



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

PETITION NO. 41 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION RULES 2013

AND

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF ARTICLES 1,2(1),10,22,36,49,73,157 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

DANIEL MUTISYA KIVUVA.....PETITIONER

VERSUS

MACHAKOS GOLF CLUB.....RESPONDENT

JUDGEMENT

1. The petitioner sued respondent for suspending him from the club membership. The petitioner pleaded that he was tried before a panel at the instance of the respondent on 28.10.2019 and was not accorded a fair trial as there were no witnesses called to testify against him hence the respondent acted ultra vires and by suspending the petitioner the same was in bad faith because the petitioner happens to be a Wiper Party supporter. The petitioner sought remedies declaring that the petitioner's fundamental rights under Articles 29,35,47,49 and 50 of the Constitution were infringed, a declaration that the trial he was subjected to was unconstitutional and an order that his membership be reinstated by the respondent.

2. Contemporaneously with the petition was the notice of motion application dated 22.11.2019 and what remains for determination is prayer three thereof that the decision to suspend the applicant from accessing the club be set aside and or suspended pending the hearing and determination of the petition.

3. The grounds in support of the application are; that the applicant was a member of the respondent and that the suspension was calculated to interfere with the applicant's enjoyment of the club services; that the applicant was never given a fair hearing by the respondent and neither were investigations carried out; that the disciplinary proceedings were conducted unfairly and the applicant was never afforded an opportunity to rebut evidence and that the same was unconstitutional and violated the applicant's legitimate expectation to fair administrative action.

4. In support of the application was an affidavit deponed by the applicant on 23.11.2019 where he averred that vide letter dated 28.10.2019 he was summoned by the respondent's disciplinary committee for insulting one of the members of the club and that a person called Collins Kitaka was said to have heard the insult. It was averred that no witness was called to support the evidence but then the respondent went ahead to suspend the applicant for a 3 month period from 28.10.2019. It was averred that the applicant is diabetic and golf is a means to keeping him healthy and now urges the court to quash the decisions that have been made by the Disciplinary committee as the same are contrary to natural justice.

5. In opposition to the application is a notice of preliminary objection dated 2.12.2019 and a replying affidavit deponed on even date by Boniface Kavuvi. In the preliminary objection, counsel B.M. Mungata and Co. Advocates was of the view that the court lacked jurisdiction to determine the application and the petition in view of the memorandum, articles of association and the bylaws of the respondent. It was stated 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. It was stated that the applicant filed an appeal against the decision of the subcommittee which was pending and that the court could not usurp the powers of the management committee and members' powers through a general meeting.

6. Vide the replying affidavit, Boniface Kavuvi, the chairman in the disciplinary committee of the respondent, averred that the respondent was established in 1992 and that the disciplinary subcommittee was set up to handle discipline of its members. It was averred that a complaint was received to the effect that the applicant had insulted one of the members of the respondent and thereafter the applicant was notified to appear for a hearing on 19.10.2019 vide letter dated 13.10.2019. It was averred that the applicant responded by letter dated 16.10.2019 stating that the date was not convenient and the hearing was rescheduled to 25.10.2019 and again on 25.10.2019 the applicant wrote another letter stating that the said date was not convenient and in compliance with the rules of natural justice the hearing was rescheduled to 28.10.2019. It was averred that on the date of the hearing, Collins Kaloki testified in the presence of the applicant and at the close of the complainant's case, the petitioner was put on his defence where he testified together with his witnesses as evidenced by the minutes marked BK7B. It was averred that a resolution was passed through voting suspending the applicant whereupon the applicant appealed against the decision to the management committee vide letter dated 30.10.2019 and on the date fixed for hearing of the appeal, the applicant did not appear hence the appeal is pending for determination. It was averred that the petitioner had not exhausted the procedures for dispute resolution and in any event the applicant had issued a bounced cheque for drinks consumed and was due for suspension. It was averred that the respondent had powers to suspend the applicant and that there were rules and regulations that governed the applicant and that the applicant's behaviour was against the said rules and regulations governing all members. It was averred that fair administrative action is not applicable for a private members club with rules and by laws and in addition the applicant had other forms of exercise at his disposal other than golf in order to regulate his health issues.

7. Vide further affidavit deposed on 4.12.2019, it was averred by the applicant that the member who complained of being insulted did not participate in the disciplinary proceedings as a witness. It was averred that if a member felt that his rights were infringed, then the court had jurisdiction to entertain an application for a threatened infringement of his rights. It was averred that due process was not followed in the disciplinary process and that the evidence did not support the recommendations of the committee. It was further averred that no particular by law was cited to support the recommendations of the disciplinary committee. It was also averred that the issue of pending bills was not the subject of the disciplinary process.

8. Since the prayers sought in the petition and the application were similar, directions were taken to the effect that the petition, application and the preliminary objection be canvassed vide written submissions that were highlighted on 6.12.2019. Learned counsel for the applicant on the issue of jurisdiction by this court to handle the petition and the application placed reliance on Article 23 of the Constitution and submitted that the court had the requisite jurisdiction. On the issue of whether the court could inquire into the affairs of a private club; counsel placed reliance on the case of **Rose Wangui Mambo & 2 Others v Limuru Country Club & 17 Others (2014) eKLR** and submitted that the decision to suspend the applicant was backed by no evidence and urged the court to find that no internal mechanism has been demonstrated to resolve the instant dispute. Counsel urged the court to dismiss the preliminary objection. In addressing the main petition, counsel submitted that the decision of the respondent did not indicate the reasons for striking out the petitioner's defence and that by suspending the petitioner un-procedurally the same amounted to discrimination contrary to Article 27 of the Constitution. It was submitted that the suspension of the petitioner without offering a fair hearing, the same was a contravention of Article 28 of the Constitution and that the petitioner's freedom of association is limited under Article 36 of the Constitution.

9. Learned counsel for the respondent submitted that the decision to suspend the petitioner was based on article 19 as read with 35g and i together with rules 4.4 to 4.6 of the by-laws of the Respondent. It was submitted that in line with article 159(2)(c) of the Constitution, there were mechanisms provided for dispute resolution and there was an appeal system as per the memorandum and articles of association as well as the by-laws of the respondent to which the petitioner has not challenged their constitutionality. Counsel submitted that there was an appeal that was pending culminating to two parallel processes running at the same time meaning that the petition was premature. Reliance was placed on the case of **East Africa Pentecostal Churches Registered Trustees & 1754 others v Samuel Muguna Henry & 4 others (2015) eKLR**.

10. Learned counsel submitted that the petitioner had not given the exact rights that were infringed. Reliance was placed on the case of **Anarita Karimi Njeru v R (1976-80) 1KLR**. According to counsel, it is undisputed that the respondent had disciplinary powers and it was misleading that the petitioner alleged that he was not accorded a fair hearing. Counsel urged the court to dismiss the petition and application, allow the preliminary objection and order the petitioner to prosecute his appeal that he had lodged with the respondent.

11. Having considered the pleadings on record together with the annexures and the submissions of the parties, the issues to be determined are whether the court has jurisdiction to entertain the application and petition; whether the petition and application have merit and what orders may be granted by the court.

12. The Respondent is a private golf club, registered as a company limited by guarantee and not having share capital under the Companies Act Chapter 486, Laws of Kenya, with the majority of its members who inter alia promote golf. The petitioner is stated to have become a member. In the application for membership, it was agreed by the applicant that they shall be subject to the Club's Memorandum and Articles of Association and by-laws.

13. Section 19 of the Articles of Association, states, in relevant part, that the Club's Board of Directors may suspend a member after passing a resolution at a meeting however at least one week before such meeting the Board of Directors shall ensure that the member had an opportunity of giving an explanation.

14. The Bylaws are silent on the procedural rules for conducting a disciplinary action against a member but however article 35g gives the directors power to make such bylaws. There is no evidence of procedures that governed the hearing nevertheless there is evidence that a hearing was conducted. There is evidence that the petitioner was notified of the hearing, of the rescheduling of the hearing and that the petitioner attended the hearing and that a decision was made and communicated to him. There is evidence that the petitioner appealed against the decision and was invited to a hearing on 29.11.2019.

15. The jurisdiction of the High Court of Kenya in constitutional matters derives from the provision of Article 23 of the 2010 Constitution; which states as follows:

"23. Authority of courts to uphold and enforce the Bill of Rights

(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.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts 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.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.."

16. The jurisdiction of the Constitutional Court is limited to the interpretation or construction of provisions of the Constitution; and determining whether a person, or institution has acted in a manner that violates a provision of the Constitution. In this regard in as far as this court is tasked to determine whether the actions of the respondent violated named provisions of the constitution, this court has jurisdiction to entertain the petition.

17. In the case of **Mumo Matemo v Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013) e KLR**: the court held:

"if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

In the above case, the Court said:

"...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle"

18. 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. Have the impugned actions of the respondent of suspending the petitioner, contravened the respective provisions of the Constitution, as are alleged by the petitioner? There is only a shift of evidential burden onto the Respondent upon the Petitioner either raising a prima facie case necessitating adverse proof by the Respondent; or where the evidence required to determine the matter before Court is either in the possession, or only within the knowledge, of the Respondent. This is in accordance with the provisions of section 107 of the Law of Evidence Act which states as follows: –

"107. (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person..."

19. The petitioner's case is that he was not afforded a fair trial. However the documents presented and the affidavit evidence of the respondent reveals the contrary. The respondent has presented evidence to the effect that the petitioner was notified to attend a hearing, he was heard and in fact the evidence that was presented was recorded. The petitioner was duly invited for the hearing which he sought adjournment a few times which request was acceded to by the respondent. Again the petitioner duly gave his defence and even called witnesses. Upon the decision being rendered he lodged an appeal which is pending determination. I am satisfied that the petitioner was given an opportunity to be heard. The application seems to be a judicial review camouflaged as a constitutional petition as judicial review is not available to the petitioner. 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. **See R v Lord Chancellor ex parte Hibbit and Saunders [1993] COD 326.**

20. Moreover, it is well established that courts will not interfere with the internal affairs of voluntary associations. A court, therefore, will not determine, as a matter of its own judgment, whether a member should have been suspended or expelled. See **Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others [2014] eKLR**. Thus, "when a plaintiff challenges a voluntary organization's decision, the case will be dismissed as non-justiciable unless the plaintiff alleges facts showing (i) the decision was inconsistent with due process, or (ii) the organization engaged in arbitrariness, fraud, or collusion." **McAdoo v. Univ. of N.C. at Chapel Hill, 225 N.C. App. 50, 72, 736 S.E.2d 811, 825 (2013).**

21. In the instant case, the petitioner had not challenged the constitutionality of the bylaws and articles of association of the respondent and has not argued that the Club's decision to suspend his membership was arbitrary, fraudulent, or collusive. Therefore, my decision is limited to whether the Club's decision met the constitutional threshold. I must also bear in mind that the available remedies were exhausted. The Court of Appeal in Trinidad Tobago case of **Damian Belfonte vs The Attorney General of Trinidad and Tobago CA 84/2004** held:

“The opinion in Jaroo has recently been considered and clarified by the Board in **Attorney General vs Ramanoop**. Their Lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their Lordships words:

“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.

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.”

22. In **Republic vs. the Commissioner of Lands, ex parte Lake Flowers Limited (Number HC Misc. Application No. 1235 of 1998)** it was held that the availability of other remedies can be an important factor in exercising whether or not to grant the relief.

23. To determine whether the respondent followed its own internal rules and procedures would necessitate a look at the adopted procedures. The charter, articles of association and bylaws of an association may constitute a contract between the organization and its members wherein members are deemed to have consented to all reasonable regulations and rules of the organization, traditional rules of contract interpretation apply when assessing whether the club followed its own internal rules and procedures. See **Wood v Odessa Waterworks Co (1889) 42 Ch D 636**. The intention of the parties must necessarily be found within the contract or the statute of the by- laws or whole written instrument that set up the club.

24. As previously discussed, this Court noted that there was prior notice and an opportunity to be heard that was granted by the respondent and this was done as was required and set forth in the organization's articles of association. The petitioner's contention that contend that the Club did not give him an opportunity to be heard is not correct as the record evidence bears witness. In addition there is evidence of notice in accordance with paragraph 52 of the articles of association.

25. In **Onyango Oloo v. Attorney General [1986-1989] EA 456** it was observed that “The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellants and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio.”

26. I conclude that the club complied with the requirements of the Articles of Association and by laws that govern the petitioner when it handled the disciplinary matter. The undisputed evidence illustrates that and the applicant was notified to appear for a hearing on 19.10.2019 vide letter dated 13.10.2019. It was averred that the applicant responded by letter dated 16.10.2019 stating that the date was not convenient and the hearing was rescheduled to 25.10.2019 and again on 25.10.2019 the applicant wrote another letter stating that the said date was not convenient and in compliance with the rules of natural justice the hearing was rescheduled to 28.10.2019. The evidence shows that on the date of the hearing, Collins Kaloki testified in the presence of the applicant and at the close of the complainant's case, the petitioner was put on his defence where he testified together with his witnesses as evidenced by the minutes marked BK7B. The evidence shows that the applicant appealed against the decision to the management committee vide letter dated 30.10.2019 and on the date fixed for hearing of the appeal, the applicant did not appear hence the appeal is pending. Because the respondent adhered to rules of natural justice and afforded the petitioner an opportunity to be heard, and there is yet another forum available to the petitioner which is that of appeal, at this moment there is no justification for the court to interfere in the operation of the respondent. I also find that there is no demonstration of any manner howsoever that the petitioner's rights were infringed.

27. In the result it is my finding that the application and the petition lodged by the Petitioner lacks merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 18th day of December, 2019.

D. K. Kemei

Judge