



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. E2 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF ARTICLE 47 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF NYANZA CLUB

REPUBLIC.....APPLICANT

VERSUS-

THE CHAIRMAN, SECRETARY AND

TREASURER OF NYANZA CLUB

(SUED AS THE OFFICIALS OF

THE MANAGEMENT COMMITTEE)..... RESPONDENT

EXPARTE APPLICANT.....SULTAN ALI KHAN

RULING

The exparte Applicant, **SULTAN ALI KHAN** has moved the Court seeking the following reliefs, by way of Judicial Review;

“i THAT an order of certiorari do issue to remove to the High Court and quashing the decision of the Respondent’s Golf Section Committee suspending the Applicant from accessing the Club’s Golf Section and all other reciprocating clubs within the Republic of Kenya for a period of six (6) months and communicated vide the Respondent’s Golf Section Committee’s letter to the Applicant dated 8/10/2020.

ii THAT an order of Prohibition prohibiting the Respondent by itself, officials, its Golf Section Committee, or whatsoever from taking any disciplinary action against the Applicant pertaining to allegations purportedly arising out of the letter dated 30th September 2020.

iii THAT an order of Prohibition directed at the respondent by itself, officials, its Golf Section Committee or whatsoever barring the Respondent Golf Section Committee from suspending and/or barring the

Applicant from accessing the Respondent's Golf Section and all other reciprocating clubs within the Republic of Kenya for services offered at the Respondent Golf Course Section or such other clubs.

iv. THAT the Honourable Court be pleased to grant such other or further relief as it may deem fit in the circumstances.

v. THAT the costs of this application be in the cause."

1. The application is premised on the Applicant's contention that the impugned decision was made Ultra Vires and Without Jurisdiction or in Excess of Jurisdiction.

2. When canvassing the application the Applicant submitted that pursuant to **Section 17 (a)** of the **Constitution and By-Laws of NYANZA CLUB**, it was only the Management Committee of the Club who were responsible for the management of the affairs of the Club.

3. Secondly, it was the Applicant's understanding that the issue as to the forfeiture of membership of the Club was regulated by **Section 16** of the **Club's Constitution**.

4. He submitted that it was only the Management Committee of the Club which had the requisite authority to deal with issues of any infringement of the Rules and Bye-laws of the Club.

5. Meanwhile, as far as the Applicant was concerned the Golf Section Committee was governed by **Section 19 (a)** of the **Club's Constitution**, which spelt out the authority of Games Committees. And in his understanding a Games Committee had only the limited power, of

"regulation of any particular game

and sport."

6. In the circumstances, the Applicant expressed the view that the Golf Section Committee's mandate was limited to organizing golf-related games.

7. His considered opinion was that the Golf Section Committee did not have any power or authority to suspend or to terminate the membership of any member of the Club.

8. Therefore, when the Golf Section Committee made a decision, which was of a disciplining nature, the Applicant submitted that that Committee acted ultra vires and without jurisdiction or in excess of its jurisdiction.

9. The Applicant cited the decision in **REPUBLIC Vs SECRETARY OF FIREARMS LICENCING BOARD, HIGH COURT JUDICIAL REVIEW APPLICATION NO. 43 OF 2018** as authority for the proposition that the decision of the Golf Section Committee was tainted with illegality.

10. The Applicant further submitted that the Golf Section Committee had usurped the mandate of the Management Committee of the Club.

11. He added that the decision which was in issue, had far reaching implications as it sought to bar the Applicant from enjoying the services of other reciprocating clubs within the Republic of Kenya: To that extent, the Applicant submitted that the decision violated his right to association.

12. The Applicant also pointed out that he had voiced his objection to the composition of the Golf Section Committee, because he believed that the Secretary to that Committee would be biased against him, thus depriving him of his right to a fair hearing.

13. He submitted that;

"..... in the present case there was evidence of a personal bias by a decision maker that led to the suspension of the exparte applicant."

14. As regards Prohibition, the Applicant submitted that such an order would be appropriate to bar the Respondent from making adverse decisions against him, without according him fairness as required by law. He further submitted that a decision which had been given without due regard to the principles of natural justice was void.

15. The Applicant's position was that the Respondent had failed to respond to his request for the reasons why he was suspended, and that the said failure was demonstration of the fact that the decision was made without any good reason.

16. In determining this application I commence by reminding myself about the scope of the remedy of Judicial Review. In the case of **MUNICIPAL COUNCIL OF MOMBASA Vs REPUBLIC & UMOJA CONSULTANTS LIMITED, CIVIL APPEAL NO. 185 OF 2001**, the Court of Appeal held as follows;

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made?”

In making the decision, did the decision-maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself, such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

17. In this case, I understand the Applicant to be complaining that he was not accorded a fair hearing.

18. Presumably, that is why he invoked the provisions of **Article 35 (b)** of the **Constitution of the Republic of Kenya**, and wrote to the Secretary of the Golf Section of Nyanza Club, seeking a copy of the minutes of the meeting held on 7th October 2020.

19. When the Applicant’s letter dated 9th October 2020 elicited no response, he concluded that the decision to suspend him was made without good reason.

20. In my considered opinion, the failure by the Respondent to provide a copy of the minutes of the Committee Meeting which resolved to suspend the Applicant, cannot be construed as necessarily implying that the decision to suspend the Applicant was not founded upon a good reason.

21. The onus was upon the Applicant to show either that the decision-maker failed to take into account some relevant factor, or that the decision-maker had taken into account some irrelevant factor.

22. I find that the Applicant did not discharge that onus.

23. When the Applicant instituted these proceedings, he exhibited, inter alia, the letter dated 30th September 2020, which required him to Show Cause why action should not be taken against him for Gross Misconduct and Indiscipline.

24. The said letter set out the two incidents of 20th September 2020 and of 23rd September 2020, which the Applicant was required to answer to.

25. The Applicant wrote back on 6th October 2020, denying the allegations that had been cited against him.

26. He told the Secretary to the Golf Section of the Nyanza Club that he did not see any reason why he should appear before a Committee to which the said Secretary was a party.

27. The Applicant’s view was that because the Secretary to that Committee would be a part of the Committee before which the Applicant was to answer, the Committee (or the Secretary) would be ;

“..... a judge, a prosecutor and a juror at the same time.”

28. The basis of that contention was that the Applicant had, reportedly, lodged a complaint against the Secretary, at the Central Police Station, after the Secretary had verbally abused him.

29. In terms of procedure, the evidence provided by the Applicant indicates that he was given Notice in writing, that the Golf Section Committee would give him an opportunity to answer the specified allegations.

30. I therefore find that the Applicant was accorded an opportunity to be heard.

31. He was informed that he would have the right to call a witness or witnesses when he appeared before the Committee, to Show Cause.

32. His complaint, at that stage was that the Secretary to the Committee could not be expected to be an objective arbitrator, because the said Secretary had verbally abused him, giving rise to the Applicant lodging a complaint at the Central Police Station.

33. The Minutes of the Committee Meeting show that it was attended by ten members.

34. The Applicant did not point out any procedural irregularity in how the meeting was convened or how the decision was arrived at.

35. Indeed, when he was canvassing the substantive application for judicial review, the Applicant appears to have abandoned the view that the Secretary of the Golf Section was either biased or had influenced the decision made by the Committee.

36. Pursuant to the Nyanza Club Constitution and Bye-Laws, **Section 17 (a)** confers upon the **MANAGEMENT COMMITTEE** the Power and Authority to manage the affairs of the Club. The said Management Committee is constituted of **NINE FULL MEMBERS**, whose qualifications are spelt out.

37. The Applicant submitted that it was only the Management Committee that has powers to handle issues that could lead to the forfeiture of membership. The said submission was anchored on the provisions of **Section 16 (a)**, which reads as follows;

“In the case of any infringement of the Rules or Bye-Laws of the Club, or if the conduct of any member in or out of the club shall in the opinion of the Committee, be injurious to the reputation of the Club, the Committee may deal with the matter as they think fit, having given the member concerned an opportunity to explain or answer the complaint. If their action takes the form of expulsion, the member expelled shall have the right to appeal to a General Meeting. A two-thirds majority of the members present and voting at such General Meeting is required to uphold the Member’s Appeal.”

38. **Section 16** of the Club’s Constitution is headed;

“Forfeiture of Membership.”

39. Thereafter, **Section 17** is headed;

“Club Management”

40. It is arguable that when the Constitution was being formulated, the issue of forfeiture of membership was deliberately separated from the general issue of club management.

41. If that were the position, there would then arise the question regarding the composition of the Committee which, under **Section 16**, has the mandate to expel a member.

42. In effect, if the “*Management Committee*” was not empowered by the Constitution to deal with issues of any infringement of the Rules and Bye-Laws of the Club, which other Committee would have the mandate to undertake that task?

43. I have carefully perused the Constitution. At **Section 10 (a)** there is a reference to “*the General Committee*”. However, there is no specific mandate assigned to the said General Committee.

44. At **Section 19** of the Constitution there is a reference to “*The Management Committee*”, and also the “*Games Committee.*”

45. In effect, the Constitution makes reference to 3 distinct Committees.

46. Whilst **Section 10** vests the management of the affairs of the Club on the Management Committee, **Article 19 (i)** vests in the Games Committee;

.....”
.....”

47. The Applicant submitted that the Golfing Section Committee’s powers were limited to the organization of golf-related games.

48. Therefore, in his understanding, the Golf Section Committee did not have power to suspend any member or to terminate the membership of any member.

49. In my considered opinion, the power to regulate the organization of any particular games, and the Sports Section cannot be limited in the manner alluded to by the Applicant.

50. In this case the Golf Section had notified the Applicant that he had allegedly driven on

“Fairway 5 thereby occasioning damage to the playing surface of the course contrary to Clause 40

of the Constitution of Nyanza Club.”

51. In effect, the Applicant was alleged to have acted in such manner as would have a direct negative impact on the Golf Course.

52. Therefore, I find that the Games Section of the Golf Section had power to handle the complaint that had been levelled against the Applicant.

53. After giving due consideration to the matter, the Golf Section Committee notified the Applicant that it had suspended him from “*Accessing Nyanza Club Golf Section.*”

54. By their letter dated 8th October 2020, the Golf Section Committee said;

“You will therefore not have access to the Golf Section.”

55. In my understanding, the decision of the Golf Section Committee did not either Suspend or Terminate the Applicant’s membership of the Club.

56. The Golf Section Committee appears to have been aware that it was only the Management Committee that could give further instructions, if such instructions were beyond the scope of the authority vested in the Games Committee.

57. In a nutshell, I find and hold that the Golf Section Committee had the requisite jurisdiction to take disciplinary action against the Applicant. However, the said Games Committee did not have jurisdiction to terminate the membership of any member of the club.

58. Even in this case, the Golf Section Committee did not suspend the Applicant from Nyanza Club. He was only barred from entering into the Golf Section.

59. Accordingly, the action taken by the Golf Section Committee was not one of “*Forfeiture of Membership*”, as envisaged under **Section 16** of the **Constitution**.

60. In the result, the application before me is without merit; it is therefore dismissed.

61. As regards the costs of the application, I order that the Applicant shall pay the same to the Respondent. The main reason for that order is that costs ordinarily follow the event.

62. Secondly, I note that the “*Officials of the Management Committee*” of the Nyanza Club are the Respondents in this case. For reasons unknown to me, the members of the Golf Section Committee are not the Respondents.

63. The allegations by the Applicant were directed against the Golf Section Committee.

64. If anything, the said Golf Section Committee was said to have;

“..... usurped the mandate of the Management Committee which, had the sole authority to deal with the issue of membership.”

65. Clearly, the Applicant was heaping blame on the Golf Section Committee, but sued the Management Committee. As the Applicant made out no case against the Management Committee, I find that it is only fair and just that the Applicant pays to the named Respondent, the costs of the substantive application for Judicial Review.

DATED, SIGNED and DELIVERED at KISUMU

This 23rd day of February 2021

FRED A. OCHIENG

JUDGE