the constitution* was violated. Further, that the manner in which the club membership committee handled the Petitioner's request/appeal violated the right to due process and natural justice. This was due to the fact that the chairperson then sat on both committees and also voted twice during the appeal since one main committee member was absent. This occasioned a miscarriage of justice.



8. The Petitioner quoted Rule 7 and 8.5.4 of the Eldoret club by- laws which state as follows;

7.0 Powers Of The Committee Sub Committee

The committee shall be empowered to approve any full members of at least 3 years Standard and resident in Kenya to fill a vacancy on the committee and co-opt any full member of good standard and resident in Kenya as additional member of the committee

8.5.4 Junior Members.

A junior member shall be an individual who has been duly invited by the committee to become a member of the club under the class of membership provided he/she has attained the age of 17 years a junior member may cease to be a member of the club on attaining the age 21 years (unless still in receipt of full-time education when the upper limit shall be 24 years)

9. It is the Petitioners' case that nowhere in the aforesaid provisions of the club by-laws is the jurisdiction of the court ousted or an alternative mode of dispute resolution offered. The Petitioners cited the decision referred to by the Respondent; *Rose Wangimambo & 2 Others Vs Ilimumu Country Club & 7 Others* [2014] eKLR and submitted that the court reiterated that courts have jurisdiction to hear and determine disputes emanating from private members club especially where there is an allegation of violation of fundamental rights and freedoms under Article 165 as read with Article 23 of *the constitution*. On the whether the court has jurisdiction to handle the petition as raised in the preliminary objection, the answer was to the affirmative and the court held as follows;

- a) Our response to this issue is in the affirmative. The court has the constitutional mandate to hear and determine disputes relating to allegations of violations of fundamental rights and freedoms under Article 165 as read with Article 23
- b) Article 22 entitles every person to move this court claiming that a fundamental right has been infringed or is threatened with infringement
- c) The bill of rights binds all state organs and all persons, corporate or incorporate, by dint of Article 2(1). Consequently, the 1st Respondent, a corporate body, is bound to respect and observe the fundamental rights of its members and of all persons.
- d) The constitutional protections apply both vertically and horizontally. As to what extent they apply horizontally depends on the context and unique circumstances of individual cases including availability of alternative remedies
- e) The alternative dispute resolution mechanisms provided under the club's internal mechanisms were intended to address the Petitioners' grievances. Attempts at mediation yielded no fruits. Avenues of alternative dispute resolution were pursued but were ineffectual.
- f) Consequently, the court has jurisdiction and can intervene to exercise jurisdiction and inquire into the issues the subject of the present matter.

10. The Petitioners cited Kisumu High Court Constitutional petition no. 29 of 2017 *Trisul Vijay Chohan Vs Mitch Menezes & 3 Others*, and Nakuru constitutional petition no. 16 of 2018 *John Githui Vs The Trustees Nakuru Golf Club* in support of the submission that the high court has jurisdiction to handle this matter.



11. The Petitioners submitted that the procedure they used to deny the 2nd Petitioner adult membership was flawed. In the letter dismissing the Petitioner's application for an uplift the Respondent management committee expressed themselves as follows

“this was arrived at by considering the management letter dated 15th December 2019 informing you that if there will be no reply received from you by 31st January 2020, the offer for an uplift will expire and the junior will not be able to use the club (refer Rule 8.5.4 as amended in AGM 2002)

M/s Angela Morgan Chemutai will therefore not be uplifted. She will have to follow the usual procedure for new members and any reduction in membership fees will not be applicable”

12. The Respondent should have considered the reason given for the delay in responding to their letter dated 15th December 2019. Due to the Respondent's decision the Petitioners have been subjected to an economic disadvantage by being made to apply for membership afresh and pay enhanced application fees whereas they have been paying junior annual subscription over the years.
13. The Petitioners concluded by praying that this court finds that the Petitioners' rights have been infringed and proceeds to allow the petition and grant the orders prayed.

RESPONDENTS' CASE

14. The Respondents opposed the petition vide a replying affidavit and submissions. The Respondents had also raised a preliminary objection dated 4th November 2022. They submitted that the honourable court lacks jurisdiction to handle the petition and the application and they placed reliance on Rule 7 and 8.5.4 of the Respondent by laws. Further, they contended that the court cannot inquire into the affairs of a private club especially where internal mechanism exists for dispute resolution. It was their submission that the Respondent is a private members club without direct supervision of the courts of law and, that the supreme decision-making organ is the members' general meeting. They referred the court to the case of *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* 120141 eKLR and the case of *Peres Atieno Adeya v Anastasia Juma Oweya* 120151 eKLR on the issue of jurisdiction. They maintained that this court lacks jurisdiction to entertain the present suit and the same is premature given that the Petitioner has not exhausted the dispute resolution mechanism envisaged under the Respondent's by laws which are binding and governing document for Eldoret Club which the Petitioner has not challenged their constitutionality.
15. The Respondent submitted that the Petitioners are guilty of material non-disclosure and are not entitled to orders sought given that they have not disclosed that from the time the Respondent club was established, a management committee was set up to handle uplifting of its junior members among other functions. The Petitioners wrote a letter to the Respondent club dated 18.05.2020 requesting the uplifting of the 2nd Petitioner being a junior member, which application was tabled before the properly constituted main committee which held a meeting on 3.08.2020 and passed a lawful resolution voting declining the 2nd Petitioners' application. The reasons declining were duly communicated to the Applicants being that: the committee considered the management letter dated 15.12.2019 informing the Petitioners that if there was no reply from them by 31.01.2020, the offer to uplift was to expire and the 2nd Petitioner Junior member of the Respondent) was to lose enjoyment rights of the facility and reference was made to Rule 8.5,4 as amended in the AGM 2002.
16. The Petitioner has also failed to disclose to this honourable court that the Respondent managing committee has powers to deal with the issue of uplifting of junior members of the Respondent in



accordance with the rules and regulations that governed the Respondent members. They have not disclosed that in compliance with the rules of natural justice, the letter dated 15.12.2019 was duly sent to the Petitioners through their postal address provided as being P.O Box 2204-30100 Eldoret and the Petitioners have not denied that the said address belongs to them, they have equally admitted at paragraph 12 of the Petition that the said letter was sent to them via their postal address and the said letter has never been returned to the Respondent unclaimed. The Respondent asked that the preliminary objection be allowed.

17. It is the Respondents' case that fair administrative action is not applicable for a private members club with rules and by laws and in addition the Respondent has other forms of exercise at their disposal other than golf in order to regulate their health issues. Besides that, the Petition hereto seems to be a judicial review camouflaged as a constitutional petition as judicial review is not available to the Petitioners. Judicial review is not available to enforce purely private law rights. Contractual and commercial obligations are enforceable by ordinary action and not by judicial review.
18. The Respondents contend that the Petitioners have not set out with a reasonable degree of precision that of which they are complaining, the provisions of constitution where their rights have been infringed and the manner in which their alleged rights have been infringed. The burden to prove each of the grounds raised in a Constitutional Petition, that an impugned action offends some provision of *the Constitution*, rests on the person challenging the validity of the action. The first issue that the court needs to determine is whether this petition meets the threshold of a constitutional petition as per the principle established in the case of Anarita Karimi Nieru -vs- The Republic (1979) eKLR which principle was later restated by the Court of Appeal in the case of Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR. If it passes the test then the court will move further to determine the issues that arise but if it fails then that would be the end of the case.
19. The impugned actions of the Respondent club of not uplifting the 2nd Petitioner did not contravene any provisions of *the Constitution*, as are alleged by the Petitioner. The Respondent maintains that the petition does not meet the threshold for a constitutional petition and the same ought to be dismissed with costs.

DECISION

20. Upon considering the pleadings, preliminary objection, responses therein and submissions filed, I have identified the following issues for determination;
 - a. Whether this court has jurisdiction to entertain this suit
 - b. Whether the petition offends the provisions of Order 2 Rule 15 of the Civil Procedure Rules
 - c. Whether the petition meets the threshold for a constitutional petition
 - d. Whether the orders sought should be granted

a.

Whether This Court Has Jurisdiction To Entertain This Suit

The issues in the preliminary objection shall be determined before delving into the issues in the petition. The definition of a preliminary objection was well set out in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696.

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."



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”

It follows that of the issues raised in the preliminary objection, the issue of material non-disclosure does not arise as the same would require the ascertainment of facts.

21. In the case of *The Owners of Motor Vessel “Lillian S” vs Caltex Oil Kenya Limited* (1989) KLR 1653 (C.A) where the Court of Appeal stated as follows: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

22. The Respondent relied on the Rules of the Respondent by-laws, specifically Rules 7 and 8.54 and submitted that the court cannot enquire into the affairs of a private club especially where an internal dispute resolution mechanism exists.

In the case of *Samuel Kamau Macharia v. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011, the Supreme Court of Kenya had the following to say with regard to jurisdiction:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant)*, Const. Appl. No. 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law.”

23. The jurisdiction of this court is granted by Article 165(3) of *the Constitution* as follows;

“(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.”

24. Article 23 of *the Constitution* also 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.”

25. In *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* [2014] eKLR when faced with a similar situation, the court held;

It must be obvious by now that not only do we find that we have jurisdiction to entertain the dispute before us, but that we consider the fact that the 1st Respondent is a private members club to be of limited relevance to the issues at hand. The Respondents cannot be allowed to wave a private entity card to bar this Court, when properly moved, from assuming jurisdiction where there are allegations of breach of fundamental rights and freedoms by its members or any other person. It cannot be safe, in a progressive democratic society, to arrive at a finding that allows private entities to hide behind the cloak of ‘privacy’ to escape constitutional accountability. We think that it would be to accord a narrow, constricted interpretation to our Supreme Law, contrary to the canons of constitutional interpretation that have for ages infused our judicial system and which now find constitutional sanction under Article 259 to accede to such a proposition.



The court stated its position on jurisdiction as follows;

- a. Whether the court has jurisdiction to handle the dispute
1. Our response to this issue is in the affirmative. The Court has the constitutional mandate to hear and determine disputes relating to allegations of violations of fundamental rights and freedoms under Article 165 as read with Article 23.
 2. Article 22 entitles every person to move this Court claiming that a fundamental right has been infringed or is threatened with infringement.
 3. The Bill of Rights binds all state organs and all persons, corporate or incorporate, by dint of Article 2(1). Consequently, the 1st Respondent, a corporate body, is bound to respect and observe the fundamental rights of its members and of all persons.
 4. The constitutional protections apply both vertically and horizontally. As to what extent they apply horizontally depends on the context and unique circumstances of individual cases including availability of alternative remedies.
 5. The alternative dispute resolution mechanisms provided under the Club's internal mechanisms were intended to address the Petitioners' grievances. Attempts at mediation yielded no fruits. Avenues of alternative dispute resolution were pursued but were ineffectual.
 6. Consequently, the Court has jurisdiction and can intervene to exercise jurisdiction and inquire into the issues the subject of the present matter.

I find that the court has jurisdiction to determine this dispute. In the premises, the issue of prematurity as raised in the preliminary objection and the issue of the suit being incompetent are consequently settled.

Whether The Petition Offends The Provisions Of Order 2 Rule 15 Of The Civil Procedure Rules

Order 2 Rule 15 of the Civil Procedure Rules provides as follows;

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.
- (3) So far as applicable this rule shall apply to an originating summons and a petition.

In this regard I shall exercise caution in determining whether there is an undisclosed cause of action or defence in law. Whereas the contents of the petition may disclose



a cause of action, there exists a test to determine whether the same would meet the threshold for a constitutional petition. It is my view that the same be determined on its own as a separate issue rather than as an issue in the preliminary objection.

b.

Whether The Petition Meets The Threshold For A Constitutional Petition

26. The threshold for what constitutes a constitutional petition as per the principle was established in the case of Anarita Karimi Njeru -vs- The Republic (1979) and was later restated by the Court of Appeal in the case of Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR. The principle established in the Anarita Karimi Njeru case (supra) was that a Constitutional petition should set out with a degree of precision the Petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed.
27. I have perused the petition dated 28th September 2021. The Petitioner states that the Petitioners' rights to have her daughter, the 2nd Petitioner's junior membership uplifted to adult membership have been infringed.
28. The petition does not state the provisions of *the constitution* that have been infringed upon. One would expect at the least a statement of the particular articles of *the constitution* the Petitioner seeks to have the court make a determination on the infringement of. The concept of a constitutional petition that does not contain the provisions of *the constitution* that have been infringed upon is one that cannot be said to meet the threshold for a constitutional petition. The Petitioners have left the determination of which constitutional provisions they claim have been infringed to the court.

The Mumo Matemo case (supra) reaffirmed the principle in the Anarita Karimi case when the Court at paragraph 44 of the judgment stated as follows: -

- (44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the Respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these short comings, it was not enough for the superior Court below to lament that the petition before it was not the "epitome of precise, comprehensive or elegant drafting, without remedy by the 1st Respondent"

At paragraph 87(3) in the same judgment the Court on its findings stated as follows: -

29. It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of *the constitution* of Kenya and the *Ethics and Anti-corruption Commission Act*, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case.
30. The petition herein does not satisfy the threshold required for a constitutional petition for the reason that it fails to state the provisions infringed upon.
31. These findings resonates well with the principles in the case of Damian Belfonte vs The Attorney General of Trinidad and Tobago CA 84/2004 in which the court affirmed that
32. Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it



appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate.

33. To seek constitutional relief in the absence of such a feature would be a misuse of abuse, of the court's process. A typical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power. Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under *the Constitution*. It would not be fair, convenient, or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights."

- 34 In the premises the petition is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 21ST DAY OF OCTOBER, 2022.

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R. NYAKUNDI

JUDGE

(skagunza@gmail.com, kariukimwanikiandco@yahoo.com)

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