



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 208 OF 2018

ARUN KUMAR JAIN.....1ST PETITIONER

SANDIP C. SHAH.....2ND PETITIONER

-VERSUS-

THE BOARD OF TRUSTEES NAIROBI GYMKHANA.....RESPONDENT

JUDGMENT

1. Through the petition dated 29th May, 2018, Arun Kumar Jain and Sandip C. Shah being Chairman and Vice Chairperson respectively of the Management Committee of Nairobi Gymkhana Club are challenging the decision by the Respondent, the Board of Trustees of Nairobi Gymkhana, made on 28th May, 2018 to take over the management of Nairobi Gymkhana Club (hereinafter the Club) from the current officials of the Management Committee (MC) who were elected into office on 27th March, 2018. It is the petitioners' case that they have been restricted from accessing the offices of the Club without any reference and or notice to them or members of the club.

2. The petitioners are particularly aggrieved with the said decision of the Respondent for the reason that together with other members of the Club they were not invited by the Respondent to address the concerns that formed the impugned decision contrary to the principle of public participation in the decision-making process under Article 10 and fair administrative action under Article 47 of the Constitution and sections 3, 4 and 5 of the Fair Administrative Action Act, 2015. The petitioners further contend that the Respondent's decision is contrary to the principles of democracy, equality, equity, inclusiveness, participation of the people and social justice.

3. The petitioners therefore seek the following orders:

“(a) A DECLARATION that the Decision of the Respondent of 28th May, 2018 resolving to take over Management of Nairobi Gymkhana Club from the Petitioners is inconsistent with the Constitution and the Fair Administrative Action Act and thus null and void.

(b) A DECLARATION that the Decision of the Respondent of 28th May, 2018 resolving to take over Management of Nairobi Gymkhana Club from the Petitioners denies, contravenes, violates, infringes and threatens the Petitioners' constitutionally protected Freedom of Association, Right to Protection of Property and Right to Fair Administrative Action as enshrined under Article 36, 40 and 47 of the Constitution and thus null and void.

(c) A DECLARATION that the decision of the Respondent of 28th May, 2018 resolving to take over Management of Nairobi Gymkhana from the Petitioners was ratified without Public Participation in violation of Article 10(2) of the Constitution and thus null and void.

(d) An order of INJUNCTION to restrain the Respondent from interfering with the Management of Nairobi Gymkhana Club by the elected officials of the Management Committee.

(e) Costs of the petition. “

4. In response, the Respondent filed a replying affidavit sworn by **Rajendra G. Thakar** on 24th July, 2018. He deposed that he is one of the trustees of the Respondent and was appointed the Chairman by the other trustees. It was his averment that the Nairobi Gymkhana is a members sports club established in 1925 to promote and accommodate the social and recreational needs of its members. It was further his

deposition that the Club was exempted from registration under the Societies Act on the 16th July, 1971 but its property and affairs are held by trustees under the Trustees (Perpetual Succession) Act. He averred that the Club has a Constitution under which its affairs are managed and the current Constitution was amended in 2015.

5. It was Mr. Thakar's averment that the management of the Club is overseen by the Board of Trustees whose members are elected every five years by a majority vote of 55% of the members present and voting. Further, that the operations of the Club are managed by the Management Committee (MC) which is made up of 14 members elected at the Annual General Meeting (AGM) with a term of one year. In addition, he averred that the roles of each member are decided by the MC from year to year and are determined at each first meeting of the MC.

6. Mr. Thakar deposed that at the AGM of 2017, it transpired that the affairs and management of the Club by the MC were not being conducted in accordance with the Constitution, rules and practice of the Club in that meetings of the MC were being conducted without the requisite minutes neither was the MC sharing correct minutes of its affairs with the trustees of the Club. Further, that the financial affairs of the Club were not being regulated as required, as expenditure by some members of the MC was not undertaken in accordance with the Club's rules and further that the MC members were unilaterally engaging in financial dealings without the proper authorization as per the Club's Constitution. Moreover, he averred that court cases against the Club were not being discussed by the MC or disclosed to the other members of the MC neither were they being reported at the AGM. He also deposed that the tendering process of the Club was not being undertaken bearing in mind best practices and procurement processes as regulated by the rules of the Club and that the Club's liabilities were being hidden from members.

7. The Chairman further swore that pursuant to Section 3 of the Club's Constitution, it was decided by the Trustees to take over the management of the Club and have an appraisal of the affairs of the Club and more specifically the conduct of the various members of the MC investigated. Accordingly, he averred that the Club's Constitution requires that the actions of the trustees must be discussed by the members at a Special General Meeting (SGM) called for that purpose within 60 days. That the trustees appointed an interim committee comprising of the then elected MC members to manage the affairs of the Club under the direct control of the trustees. Meanwhile, the trustees were mandated by the members to seek and commission forensic auditors to undertake the investigations of the affairs of the Club for the period 2012-2016. He averred that the forensic auditors interviewed the petitioners, the MC members, and the employees of the Club who were all given an opportunity to respond to any issues that were under investigation and a formal report compiled, which report was unanimously adopted by the members of the Club including the petitioners on 24th May, 2018 at the SGM mandating the trustees to act upon the recommendations within 7 days.

8. The Respondent's case is that pursuant to the forensic audit report and the mandate given to the trustees at the SGM of 24th May, 2018, the trustees formed the opinion that the petitioners had during the period in issue conducted the affairs of the Club in a manner that was inconsistent with the rules, by-laws and resolutions of the Club as variously set out in the forensic audit report. Accordingly, the trustees made a joint decision to appoint an interim MC of the Club pending the convening of a SGM within 60 days during which time the petitioners were called upon to respond to any allegations and if necessary undertake disciplinary process for ratification by members. He accordingly averred that the petitioners could not be allowed to continue in office while the investigations were ongoing.

9. In Mr. Thakar's view, the decision that the petitioners are challenging is a preserve of the trustees donated by the Club's Constitution to protect the assets of the Club during their term in office and unilaterally decided by members of the Club. It was also his averment that the trustees are not members of the Disciplinary Committee which is comprised of three past chairmen, two former secretaries and two ordinary members of the Club. In any event, he argued that the decision of the trustees was subject to the members' decision in a Special General Meeting that was scheduled for on 26th July, 2018 and the petitioners would have an opportunity to present their grievances, if any, on that date in accordance with the Club's Constitution.

10. It was further Mr. Thakar's deposition that the petitioners have misrepresented the facts to the court by failing to disclose that they were removed as MC members. They have also not disclosed that a forensic audit report found that they were involved in malpractice and financial misdeeds and that they had been given an opportunity of responding to the allegations before a Disciplinary Committee. In view of the foregoing, he urged the court to dismiss the petition.

11. Mr. Maloba appearing for the petitioners filed written submissions and supplementary submissions. On the issue whether the Respondent is in contravention of Article 47(1) of the Constitution, counsel submitted that the provisions thereunder require that an administrative action must be expeditious, fair, lawful and reasonable and that where such an action adversely affects a person's right or fundamental freedom, the affected person is entitled to be given written reasons for the action. He further submitted that the right to fair administrative action is a constitutional right as was stated in the cases of **Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR** and **Dry Associates Ltd v Capital Markets Authority and another [2012] eKLR**, and further emphasized by the Court of Appeal in the case of **Judicial Service Commission v Mbalu Mutava & another [2014] eKLR**. In counsel's view, the Respondent violated the petitioners' right to fair administrative action contrary to Article 47 of the Constitution by failing to accord the petitioners proper interview and failing to consider their responses which further confirms that no appropriate hearing was granted.

12. On whether the Respondent's actions are in contravention to Article 27 of the Constitution, counsel submitted that the Respondent's actions violated the right to due process and natural justice in the manner in which they conducted the disciplinary process against the petitioners and defeated the purpose of the Bill of Rights in the Constitution of Kenya, particularly Article 27 which guarantees the right to equality and non-discrimination. It was further counsel's submission that the MC comprised of 13 members yet the complaint was raised only against the petitioners thereby leading to their suspension.

13. On the issue whether clause 8.2 of the Club's Constitution indemnifies the MC members, counsel submitted that the acts done by the authority of the MC in good faith and with the authority of the Club, expressed or implied, were and are deemed to be the acts of the Club and the members of the MC are specifically indemnified under clause 8(II) of the club's Constitution for such acts. Accordingly, counsel asserted that the petitioners were indemnified by the Club and the members thereof for any cost, losses and expenses which were incurred by

reason of such acts which is the basis of the complaints raised against the petitioners.

14. On the issue whether the Respondent's actions were tainted with malice, counsel submitted that the whole disciplinary process against the petitioners was flawed as the Respondent nominated the interim MC particularly the current Chairman who participated in the elections of 27th March, 2018 for chairmanship of the Management Committee and lost miserably to the 1st Petitioner. In his view, nominating a person as chairman who was rejected by members two months prior to the petitioners' suspension is irrational and confirms prejudgment. Accordingly, he urged the court to allow the prayers sought in the petition.

15. Mr. Mogeni appearing for the Respondent filed written submissions dated 17th December, 2018. Counsel submitted that Section 3 of the Constitution of the Club provides that the trustees shall take over the management of the affairs of the Club in the event that the MC conducts its affairs and activities in a manner inconsistent with the rules, by-laws or resolutions of the Club. Further, he submitted that Section 6(1) of the Constitution of the Club provides that the MC of the Club shall be vested in a Committee known as the "The Management Committee" whose members shall be elected at the AGM and will hold office until the next AGM unless the affairs of the Club are taken over by the trustees. It was his submission that petitioners as members of the MC, together with others not before court, were suspected of financial fraud involving the funds of the Club necessitating the Club to appoint forensic auditors to look into their financial dealings and an interim MC was appointed pending investigations as provided for in the Club's Constitution. In his view therefore, the Respondent acted in accordance with the provisions of the Club's Constitution.

16. Be that as it may, counsel for the Respondent submitted that the decisions of the trustees made on 28th May, 2018 which the petitioners are challenging were approved and adopted by the members in a Special General Meeting held on 26th July, 2018. Furthermore, he submitted that the petitioners have been heard by the Disciplinary Committee which is the mechanism provided for in the Club's Constitution. In his view therefore, the petitioners have not exhausted the processes provided for within the rules and regulations of the Club. Counsel for the Respondent also submitted that despite the fact that fair administrative action refers to administration in public bodies, the Respondent complied with all the lawful and legal requirements in settling the issues involving the management of the Club by the petitioners.

17. To buttress his argument, counsel cited the case of **JNN v Naisula Holdings Ltd [2018] eKLR** where Mativo, J stated that fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by State organs and statutory bodies in the execution of constitutional and statutory duties. The Court further observed that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is constitutionally fragile and unsustainable. Counsel accordingly submitted that the decision in question can only be challenged on grounds of illegality, irrationality and procedural impropriety.

18. Counsel for the Respondent therefore urged the court in determining the issues set out by the petitioners to consider the chronology of events leading to the takeover by the Respondent; the investigation by the forensic auditors, the special general meetings held subsequent to that, and the previous special general meetings where the Club's accounts and the conduct of the petitioners were discussed. He further submitted that the petitioners were given adequate notice of the takeover of management and the reasons communicated to them which they responded to. Accordingly, counsel urged that the petitioners having failed to inform the court of the reasons necessitating the takeover, this petition should be dismissed with costs.

19. Having considered the petition, the responses thereto, submissions by counsel for the parties and authorities relied on, I am of the view that the issue for determination is whether the instant petition is properly before this court and if so, whether it has merit.

20. The petitioners herein are challenging the process in which the Respondent took over the management of the Nairobi Gymkhana Club, a privately owned sports club. The Respondent on the other hand contends that the Club is governed by a Constitution, which prescribes the procedure to be followed in the event of a dispute. Furthermore, the Respondent submits that the right to fair administrative action, which the petitioners have pegged their petition on, is a right against public bodies and not private bodies as is case here.

21. It is this court's policy to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for. This is indeed a requirement by Section 9(2) and (3) of the Fair Administrative Action Act, 2015. This principle was stated by the Court of Appeal in the case of **Republic v National Environment Management Authority ex Parte Sound Equipment Limited [2011] eKLR**.

22. It is settled law that where there exists other sufficient and adequate avenues for resolving a dispute, a party ought to pursue that avenue and not invoke the court process. However, the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. The question is whether the principle is applicable to the instant petition. It is apparent that the petition was filed prematurely as the disciplinary process, which is legislated in the Club's regulations was still ongoing. The petitioners had therefore not exhausted the internal dispute resolution mechanism. This case is for dismissal at this stage but I will nevertheless consider the merits of the petition.

23. The petitioners are challenging the decision of the Respondent made on 28th May, 2018 to take over the management of the Club from the officials of the MC who were elected into office on 27th March, 2018 thereby restricting them from the accessing the offices of the Club. I have looked at Section 3(XI) of the Club's Constitution annexed to the Respondent's Replying affidavit and marked "RT1" and it gives power to the trustees to take over the management and affairs of the Club in the event that the MC conducts its affairs and activities in a manner inconsistent with the rules, by-laws or resolutions of the Club. The question that this court then needs to address is whether there was indeed financial impropriety on the part of the petitioners.

24. The Respondent has annexed herewith the forensic audit report marked "RT4" which recommended that the Club should have a documented governance structure covering all areas of its operations and ensure sufficient controls, oversight and supervision with regard to each process. Another recommendation was that the Club should come up with robust policies for key functions such as finance, procurement and human resource that will ensure consistency in the procedures followed. Lastly, it was suggested that the Club should consider a clear mandate for each of the MC positions to increase accountability. It is on the basis of this report that the Respondent took

over the management of the Club as provided for under Section 3(XI) of the Club's Constitution.

25. Pursuant to the SGM held on 24th May, 2018 it was resolved that a Disciplinary Committee be constituted so that members of the MC who misappropriated funds could be investigated. The petitioners indeed admit that they were invited for the disciplinary hearing on 18th July, 2018 vide an email marked "SS3" in the supporting affidavit of Sandip C. Shah, the 2nd Petitioner herein. Their only contention is that the Disciplinary Committee did not consider their responses to the allegations raised against them thereby suspending them from the Club. Furthermore, a letter dated 11th September, 2018 annexed to the petitioners' supporting affidavit as "SS6" indicates that the petitioners were even given an opportunity to submit in writing their grounds of appeal however it is not clear from the pleadings what became of that.

26. In my view therefore, no convincing argument has been presented by the petitioners to this court to show that the trustees acted outside their mandate or that they improperly exercised their discretionary powers, or that the petitioners were not taken through a fair administrative process. While the right to fair administrative action is a constitutional right, I am of the view that the Respondent followed due process as espoused in the Club's Constitution. Be that as it may, the role of this court is to ensure that rights and fundamental freedoms have not been violated. In executing this function, the court is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the process followed by the decision-maker is proper, and the decision is within the confines of the law, the court will not interfere. This court could only intervene had the trustees misconceived the nature of the discretion conferred upon them and took into account irrelevant considerations or ignored relevant ones, or where the decision was so grossly unreasonable that the decision-maker failed to apply his mind to the matter. The evidence placed before the court clearly shows that the petitioners were taken through a fair process. No violation of the country's Constitution has been disclosed in this case.

27. It is also important to note that the dispute here involves a private members' club and the court should be very slow in wading into the affairs of such an organization. Members of private clubs should be allowed to run their affairs without unnecessary oversight by courts. The petitioners have not demonstrated that their treatment contravened any provisions of the Constitution. Their averments that they were discriminated upon was rebutted by the Respondent who indicated that other members of the MC who were implicated in the forensic report were also taken through the disciplinary process. From the pleadings filed in court, it is quite clear that the right to fair hearing was protected. The petitioners were given an opportunity to appear before the Disciplinary Committee and they did so.

28. In view of what I have stated in this judgement, I am inclined to disallow the petition and I do so. The petition is therefore dismissed. The petitioners were defending their individual rights. This is not public interest litigation. Costs should therefore follow the event. The petitioners will therefore meet the Respondent's costs for this litigation.

Dated, signed and delivered at Nairobi this 27th day of February, 2020.

W. Korir,

Judge of the High Court