



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JR APPLICATION NO. E007 OF 2020

IN THE MATTER OF: APPLICATION BY WILFED ACHILA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI TO QUASH THE DECISION BY THE RESPONDENT MADE ON 20TH NOVEMBER, 2020 ARTICLE 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTIONS 4, 6, 7 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 CIVIL PROCEDURE ACT AND LAW REFORM ACT

BETWEEN

WILFRED ACHILLA EX PARTE APPLICANT

-VERSUS-

MOMBASA GOLF CLUB RESPONDENT

RULING

1. Pursuant to leave granted on 3 December 2020, the *Ex parte Applicant* filed a Notice of Motion dated 16/12/2020 seeking the following orders:

a) *An order of certiorari to issue removing the resolution of the board of directors of the Respondent dated 20 November 2020 to this Honorable Court for quashing.*

b) *Costs of the proceedings be provided for.*

2. The application is grounded on the matters set out in the Statutory Statement dated 16/12/2020 and the Verifying Affidavit of Wilfred Achilla sworn on 17 /12/2020.

3. The *Ex parte Applicant* avers that he is a member of the Mombasa Golf Club and a captain of the said club. He states that on 17/11/2020, he received a notification from the club dated 16/11/2020 commencing disciplinary proceedings against him for actions taken in his private capacity and with people associated to him. The notification was a notice to show cause why he should not be suspended from the membership of the club. He added that the said notice comprised a summary of the complaint in terms of the four allegations that were leveled against him, and also he was required to make his presentation either orally or in writing.

4. It is the *Ex parte Applicant's* case that on 17/11/2020 he wrote to the Honorary Secretary accepting his willingness to attend the board meeting but requested that due to the short notice of 3 days, he had been given, he was unable to attend, and he requested for the meeting to be rescheduled to 27/11/2020. He further states that the Respondent vide a letter dated 18/11/2020 sent by email stated that they had

disregarded his request to reschedule the disciplinary proceedings. He avers that he replied with a letter on 19/11/2020 erroneously dated 17/11/2020 that he had a tight work schedule and he was to travel out of town to Malindi for work and that he was to avail himself on the 27/11/2020. He further states that in that letter he stated that he wanted to be heard orally due to the gravity of the matter. He avers that the Respondent did not respond to his request and a special board meeting was held on 20/11/2020 and a resolution was taken to suspend him for a period of six months effective from 20/11/2020 and the resolution of the suspension be posted on the club's notice board and shall become final after 14 days from the date of the resolution.

5. Contrary to the rules of the Respondent there was a further communication from the board of directors of the club to all members of the club attaching the said resolution alleging that he had been suspended from the club contrary to the clear provisions of Article 20(3) of the Memorandum of Articles of Association of the club. He states that the court must notice that a separate resolution denying him reciprocal and courtesy rights was also sent to all reciprocating clubs even before the expiry of the said 14 days period which communication was misleading malicious and calculated to injure and destroy his reputation. He further states that on 25/11/2020, he put his name on the draw at Nyalı Golf Club but the captain of the said Nyalı Golf Club which is reciprocating club to the Respondent said that they had received a letter from the Respondent stating that he had been suspended and his name was withdrawn from the draw which caused him serious embarrassment and inconvenience.

6. According to the *Ex parte Applicant*, the Respondent acted contrary to his rights in his capacity as captain and if the suspension is allowed to stand he cannot access the club or any other reciprocating clubs the effect of which will be to lose his captainship which shall damage his reputation and subject him to embarrassment.

7. He avers that article 20 (1) of the Memorandum of Articles of the Respondent is very clear that a person be provided with a summary of the complaint and must be given an opportunity to be heard. He further stated that according to Article 47 (1) of the constitution, every person has the right to administrative action that is expedient, efficient, lawful, reasonable, and procedurally fair. He contends that the conduct of the Respondent's board proceedings was a violation of his rights.

8. He further contends that the conduct of the Respondent's disciplinary proceedings violated Article 50 of the Constitution as he had clearly requested in his letter dated 17/11/2020 that the meeting be rescheduled, and an impartial panel be convened by the Respondent which was not done. He states that the decision by the Respondent was unfair having been taken by them whilst they were also the complainants in the matter and ultimately the judge and jury. According to the *Ex parte Applicant*, the Respondent's decision to suspend his membership without a hearing and imposing the sanctions with effect from the date of their decision is not only unfair administratively but illegal in the face of the very memorandum of Articles of association invoked by them.

The Response

9. The Respondent opposed the application vide the replying affidavit of one Nancy Lauzi Mundu the manager of the Respondent. Ms. Mundu deposed that the *Ex parte Applicant* is a member of the club and on 14/11/2020 while at the club, he exhibited unruly behavior by forcing his way into the counter beyond sale hours and even insulted the board of directors, club members and the staff by uttering profane insults which acts amount to gross misconduct. She further deposed that a member of the club is supposed to depict high levels of self-discipline and respect while at the club something which the *Ex parte Applicant* completely ignored and went on to not only insult the club members and the management but also to forcefully access the alcohol stock beyond sale hours after the barman had already closed sale for the day.

10. Ms. Mundu deposed that the club being dissatisfied by the behavior of the *Ex parte Applicant*, duly invited him for a disciplinary hearing which was scheduled to take place at the club house, on 20/11/2020. She added that the invitation letter contained the summary of the complaint against the *Ex parte Applicant* clearly outlining all the complaints that had been levelled against him. She deposed that the invitation letter expressly stated that the *Ex parte Applicant* could make a presentation before the board either orally or in writing, whether in person or through the applicant's authorized representative. Ms. Mundu deposed that upon receipt of the invitation letter, the *Ex parte Applicant* responded vide a letter dated 17/11/2020 requesting to reschedule the disciplinary hearing for reasons that he would be on a trip out of town. She deposed that the board considered the applicant's letter, and they were not satisfied by the reasons adduced and they resolved to maintain the date of the disciplinary hearing as scheduled. She added that the board's decision was duly communicated to the applicant vide a letter dated 18/11/2020, and on 20/11/2020, the date scheduled for the disciplinary hearing, the applicant was at the club and even participated in a tournament which transpired at the club.

11. Ms. Mundu deposed that despite the *Ex parte Applicant* being present at the club for the tournament, he deliberately failed to attend the disciplinary hearing which was scheduled for the same day and further, he did not submit any written document for consideration by the board, nor did he authorize his representative to appear before the board on his behalf.

12. She deposed that the board proceeded with the meeting as scheduled in the absence of the *Ex parte Applicant*. She added that after discussions and deliberations in the meeting regarding the *Ex parte Applicant*'s conduct at the club, it was unanimously resolved to suspend the *Ex parte Applicant* from the club. She deposed that contrary to what had been alleged by the *Ex parte Applicant*, it is evident from the documents annexed herewith that the Applicant deliberately failed to attend the disciplinary hearing since he was present at the club on the 20/11/2020.

13. Ms. Mundu deposed that after the resolution was passed, the same was duly communicated to the Applicant vide a letter dated 20/11/2020, and further to this, the club also communicated to the club at large and all reciprocating clubs, of its resolution. According to Ms. Mundu, all reciprocating clubs reserve the right of admission of members in their respective clubs and the Respondent herein has no influence whatsoever on how they treat their members.

14. She deposed that contrary to what is alleged by the *Ex parte Applicant*, the Respondent circulated the same board resolution to all the reciprocating clubs. She deposed that the board's resolution was passed pursuant to Article 20 of the Memorandum and Articles of the club and therefore the allegations raised by the applicant cannot hold water. She deposed that the board did not violate the *Ex parte Applicant*'s

right as alleged as the *Ex parte* Applicant was duly given an opportunity to appear before the board or authorize his representative to appear on his behalf or submit his written submission for consideration by the board and chose to deliberately fail to present himself at the board despite being present on the very day for a tournament held at the club.

15. Ms. Mundu deposed that the board acted as per the constitution, the Fair Administrative Action Act, and its Memorandum and Articles of Association prior to the suspension of the *Ex parte* Applicant and as such the application should be dismissed with costs.

16. She deposed that the board had jurisdiction to hear the disciplinary hearing and the ultimate decision to suspend the Applicant was within the jurisdiction of the board.

17. The *Ex parte Applicant* filed a supplementary affidavit. He denied the allegations of Ms. Mundu and further deposed that she was not an eyewitness to any such false incidences as in any event she had just been employed and on probation. He deposed that he was willing to attend the disciplinary proceedings but the board had given him a short notice and that is why he requested the Respondent to reschedule the meeting. He further deposed that the deponent had acknowledged that the board disregarded his request which is contrary to the principles of natural justice and Article 47 and Article 50 of the constitution. He further deposed that although he came to the club on 20/11/2020, it was only in the morning hours, and he immediately proceeded to travel to Malindi for work.

Determination

18. I have considered the arguments and submissions made. Before analysis of this issue, it is important and necessary to restate the nature and purpose of judicial review proceedings. These are proceedings in which the Court is primarily asked to review the lawfulness of an enactment, decision, action or failure to act in the exercise of a public or administrative function. Article 165(6) of the Constitution in this regard provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person's rights. Judicial review is also now entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right to fair administrative action.

19. Section 7 of the Fair Administrative Action Act in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the said action or decision. An administrative action or decision is defined under section 2 of the Act to mean:

i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

20. A number of factors may affect the extent of, and limit this Court's judicial review jurisdiction, including the nature of the dispute especially if of a private nature, availability of an adequate alternative remedy, prematurity of a claim, delay, and where the claim would cause great prejudice and hardship to third parties or the public interest. Lastly, there are also limits to this Court's judicial review jurisdiction set out in Article 165(6) of the Constitution, with respect to reviewing decisions of superior courts.

21. Therefore, while the *Ex parte* Applicant's membership of the club may be of a voluntary nature, under the Fair Administrative Action Act, any decision of the Respondent that affects the rights or interests of its members will be amenable to judicial review. The *Ex parte* Applicant in this regard provided evidence of the decision made by the Respondent in letter dated 20/11/2020, suspending his membership.

22. In the present application the *Ex parte* applicant contends that he was given short notice of three days to attend the disciplinary proceedings and due to work commitments and the gravity of the issues he could not attend the disciplinary proceedings and/or present written submissions to his case. The *Ex parte Applicant* requested for the postponement of the proceedings, but his request was not met. The Respondent on the other hand avers that the *Ex parte Applicant* did not give good and sufficient reasons to have the proceedings postponed and further to this the Respondent participated in a tournament the morning before the disciplinary proceedings.

23. The *Ex parte* Applicant submitted that the Respondent suspended him without following the due procedure as elaborated in their Memorandum and Articles of Association, and without giving him an opportunity to be heard. Therefore, that the Respondent's actions were unconstitutional and against the rules of natural justice. Article 47 of the Constitution provides as follows in this regard:

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

“(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

24. It is indicated in Article 47 the situations where a duty to act fairly will apply, that is, where the decision maker is taking a decision that will have a direct and specific impact on an individual. Section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows in this regard:

“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

a) prior and adequate notice of the nature and reasons for the proposed administrative action;

- b) an opportunity to be heard and to make representations in that regard;
- c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- d) a statement of reasons pursuant to section 6;
- e) notice of the right to legal representation, where applicable;
- f) notice of the right to cross-examine or where applicable; or
- g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

- a) attend proceedings, in person or in the company of an expert of his choice;
- b) be heard;
- c) cross-examine persons who give adverse evidence against him; and
- d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

25. The core of the duty to act fairly therefore is the need to ensure that a person affected by a decision has an effective opportunity to make representations, before it is made and by an impartial decision maker. The Court of Appeal in this respect held as follows in **Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR**:

“The term “procedurally fair” used in Article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to right to fair administrative action.”

26. The Respondent is under a duty to act fairly in his decision making. The issue then that needs determination is whether the procedure that the Respondent followed before suspending the *Ex parte* Applicant was fair. Article 20 of the Respondent’s Memorandum and Articles of Association is drawn as follows: -

“Suspension of Members

20.1A member or an associate member may be suspended by the board of directors if in their opinion the conduct of the member or associate member is unbecoming or injurious to the smooth running of the company or is in breach of rules of golf and other sports or matters pertaining to discipline or amounting to indiscipline. However, no resolution for suspension may be voted upon until the directors have first provided the person concerned with a summary of the complaint and allowing him/her an opportunity of being heard in his/her defence, whether orally or in writing and whether in person or through an authorized agent.

20.2. The person so suspended shall be notified in writing by the honorary Secretary of such suspension within 48 hours of the resolution provided that delay in notifying the person shall not in any way affect the validity or efficacy of resolution.

20.3 No resolution for the suspension shall be final until after the expiry of a period of 14 clear days from the date of the resolution, during which period a notice of the resolution shall be posted on the club Notice Bard and in a requisition for a special general meeting to rescind the resolution is made within the period of 14 days referred to in the...”

27. According to the Memorandum and Articles of association, the Respondent followed the due procedure. As per Section 4 of the Fair Administrative Actions Act, the *Ex parte* Applicant was given prior and adequate notice. He was also given an opportunity to be heard. However, he did not make an appearance. The *Ex parte* Applicant claimed that he needed to travel out of town the day for the disciplinary hearing and the same day he participated in a tournament at the same location. This is an act that would make it impossible for the board of the Respondent to consider rescheduling the hearing. The letters from the Respondent were clear that if he did not appear in accordance to the invitation, the board would proceed to consider the matter and make a resolution in his absence. This was done.

28. It appears to me that the *Ex parte* applicant was not only the author of his misfortune, but also that he actively participated to aggravate the situation by failure to attend the hearing.

29. It is noteworthy that Judicial Review remedies are discretionary, and only a party who seeks them with clear conscience may succeed. Further, Judicial review remedies do not consider the merit of the decision, but the process leading to the decision. In this regard I note that the *Ex parte* Applicant himself did not appreciate the process, and indeed with impunity, distanced himself from the process by refusing to attend the disciplinary proceedings. He accordingly, has himself to blame.

30. In the upshot the Notice of Motion before the Court lacks merit and is dismissed with costs to the Respondent.

Dated, Signed and Delivered in Mombasa this 30th day of September, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Ngaira holding Ananda for Applicant

No appearance for Respondent

Ms. Peris Court Assistant