



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW APPLICATION NO. E00 8 OF 2020**

**IN THE MATTER OF: AN APPLICATION BY SIMON MAINA MWANGI FOR JUDICIAL REVIEW 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 THE 13<sup>TH</sup> JULY, 2020.**

**AND**

**IN THE MATTER OF: SECTION 4, 6, 7 & 11 OF THE FAIR ADMINISTRATIVE ACTION ACT 2015**

**AND**

**IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010 AND THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NYALI GOLF & COUNTRY CLUB LIMITED.....RESPONDENT**

**AND**

**SIMON MAINA MWANGI.....EX-PARTE APPLICANT**

**RULING**

1. By way of Notice of Motion dated **16<sup>th</sup> December, 2020** and filed on the **18<sup>th</sup> December, 2020**, the Applicant seeks the following orders:

**1. THAT an Order of Certiorari do issue to remove to this Honourable court for purposes of being quashed the Proceedings and/or Decision of Nyali Golf & Country Club made on the 13<sup>th</sup> July, 2020 suspending the Ex-parte Applicant as a member of Nyali Golf & Country Club Limited for a period of Two (2) years vide a Letter dated 13<sup>th</sup> July, 2020.**

**2. THAT costs of this Application be provided for.**

2. The application is premised on the grounds set out therein and on the Affidavit of **Simon Maina Mwangi** sworn on **3<sup>rd</sup> December, 2020**.

**The Applicant's Case**

3. The Applicant is a member of the Respondent and alleged avid golfer. He averred that on or about **19<sup>th</sup> June, 2020** he received a notification that the Respondent's Management Committee had commenced disciplinary proceedings against him for actions he states were

committed in a private capacity.

4. After the Applicant received the notification, he appointed his Advocates on record herein to represent him in the disciplinary hearing. The advocate protested and raised concerns on the Respondent's Committee impartiality being that it was the complainant, particularly the Chairman and Secretary, who allegedly had been adversely mentioned by the Applicant. The said protest was raised vide the letters dated **22<sup>nd</sup> June, 2020** and **29<sup>th</sup> June, 2020** attached as "SMM 2" and "SMM 3" respectively. Further, the Applicant states that an objection was raised on the **1<sup>st</sup> July, 2020** when the disciplinary hearing was set to proceed.

5. It is the Applicant's case that the Respondent's Committee failed to deliver a reasoned decision on the objection raised and proceeded with the disciplinary hearing and the Applicant was asked to defend himself on charges that were not disclosed to him.

6. The Applicant avers that the Respondent's Management Committee had a pre-determined decision on the matter and the disciplinary hearing was a mere smokescreen to allow the Committee deliver a biased decision. The Applicant therefore declined to offer a defence as demanded as the complainants who were members of the Respondent's Committee would not be available for him to cross-examine them.

7. Being unable to proceed, the Applicant avers that he and his Advocates were removed from the Zoom forum and the purported hearing proceeded without his participation.

8. By a letter dated **2<sup>nd</sup> July, 2020**, the Applicant's Advocates on record wrote to the Respondent and demanded for a copy of unedited proceedings. The Applicant avers that on the **13<sup>th</sup> July, 2020** he received a copy of his suspension letter and attached thereto were alleged records of proceedings of the disciplinary hearing that occurred on the **1<sup>st</sup> July, 2020** to which his Advocates protested via a letter dated **14<sup>th</sup> July, 2020** and raised concerns that the said proceedings had been edited and did not reflect the true and correct position of what occurred on the **1<sup>st</sup> July, 2020**.

9. He further averred that vide a letter dated the **23<sup>rd</sup> July, 2020** his Advocates wrote to the Respondent's Committee and asked to be provided with video and audio recordings of the said hearing, but his request fell on deaf ears.

10. The Applicant contends that the entire Management Committee, particularly the Chairman and the Secretary, who sat at the disciplinary hearing was completely conflicted and incapable of presiding over any impartial disciplinary proceeding against him as the letter of notification dated **19<sup>th</sup> June, 2020** alleged that he had insulted them.

11. It is the Applicant's averment that the Committee's decision to proceed with the disciplinary hearing was contrary to the principles of natural justice as it is clear that they were biased.

12. According to the Applicant, the disciplinary hearing was premature as he had not received nor been served with any notice to show cause setting out the complaint or allegations leveled against him and that denied him his cardinal right to respond to specific charges and be allowed to defend himself against the charges raised by the Committee.

13. The Applicant averred that the Covid-19 pandemic and existing government protocols made it difficult for him to exhaust his remedy under **Article 17(d)** of the Respondent's Memorandum and Articles of Association as he was to call for special general meeting of the members to deliberate on the decision of the Committee made on the **13<sup>th</sup> July, 2020**, considering the Golf Club's restricted patronage.

14. It is the Applicant's contention that the decision of the Respondent made on **13<sup>th</sup> July, 2020** is illegal and the general membership of the club was still not the most appropriate forum to canvas such procedural impropriety.

### **The Response**

15. The Respondent herein opposed the motion through a Grounds of Opposition dated the **7<sup>th</sup> April, 2021** and a Replying Affidavit sworn by **Taib Bajaber**, the Respondent's chairman, but the same is not dated.

16. It is claimed that the Applicant vide a "WhatsApp" message used insulting language against the Management Committee and incited members towards dissolution of the club and made many other unfounded claims against the Board of Management and thus on the **19<sup>th</sup> June, 2020** he was issued a notification to answer for his actions.

17. The Respondent's case is that the exhibits on record demonstrate that it complied with the provisions of **Section 4 (3) (a), (b) and (g) of the Fair Administrative Action Act**; that the Applicant had adequate notice of the nature and reasons for the proposed disciplinary hearing and was given the opportunity to be heard and makes presentations in that regard.

18. Further, the Respondent states that it complied with **Section 4 (3) (a), (b), (c) and (d)** of the **Fair Administrative Action Act** at the hearing on the **1<sup>st</sup> July, 2020** when the Applicant was accorded the opportunity to attend the proceedings in person or in the company of his Advocates, to be heard and to cross examine any person who might give adverse evidence against him and to request for adjournment of the proceedings.

19. It is the Respondent's contention that it complied with **Section 4 (3) (c) and (d) of the Fair Administrative Action Act** when it served the Applicant with the letter dated **13<sup>th</sup> July, 2020** which communicated the decision of the Committee, reasons for the said decision and the Applicant was informed of his right under **Article 17 (d)** of the Respondent's Articles to contest the decision.

20. According to the Respondent, the Applicant's counsel's only intent was to derail the disciplinary hearing and assist the Applicant circumvent the disciplinary procedures set out in the Club's Articles and thus, escape accountability for his conduct as a member of the Respondent. The respondent stated that the Applicant's allegation that he was never provided with a Notice to Show Cause was false as in his possession was a letter dated **19<sup>th</sup> June, 2020** which contained the Committee's complaints against him.

21. The Respondent contends that the Applicant was given an opportunity to be heard, which he did not take up, and he should not be allowed to turn around and state that his right to be heard was infringed. He is therefore, disentitled to the orders sought.

### **Submissions**

22. The application was canvassed through written submissions. All parties filed submissions which I have carefully considered. The issue which I raise for determination is as follows:

***(i) Whether the Ex Parte Applicant has met the grounds for granting of Judicial Review Order of Certiorari***

### **Determination**

23. Judicial Review remedy of certiorari is a discretionary remedy which a court may grant to correct the decisional excesses of public bodies like the Respondent. This remedy is rarely available because it is not the province of the courts to enter into the arena of internal management of corporations or public bodies. The remedy is available where it is evident that the decision of the Respondent violated procedures or was clearly illegal or irrational. It is not given because the Respondent's decision was wrong. This remedy is more concerned with the process used by the Respondent to arrive at the decision.

24. In this case, the issue is whether before the Ex parte Applicant was suspended from the club, he was notified of the offence which he was alleged to have committed; and whether he was given a chance to defend himself, and what was the outcome?

25. From the proceedings herein, it is not in doubt that the Ex parte Applicant was notified of the offence he was alleged to have committed vide a letter to him dated 19/6/2020 which informed him of the alleged offence.

26. It is also not in doubt that the Ex parte Applicant was given an opportunity to be heard in a disciplinary hearing through zoom on 23/6/2021 at 11.00 a.m., which was rescheduled to 1/7/2020 at 19 hours.

27. Vide his advocate's letter dated 22/6/2020 the Ex parte Applicant confirmed attendance of the disciplinary hearing through his advocate, who also indicated that they would be raising a preliminary objection on grounds of impartiality on account of alleged conflict of interest of some members of the management committee. The Ex parte Applicant also stated that they would cross-examine the Chairman, Secretary and Treasurer of the club. Further, the Applicant also stated that the date of hearing being 23/6/2020 was not convenient to them, and he proposed 1/7/2020 at 1600 hours. The Respondent accepted this via their letter dated 24/6/2020.

28. The parties thereafter exchanged correspondence dated 29/6/2020 where they expressed varied views on content of proceedings, fair hearing and time of hearing. The hearing proceeded as scheduled on 1/7/2020.

29. However, from the letter dated 2/7/2020 by the Ex parte Applicant's advocates to the Respondent, it is clear that the hearing did not end up well, and that the Applicant and his team was removed from the zoom platform. The Ex parte Applicant sought to get unedited version of the proceedings up to the point when they were removed.

30. It is evident from the letter dated 13/7/2020 by the Respondent, which letter also informed the Ex parte Applicant of his suspension from the club for 2 years, that the disciplinary proceedings did not go well.

31. The Respondent accused the Ex parte Applicant's advocate of intention not to proceed with intended hearing by raising several preliminary issues. Some of these issues were declined by the Respondent with the apparent result that the Ex parte Applicant was removed from virtual session. The Respondent observed as follows:

**“Upon your exit from the said session, the management committee deliberated on the matter and found that having given a ruling on the preliminary issues raised and having impressed on you to proceed with your defence as provided under Article 17 (2c), you nonetheless blatantly refused to submit yourself to the management committee which is the body empowered under Article 17 of the NGCC Memorandum and Articles of Association to deal with disciplinary issues of the club.”**

32. From the foregoing the question that this Court must ask is whether or not the Ex parte Applicant was given a fair hearing.

33. In my view what the Court needs to ascertain is whether or not the Ex parte Applicant was informed of the offence he had committed, and whether or not he was given a chance to be heard.

34. I am not in doubt that the Respondent complied with Article 47 of the constitution when it informed the Applicant of the offence he was alleged to have committed, and also provided him with a hearing. However, during the hearing issues arose which this Court is not able to ascertain their cause. As a result, the Ex parte Applicant was removed from the platform. Thereafter the management committee of the Respondent proceeded with the evidence at hand to hand over their decision which they communicated to the Ex parte Applicant vide the letter dated 13/7/2020.

35. 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.”***

36. 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.”***

37. 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.”***

38. 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..."*

39. This Court is not in a position to know the content of the proceedings leading to that decision. Again this Court cannot pin the Respondent on the merit of their decision. However, this Court is satisfied that due process took place, and that the Ex parte Applicant was accorded an opportunity to defend himself, and he submitted himself to the process, but left prematurely.

40. It is not the duty of courts to hold parties to correct and accurate determination in their proceedings. When the Ex parte Applicant became unruly, he was also at the same time interfering with the process of fair hearing.

41. Consequently, this Court is not satisfied that an order of certiorari is merited. The motion is dismissed with no orders on costs.

**Dated, Signed and Delivered at Mombasa this 30<sup>th</sup> day of September, 2021.**

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Mr. Thaka holding brief Mutubia for Applicant

Mr. Karanja for Respondent

Ms. Peris Court Assistant