



REPUBLIC OF KENYA



**Din & another v Malik & 4 others (Petition E093 of 2022) [2025] KEHC 2445 (KLR)
(Constitutional and Human Rights) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2445 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E093 OF 2022
LN MUGAMBI, J
FEBRUARY 13, 2025**

BETWEEN

ZULFIKAR DIN 1ST PETITIONER

MOHAMED TARIQ KHAN 2ND PETITIONER

AND

SAHIR MALIK 1ST RESPONDENT

ZAFAR NIAZ 2ND RESPONDENT

NAUSHAD HAKADA 3RD RESPONDENT

AYUB KHAN 4TH RESPONDENT

EBRAHIM FIDAHUSSEIN 5TH RESPONDENT

(Being sued in their capacity as Chairperson, Vice Chairperson, Treasurer, Secretary, Assistant Treasurer and members of the Managing Committee of SIR ALI MUSLIM CLUB)

JUDGMENT

1. The Petition dated 7th March 2022 is supported by the Petitioners' affidavits in support of the same date and further affidavits dated 13th October 2023.
2. The gravamen of this Petition concerns the Petitioners allegation that the Respondents expelled them from the Sir Ali Muslim Club (SAMC) without any regard to principles contained in Articles 47 and 50 of *the Constitution*. For this reason, the Petitioners seeks the following relief:



- a. A declaration that the proceedings of 1st December, 2021 and the verdict by the Respondents to expel the Petitioners from the membership of Sir Ali Muslim Club as contained in the letter dated 8th December, 2021 is unconstitutional, illegal and void ab initio.
- b. A declaration that the Respondents have breached, infringed and/or violated the Petitioners' right to fair administrative action and the right to a fair hearing.
- c. An Order of certiorari to bring into this Court to quash the decision by the Respondents to expel the Petitioners from the membership of Sir Ali Muslim Club contained in the letter dated 8th December, 2021.
- d. An Order of mandamus do issue directing the Respondents to forthwith and unconditionally reinstate the Petitioners as members of Sir Ali Muslim Club and to their status as Assistant Secretary and Sports Secretary respectively, entitled to all rights and privileges as conferred by the Constitution of the Club.
- e. Damages.
- f. Any further orders and/or directions as this Court shall deem fit to grant.
- g. Costs of and/or incidental to these proceedings.

Petitioners' Case

3. The Petitioners aver that they are the former Sports Secretary and Assistant Secretary of Sir Ali Muslim Club.
4. The Petitioners depone that by a notice dated 13th September 2021, some members of the Club requested for an Extra – Ordinary General Meeting with a view of taking disciplinary action against the 1st, 2nd and 4th Respondents.
5. Thereafter, they depone that the 4th Respondent vide a letter dated 20th September 2021, informed the 2nd Petitioner that a complaint had been lodged against him on 18th September 2021 by 14 club members.
6. Congruently, it is alleged that the 4th Respondent informed one of the club members, Atif Darr, that another complaint dated 25th September 2021 had been lodged by the 113 club members against the Petitioners. This complaint in addition to highlighting the various allegations also called for a Special General Meeting to take disciplinary action against the Petitioners.
7. They depone that following these complaints against some of the members of the Managing Committee, the 4th Respondent on 22nd October 2021 issued a Notice to the Club members inviting them for an Extra- Ordinary General Meeting scheduled for 23rd January 2022. The aim of this meeting was to address the 1st, 2nd and 4th Respondents' leadership issues.
8. Soon after, on 30th November 2021, the 4th Respondent also shared the Agenda for their monthly Committee meeting which was to be held on 1st December 2021.
9. The Petitioners allege that in a shocking turn of events, the 3rd Respondent at the Committee meeting moved a motion to have the Managing Committee discontinue the set Agenda and instead deliberate on the Petitioners conduct. They claim that this led to a degeneration of the meeting into a shouting match which led the Petitioners to walk out of the meeting in protest. Moreover, they add that they were not afforded an opportunity to defend themselves against the allegations brought against them.



10. Consequently, the 4th Respondent in an email communication dated 8th December 2021 informed the Petitioners that they had been expelled from the Club. According to the Petitioners, the Respondents had a pre-determined goal of expelling them from the Club and thus used the meeting dated 1st December 2021 as a ploy to conduct the disciplinary proceedings.
11. The Petitioners take issue with the Respondents actions for their failure to follow the due process which is in violation of their right to a fair administrative action, a fair hearing and rules of natural justice.
12. Furthermore, the Petitioners point out that they were never issued with a notice to show cause at the meeting held on 1st December, 2021; that no hearing notice was issued to them concerning a disciplinary hearing; that they were never accorded an opportunity to be heard, make representations or defend themselves; equally, that they were never furnished with the materials or evidence that was used to arrive in the decision to expel them from the club and likewise that the meeting held on 1st December, 2021 was advertised as a normal monthly committee meeting and not a disciplinary meeting.
13. The Petitioners in their further affidavits aver that subsequently, the Respondents filed a Notice for the Bi – annual General meeting scheduled for 14th April 2023 wherein an election was conducted and the four re-elected.
14. The Petitioners are aggrieved as their expulsion from the Club was never raised as an Agenda in this meeting as required under Article 16 of the Club’s Constitution. In essence, the Managing Committee’s actions require the confirmation of the members of the Club to be final, however this was not done.
15. The Petitioners as well point out that the 1st Respondent had no authority to swear the Replying affidavit on behalf of the Club as no authority was produced in line with Article 7(iii)(g) of the Club’s Constitution. The Petitioners assert thus that the Respondents actions even in prosecuting this matter is a clear indication of the callous manner in addressing their issues and a display of their ulterior motive.

1st Respondent’s case

16. In response, the 1st Respondent who is the Chairman of the Club and on behalf of the Club, filed his Replying Affidavit sworn on 5th October 2023. He makes known that the Club is a private members club registered under the [Societies Act](#). Accordingly, the Club members are bound by the provisions of their Constitution. Additionally, he states that the day to day affairs of the Club are governed by the Managing Committee which is elected by the members.
17. With regard to disciplinary matters, he informs that Constitution does not provide a detailed procedure of the same. However, the Management Committee’s decision on a disciplinary issue is not final. For this reason, an aggrieved member has a right to appeal the decision of the Managing Committee at the Bi - annual General Meeting of the Club. In addition, a party is granted an opportunity to be heard concerning the complaints lodged against it. In view of this, he asserts that the Petitioners failed to exhaust the internal mechanism as required under the [Fair Administrative Action Act](#) before filing this matter in Court.
18. In response to the Petition, he depones that the Secretary of the Club received a complaint dated 18th September 2021 against the 1st Petitioner and one dated 23rd September 2021 against the 2nd Petitioner. In like manner, they also received a complaint against some of the members of the Managing Committee seeking a vote of no confidence on 13th September 2021. Lastly, they also received a complaint from 113 members against the Petitioners.



19. He posits that the complaints against some members of the Managing Committee was a Petition for their removal which can only be conducted at a Special General Meeting. He claims that arranging such a meeting is an expensive affair which cannot be convened on short notice. He adds that at the time the Club was undergoing financial constraints. On the flipside, he asserts that disciplinary issues lie within the scope of the Managing Committee not the General Meeting.
20. He depones that the 1st Petitioner was to be heard by the Managing Committee in a meeting set for 25th September 2021 however failed to attend the meeting. He avers that the 1st Petitioner was duly served with the complaints and even responded to the same.
21. He states that the 1st Petitioner who attended the meeting scheduled for 1st December 2022 was granted an opportunity to be heard. However, it is claimed that the 1st Petitioner came to the meeting with the intention of disrupting the meeting.
22. He states that despite this, the Managing Committee resolved to proceed and decide on the matter. He adds that in the course of their deliberations, the 2nd Petitioner was abusive and violent as can be seen from the adduced video evidence attached to the 1st Respondent's affidavit. He in addition states that the Managing Committee conducted the meeting as required by the Club's Constitution.
23. It is contended therefore that the Petitioners case is misplaced as the allegations made against the Petitioners were comprehensive. He further informs that no hearing notice was issued to the Petitioners as they waived their right by accepting to participate in the proceedings.
24. Equally he asserts that the Petitioners were accorded an opportunity to be heard but chose to create chaos and issue threats. He adds that being that the Petitioners have gone on to file suits against these complaints, demonstrates that they were aware of the evidence against them.
25. On this premise, he argues that the meeting dated 1st December 2021 was properly convened and that the Petitioners expulsion was in line with the due process. He accordingly claims that the instant Petition is malicious and an attempt to disrupt the smooth running of the Club.

Parties Submissions

Petitioner's Submissions

26. On 7th December 2023, the Petitioners through Tobiko, Njoroge and Company Advocates filed submissions and highlighted the issues for determination as: whether due process was followed before the decision to expel the Petitioners was made and if so whether the Petitioners are entitled to damages.
27. Counsel submitted that in light of the Petitioners averments it was certain that due process had not been followed by the Respondents before they were expelled. Counsel noted that the right to a fair hearing as envisaged under Article 47 of *the Constitution* entails that a prior and adequate notice is issued and an opportunity to be heard is granted before an adverse action is taken against a party. Counsel submitted that this Article echoes the necessity of the rules of natural justice before an action is taken.
28. Moreover, Counsel submitted that Article 47 of *the Constitution* which is operationalized by the *Fair Administrative Action Act* requires that an administrative action be expeditious, fair, lawful and reasonable and where such an action affects a party's fundamental rights, written reasons be issued for



the action. To buttress this point reliance was placed in *Kenya Human Rights Commission v Non-Governmental Organizations Co-Ordination Board* [2016] eKLR where it was held that:

“...A person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of *the Constitution*. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The *Fair Administrative Action Act*, 2015 must be viewed in that light.”

29. Similar thoughts were expressed in *Dry Associates Ltd v Capita Markets Authority and another* (2012) eKLR and *Judicial Service Commission v Mbalu Mutava & another* (2014) eKLR.

30. In like manner, Counsel submitted that Article 50 of *the Constitution* provides for fair hearing. Counsel contended that the meeting held on 1st December 2021 fell short of this as can be discerned from the Petitioners affidavits. Equally that the 1st Respondent admitted that the Petitioners were not given prior notice before this meeting. In addition, that the Petitioners were not given an opportunity to defend themselves. Counsel was certain thus that the Respondents in this matter did not follow due process.

31. Reliance was placed in *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another* [2019] eKLR where it was observed that:

“While the wording of Article 50 of *the Constitution* on the right to a fair hearing prima facie seems to focus on criminal trials it’s not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent, independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing and the right to be heard within a reasonable time.”

32. Comparable dependence was placed in *Indru Ramchand Bharvani & others v Union of India and others* 1988 SCR Supl. (1) 544, 555 and *John Florence Maritime Services Limited and another V Cabinet Secretary Transport and Infrastrcutre & 3 others* [2015] KESC 39 (KLR).

33. On this premises Counsel submitted that the Petitioners are entitled to an award of damages. Reliance was placed in *Siewchand Ramanoop vs the Ag of T & T*, PC Appeal No. 13 of 2004 where it was held that:

“An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong.”

34. Comparable reliance was placed in *Minister of Health & Others vs Treatment Action Campaign & Others* (2002)5 LRC 216, *Peters v Marksman & another* [201]1 LRC, *Doucet- Boudreau v Nova Scotia (Minister of Education)* 2003 SCC 62, *Peter Mauki Kaijenja & 9 others vs Chief of the Defence Forces & another* (2019) eKLR and *Smt. Nilabati Behera Alias Lalit vs State of Orisa and ors*, AIR 1993 SC 1960.



35. Counsel submitted that the Petitioners had not been able to access the Club's facilities or engage in its activities since 2021. It was argued that this has caused them great emotional and psychological anguish.
36. According to Counsel an award of Kshs.2,000,000/- would suffice as general damages in the circumstances of this case. In this regard Counsel relied in *Akusala A. Boniface v OCS Langata Police Station & 4 others* (2018) eKLR, *Ann Njoke Kumena V KTDA Agency LTD* [2019] eKLR, *NWR & another v Green Sports Africa Ltd & 4 others* [2017] eKLR and *Kooba Kenya Limited v County Government of Mombasa* (2022) eKLR where similar compensations were made.

Respondents' Submissions

37. Mungu and Company Advocates for the Respondents' filed submissions dated 6th May 2024 and set out the issues for discussion as: whether the further affidavits of the Petitioners conform with the directions of the Court, whether the Petitioners were served with the complaints made to them, whether the Petitioners were issued with notice of the hearing of the disciplinary action by the Management Committee and whether the Petitioners were accorded an opportunity to be heard.
38. Counsel in the first issue submitted that the Petitioners had introduced new facts in their further affidavits which were not part of the Petition. Counsel asserted that it is trite law that a party should not introduce new facts in a further affidavit. Counsel argued that the Petitioners ought to have amended the Petition instead.
39. On the second issue, Counsel asserted that as per the annexures adduced in the 1st Respondent's affidavit it was clear that the Petitioners were well notified about the complaints that had been made against them.
40. Turning to the third issue, Counsel submitted that the Petitioners had been invited for the meeting set for 25th September 2021 however failed to attend it. Moreover, Counsel submitted that the Management Committee has wide powers under Clause 7 of their Constitution including the power to regulate its own meetings and thus there was no error in the Committee turning the subsequent meeting to a disciplinary meeting.
41. In like manner in the next issue, Counsel emphasized that there was no doubt that the Petitioners had been accorded an opportunity to be heard yet failed to utilize the same.
42. In sum, Counsel submitted that the circumstances of this case make it plain that the Petitioners are not entitled to an award of damages. Moreover, that the Petitioners had not demonstrated how by being expelled from the club meant they could not join another private club.

Analysis and Determination

43. It is my considered view that the issues that arise for determination are as follows:
 - i. Whether the Petitioners exhausted the internal mechanisms before filing this suit.
 - ii. Whether the Petitioners were afforded a fair administrative action and a fair hearing by the Managing Committee of the Sir Ali Muslim Club in line with Article 47 and 50 of *the Constitution*.
 - iii. Whether the Petitioners are entitled to the relief sought.
Whether the Petitioners exhausted the internal mechanisms before filing this suit.



44. The exhaustion doctrine asserts where an administrative mechanism for settlement of a dispute is provided for in a statute or regulatory regime, the resolution of the dispute should first be the alternative procedure instead of directly instituting court an action or suit.

45. Section 9 of the *Fair Administrative Action Act* buttresses the above position. It states:

9. Procedure for judicial review

1. Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
2. The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
3. The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
4. Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
5. A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

46. This doctrine was discussed by the Supreme Court in *Sammy Ndung'u Waity vs Independent Electoral & Boundaries Commission and Three Others* (2019) eKLR as follows:

“ 63 Where *the Constitution* or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice...”

47. Equally in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR it was opined that:

“ 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts...”

48. Just like it is provided under Section 9 (3) of the Fair Administrative Actions Act; there are limited exceptions to the application of the doctrine as was held in *William Odhiambo Ramogi case*(supra) which the Court articulated as follows:



60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.
62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."
49. Now, delving into the dispute before this Court, the Respondents contend that the Petitioners did not exhaust the Club's internal mechanisms before filing this suit.
50. I have carefully examined the Club's Constitution and of interest to me was how the club resolves disputes of that nature that are deemed to go against the Club's principles by the members. This is particularly covered under Rule 16 of the Club's Constitution which provides thus:
- 16: Conduct
- i. In the case of the infringement of these rules and By-Laws or if the conduct of any member in and out of the Club, in the opinion of the Management Committee is injurious to the reputation of the Club, the Management Committee may take such action it may deem fit. Should such action take the form of expulsion from the Club, the member so expelled shall forthwith cease to be a member of the Club, subject to the right of appeal to the Bi-Annual General Meeting. The Members present at the General Meeting, shall be required to confirm the action of the Management Committee. If the expulsion is not confirmed by a simple majority vote, the expelled member shall be reinstated immediately.
 - ii. Any member proved to be found misbehaving in accordance with smooth running of the Club and who becomes harassment to other members shall be struck off the list of Club membership
 - iii. Any member struck off the list shall have the right to appeal to Bi-Annual General Meeting, to rescind the Managing Committee Resolution. The Appeal to the Bi-Annual General Meeting must be passed by a two-thirds (2/3rd) majority of those members voting at the Bi-Annual General Meeting.
51. The Club Constitution thus gives the Management Committee the mandate to deal with misconduct among its membership in all its manifestations. That makes the Management Committee the disciplinary organ of the Club. Nevertheless, decisions made by the Management Committee of the Club, particularly on the expulsion and the striking off are not final.



52. An expelled member, such as the Petitioners herein have the right to exercise their right of appeal to the Bi-Annual General Meeting of the Club where if the decision is not confirmed by the simple majority vote of the members present, the expelled member is reinstated immediately.
53. The question thus becomes, did the Petitioners avail themselves this right of appeal when the Management Committee expelled them vide its letter of 8th December, 2021 following its resolution in the meeting of 1st December, 2021 before seeking to Petition this Court?
54. There is no evidence that prior to filing this Petition, the Petitioners made use of regulation 16 of the Club's Constitution. They did not appeal their expulsion to the Bi-Annual General Meeting of the Club. Instead, they chose to file this Petition before this Court without appealing to the Membership of the Club to consider their grievances against the Management Committee's decision to expel them as required by the Club constitution.
55. This Court is wary of invoking the Constitution of the Republic when the Constitution of the Club has provided a mechanism for redressing the grievance in question. In my very humble assessment, the Petition not only infringes the doctrine of exhaustion of remedies but also, it does not arouse a constitutional controversy that forces this Court to apply the Constitution to resolve it.
56. The Petitioners who were officers of the Club and are thus assumed to have been well versed with its Constitution sprinted to this Court to file this Petition instead of exhausting the process provided by the Club Constitution to address their troubles. It is thus the finding of this Court that the Petition offends the doctrine of exhaustion of remedies. As was held by the Court of Appeal, in Geoffrey Muthinja Kabiru & 2 Others; [2015] eKLR.

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

57. Having reached this decision, it will be unnecessary to delve into other issues in this petition as the Court is barred from assuming jurisdiction over this matter in the light of this finding. The upshot is that this Petition is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

.....
L N MUGAMBI
JUDGE

