



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CONSTITUTIONAL PETITION No. 29 of 2017

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS NAD FREDPMS UNDER ARTICLES 1, 2, 19, 20, 21, 22, 23, 43, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE SOCIETIES ACT

AND

IN THE MATTER OF NYANZA CLUB

BETWEEN

TRISHUL VIJAY CHOCHAN.....PETITIONER

AND

MITCH MENEZES.....1ST RESPONDENT

GEOFFREY OBUON.....2ND RESPONDENT

ALBERT OJONY.....3RD RESPONDENT

NAVIN SHAH.....4TH RESPONDENT

(Being sued respectively as chairman, vice chairman, secretary and treasurer of the management committee of Nyanza Club)

### JUDGMENT

#### Background

1. On 1st December, 2017, the petitioner had an exchange with a staff member of Nyanza Club (hereinafter referred to as *the Club*).
2. The waiter complained to the respondents who summoned the petitioner for a disciplinary hearing on 14th December, 2017.
3. On 19th December, 2017, the petitioner was served with a letter dated 14th December, 2017, from the respondent expelling him from *the Club*

#### Applicant/Petitioners' Case

4. The petitioner's grievance is that there is a violation of his constitutional right and natural justice in that;
  - i. During the disciplinary hearing, he was made to defend himself against a non-existent offence
  - ii. He was not allowed to give his statement or side of the story

- iii. He was not allowed to question, cross-examine or even see the accuser during the hearing
- iv. His witnesses were not allowed to give evidence
- v. He was condemned unheard
- vi. He is being targeted for victimization and witch-hunt
- vii. The decision of the respondent is meant to silence disgruntled members of **the Club**

Petitioner therefore prays for:

***i. A declaration be issued that any arbitrary suspension, expulsion, expulsion and/or removal of the petitioner as a member of Nyanza Club without consideration of due process and all tenets of natural justice is a violation of Articles 27 and 47 of the Constitution and therefore null and void***

***ii. An order quashing the purported expulsion of the petitioner from the membership of Nyanza Club and reinstating him back to full membership without loss of benefits***

***iii. An order of compensation***

***iv. Costs***

***v. Any other order that the Honourable Court may deem fit and just to grant***

#### **Respondents' case**

5. The respondent's response is contained in an affidavit sworn by the 2nd respondent on 9th January, 2018. He avers that on 2.12.17, respondents received a written complaint marked F1(a) from a waiter, one Fredrick Odhiambo that the petitioner had refused to pay his bill after being served and had without provocation slapped and insulted the waiter.

6. That upon receipt of the complaint, the respondents formed an opinion that petitioner had breached section 7 (b) of **the Club's** by-laws marked F2 and he was invited for a hearing.

7. That the respondent convened a Disciplinary Committee meeting on 14.12.17 after issuing relevant notices to the petitioner and Fredrick Odhiambo and that after hearing them and the witnesses concluded that this was a fit case for expulsion under section 16(a) of **the Club's** Constitution as shown in the minutes marked F3.

8. The 2nd respondent that the petitioner stormed into the committee room whilst the waiter was giving his testimony, became arrogant, rude and obnoxious, and refused to apologize for his behaviour or accept his wrong doing.

9. The 2nd respondent further avers that this petition is premature since the petitioner has not appealed the decision of the respondents to the General Meeting of **the Club**.

#### **Petitioner's reply**

10. In reply to the replying affidavit, petitioner avers that prior to service of the replying affidavit, he was unaware of the existence of **the Club's** by-laws marked F2.

#### **PARTIES' SUBMISSIONS**

11. When the petition came up for hearing on 16th January, 2018, Mr. Odeny for the petitioner and Mr. Awino for the respondent agreed to dispose off the petition by way of written submission which they dutifully filed.

#### **Petitioner's submissions**

12. It was submitted for the petitioner that the petition is brought in good faith, states with precision the complaint to enable the respondents know their acts or omissions and identifies the rights accruing that can be enforced.

13. The Petitioner contends that his right to fair hearing under Article 50 (1) and to fair administrative action under Article 47 was infringed when the Respondents failed to serve him with the complaint and denied him a chance to hear and cross-examine the accuser or give evidence during the disciplinary proceedings.

14. Petitioner also submitted that the respondents did not serve him with the letter and statement of complaint raised against him or afford him any chance to either appear before it to defend himself or to file any substantive response to the allegations against him. According to the petitioner, he was expelled from **the Club** as punishment for being vocal about failure of the respondents' waiters to issue official bills for services offered and complaints about loss of members' money.

15. He therefore holds the view that the disciplinary hearing process went against the rules of natural justice that dictate that one cannot be condemned unheard. The petitioner additionally submitted that the Honourable Court has jurisdiction to intervene in affairs of private members' clubs to resolve disputes involving redress of violation of constitutional rights. The petitioner placed reliance on the decisions of Anarita Karimi Njeru vs. The Republic (1976-80) 1 KLR and Mumo Matemu vs. Trusted Society of Human Rights Alliance & Others [2013] eKLR and Rose Wangui Mambo 2 Others V Limuru Country Club & 17 Others [2014] eKLR.

### **Respondents' submissions**

16. The respondents submitted that due process was followed before the petitioner was expelled and that petitioner was summoned to answer charges against him as has been demonstrated in annexure TVC 4 attached to the petitioner's affidavit supporting the Notice of Motion filed on 22nd December, 2017. The respondents further submitted that the accuser was given an opportunity to state his case and the petitioner to defend himself and call his witnesses but he called none. Respondents contend that the petitioner's remedy lies with an appeal to the General Meeting and that this petition is on that ground premature since petitioner has not exhausted internal procedures available to him.

17. The respondents placed reliance on the decisions of Republic v Chuka University Ex-parte; Kennedy Omondi Waringa & 35 Others [2016] eKLR and Republic v Commissioner of Domestic Taxes EX-parte I & M Bank Ltd [2017] eKLR.

### **Issues**

18. The main issues in this Petition may be stated as follows.

*a) Whether the Petition meets the competency threshold set out in the case of Anarita case*

*b) If so, whether the suspension of the petitioner by the respondents amounts to a violation of the Petitioner's rights and freedoms guaranteed under the Constitution.*

*c) If answer to (b) above is in the positive, what are the appropriate reliefs*

### **Analysis and Determination**

19. It is now well settled that parties coming to court and alleging violation of Constitutional rights must with reasonable precision spell out the relevant Articles of the Constitution and further particularize with reasonable precision the alleged violations as well as how the violations were committed. This legal proposition was meticulously explained in the case of Anarita Wairimu Njeru -v- Republic (Supra) cited by the petitioner. In Mumo Matemu -v- Trusted Society of Human Rights Alliance and 5 Others (Supra), the Court of Appeal revisited the proposition in Anarita's case and stated as follows:

*“However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). 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.”*

20. The competency threshold does not however constitute an absolute precision in drafting. The rationale is that a party should be aware of the case it is facing and the allegations raised. Thus in the case of Kevin Turungalthagi -v- Hon. Justice Fred Ochieng & Others [2015] eKLR, Onguto J. stated that the principles espoused and championed in Anarita Karimi Njeru -v- Republic (Supra) must be applied with adequate caution to ensure deserving parties are not denied justice, or access to justice, without adequate hearing and consideration of their cases on merit.

21. The threshold of competency is met if a court can painlessly identify, from the Petition, the Articles allegedly violated and also the alleged manner of violation.

### **Violation of Article 47 and 50 of the Constitution**

22. The pleadings herein disclose that the Petitioner is alleging that his right to fair hearing was not observed. The Petitioner has detailed Articles 47 and 50 of the Constitution as the Articles violated. These two Articles guarantee the right to fair administrative action and fair hearing respectively.

23. The Petitioner has also detailed the alleged manner of violation when he complains that respondents failed to serve him with the letter and statement of complaint raised against him and denied him a chance to hear and cross-examine the accuser or give evidence during the disciplinary proceedings.

24. The provisions of the Constitution allegedly violated were cited with adequate specificity. The manner in which they were allegedly violated was also detailed albeit in a windy manner. The remedies sought for the violation were also clearly articulated. The court understood with little difficulty the Petitioner's grievances. I have no doubt that the Respondents certainly knew and appreciated the claim they were up against. From the foregoing; I hold the view that the petition meets the basic and reasonable minimum requirements of a petition.

25. There is no doubt that the burden of proof always rests upon the Petitioner who alleges any violation. It is for the Petitioner to present a factual basis as well as the evidence in support to enable the court to make a determination whether there has been a violation. In the case of Githunguri Dairy Farmers Co-operative Society Ltd –v- The Attorney General and 2 Others HCCP No. 257 of 2015 [2016] eKLR, the Court rendered itself as follows:

**“[46] The complainant has to satisfy an evidential burden to show or establish that the specific right existed and that it had been restricted or violated and then the burden fell on the State to prove on a balance of probabilities that such violation or alleged violation was saved by the Constitution.**

26. In an effort to prove on a balance of probabilities that his rights were violated, the Petitioner stated that the Respondents, without giving him a hearing proceeded to expel him from the Club indefinitely. This led to a denial of access to the Club of himself and his family. The Petitioner further states that there was no basis for such action. The Respondents’ contention is however that due process was followed before the petitioner was expelled.

27. At the core of the Petition is the manner in which the expulsion order was reached. The Petitioner referred to both Articles 47 and Article 50(2) of the Constitution. These two Articles respectively deal with the right to fair administrative action and to fair hearing.

28. Article 47(1) of the Constitution provides that:

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

29. Article 47 forms the basis and foundation of the High Court’s powers and jurisdiction under Article 165 (6) of the Constitution. This court has a supervisory jurisdiction over the subordinate courts and over any person or body or authority, exercising a judicial or quasi-judicial function. Such jurisdiction is in addition to any appellate jurisdiction.

30. Fair hearing under Article 47 would entail the right to a prior and adequate notice before any adverse action is taken or decision is made. Besides, there is also the resulting right to be afforded an opportunity to be heard.

31. The Petitioner had the duty and burden to show that it had a right which has apparently been infringed and then the burden moved to the Respondents to show on a balance of probabilities that the violation or alleged violation was justified and reasonable: (see Catholic Commission for Justice & Peace in Zimbabwe –v- Attorney General [1993] 2 LRC (Court) 279.)

32. I have perused the proceedings of the Disciplinary Hearing. At page 2 of the minutes attached to the replying affidavit marked F3, Minute MC4:141217 in summary, states as follows:

- **The Chair read a letter from the aggrieved waiter Fredrick Odhiambo against a member No. 3090 Trishul Vijay Chohan**
- **The chair then called the complainant Fredrick Odhiambo in, and gave him a chance to state his case**
- **After a lengthy interrogation by members, the Chair let him leave**
- **The Chair then called in the accused member**
- **He was then asked to give his side of the story**
- **After a lengthy interrogation and questions by the members, the Chair thanked him for coming and let him go and await a determination of his case**
- **The chair then called the barman and the security guard who happened to have been mentioned by the complainant**

33. In its decision, the disciplinary Committee in conclusion stated as follows:

**“After consideration to the alleged offence which was otherwise proved by all witnesses of the complainant and the accused witnesses absconding hearing, it was therefore resolved that the member be expelled forthwith .....**”

34. That the Respondents have powers and jurisdiction to discipline its members is not in dispute. The question to be determined is whether in arriving at its decision the due process of the law was adhered to. Article 47(1) and (2) of the Constitution provide:

**(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.**

35. The proceedings of the Disciplinary Hearing evidently confirm the petitioner’s allegation that he was denied an opportunity to hear what his accuser said against him and to cross-examine him. There’s further evidence that the complainant’s witnesses testified in the absence of the petitioner and that the petitioner was not afforded an opportunity to cross-examine the said witnesses or call his own witnesses.

36. With respect to the denial of the opportunity to call witnesses, the petitioner on 1st March, 2018 filed a supplementary affidavit of Chand karakant Rabadia who avers that he accompanied the petitioner to the disciplinary hearing but was denied entry into the meeting room and was not called as a witness.

37. When one looks at the said proceedings, the only rational conclusion one arrives at is that the proceedings before the Committee was not

conducted in accordance with the principles of reasonableness and procedural fairness.

38. From the proceedings of the Disciplinary Committee on record, there is evidence to support the applicant's allegations and hence this Court finds that the disciplinary process adopted by the Respondents failed to meet the threshold of a fair administrative action.

### **Court's jurisdiction**

39. The jurisdiction of the Court is also challenged on the basis that there are in existence, alternative dispute resolution mechanisms within **the Club** itself. The respondents aver that the petitioner ought to have appealed to the General Meeting of **the Club** first, before approaching this Honourable Court, to canvass the perceived violations of his constitutional rights.

40. The respondents further contend that the petitioners' grievances could effectively be resolved within the realm of the Club's constitution and rules.

41. It is indeed true that the Constitution expressly recognizes the place and importance of alternative means of dispute resolution. One of the principles guiding the exercise of judicial authority under **Article 159(2) (c)** is that; **"alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)."**

42. While I agree with the decisions in **Republic v Chuka University Ex-parte; Kennedy Omondi Waringa & 35 Others [2016] eKLR** and **Republic v Commissioner of Domestic Taxes EX-parte I & M Bank Ltd [2017] eKLR** cited by the respondents in support of alternative dispute resolution, the cases are distinguishable since there were statutory appeal processes available to the petitioners in the said cases which is not the case in this petition.

43. The court was referred to Article 16(a) of **the Club's** Constitution. Article 16(a) is titled **'Forfeiture of Membership'** and provides in part as follows;

***"...In the case of any infringement of the Rules or By-Laws of the Club, or of 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 a right of appeal to a General Meeting....."***

44. As to whether the internal mode of dispute resolution provided by the Club is effective can only be determined from the unique facts of the case. From the material before this court, I am unable to find that such internal mechanism was adequate or even feasible for the petitioner; the respondents themselves having breached the Club's Constitution by failing to give the petitioner an opportunity to explain or answer the complaint against him.

45. Consequently, this court's finds and holds that it has jurisdiction to adjudicate over the issues presented in the petition herein.

### **Orders**

46. Consequently, the court makes the following orders:

***1. A declaration be and is hereby issued that any arbitrary expulsion and/or removal of the petitioner as a member of Nyanza Club without consideration of due process and all tenets of natural justice is a violation of Article 47 of the Constitution and therefore null and void***

***2. An order be and is hereby issued quashing the purported expulsion of the petitioner from the membership of Nyanza Club and reinstating him back to full membership without loss of benefits***

***3. Costs ordinarily follow the event. I have the discretion on the issue of costs. However, I make no order as to costs taking into account the relationship between the parties to these proceedings.***

**DATED AND DELIVERED THIS 15TH DAY OF MARCH 2018**

**T.W. CHERERE**

**JUDGE**

Delivered in open court in the presence of-

**Court Assistants** - Felix &Carolyne

**For the Applicant/Petitioner - Mr Odeny**

**For the Respondents** - Mr Mbeka/Mr Ngala