**Solanki v Nairobi Gymkhana & another (Petition E480 of 2023)**
**[2025] KEHC 4387 (KLR) (Constitutional and Human Rights) (4 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4387 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E480 OF 2023**

**LN MUGAMBI, J**

**APRIL 4, 2025**

**BETWEEN**

**KALPESH SOLANKI ..... PETITIONER**

**AND**

**NAIROBI GYMKHANA ..... 1ST RESPONDENT**

**CHAIRPERSON, BOARD OF TRUSTEES ..... 2ND RESPONDENT**

## JUDGMENT

1. The Petition dated 27th November 2023 is supported by the petitioner's affidavit in support of even date and a further affidavit dated 6th March 2024.

2. This petitioner alleges that the respondents suspended him from the membership of the 1st respondent without following the due process and adhering to the principles espoused under Articles 47 of *the Constitution*.

3. For that reason, the petitioner seeks the following reliefs:

    a. A declaration that the decision suspending the petitioner from the Nairobi Gymkhana and immediately withdrawing his rights, benefits and privileges as members of the Club contained in letter and Notice dated 07/09/2023 and 09/10/2023 respectively infringe and violate his right to fair administrative action under Article 47 of *the Constitution*.

    b. A declaration that the decision suspending the petitioner from the Nairobi Gymkhana and immediately withdrawing his rights, benefits and privileges as members of the Club contained in letter and Notice dated 07/09/2023 and 09/10/2023 respectively infringe and violate his rights to equality and freedom from discrimination, consumer protection, human dignity and freedom of association.

c. A declaration that any suspension, removal and further action taken on account of the letter and Notice dated 07/09/2023 and 09/10/2023 is unlawful, null and void.

d. An order of judicial review by way of certiorari to remove into the High Court and quash the decisions contained in the letter and Notice dated 07/09/2023 and 09/10/2023.

e. An order that the respondents acted in bad faith in making the decisions contained in the letter and Notice dated 07/09/2023 and 09/10/2023 and therefore not entitled to the protection afforded by *the Constitution* of the Club, 2018.

f. An order that the petitioner is entitled to compensation for violation of his rights and fundamental freedoms under Article 23(3)(e) which compensation should be paid by the respondents.

g. An order that the respondents do provide costs of the petition.

**Petitioner's Case**

4. The petitioner states that the 1st respondent is a private members club that was established in 1927 and registered under the *Societies Act*. Additionally, the 1st respondent amended its Constitution which became operation with effect on 24th May 2018.

5. The petitioner states that he is a paid-up member of the 1st respondent where he also serves as the Honorary Secretary. He avers that he performed outstandingly in this role. He adds that he has an excellent record in the sporting industry specifically in hockey and cricket. He equally notes that he has a good standing with the 1st respondent and has never faced any disciplinary action either through a suspension or expulsion.

6. The petitioner depones that to his dismay on 9th October 2023, the 2nd respondent issued a Notice notifying the members that he had been suspended from the 1st respondent. The contents of this Notice were picked from the letter dated 7th September 2023 addressed to him.

7. The petitioner avers that in line with the 1st respondent's Constitution, he communicated his discontent with the Board of Trustees decision and sought a review of the decision. He claims that the respondents did not issue any response. It is deponed that the respondents proceeded also to remove the petitioner from all the official WhatsApp groups.

8. The petitioner takes issue with the respondents' actions as the removal was done unlawfully and with no regard for the due procedure. He contends that he was not granted an opportunity to be heard in line with Article 11 of the 1st respondent's Constitution, *the Constitution* and the Fair Administrative Actions Act. He alleges that even the 1st respondent's advocates informed them that they had breached the law in acting contrary to the law in view of the unlawful dismissal.

9. Equally, the respondents failed to issue the meeting minutes of the Management Committee and his complaints fell on deaf ears. Considering these factors, he argues that the respondents' impugned Notice dated 9th October 2023 and the letter dated 7th September 2023 are null and void.

10. The petitioner posits that as a result of the respondents' actions, his excellent reputation has been tarnished before the club members and his privileges of being a club member completely stripped. This is addition to violation of his right to the due process.

**Respondents' case**

11. In response, the respondents through the 2nd respondent filed a Replying Affidavit sworn on 29th January 2023.

12. The 2nd respondent avers that the 1st respondent was exempted from registration under the *Societies Act* on 16th July 1971. However its properties are held by trustees under the *Trustees (Perpetual Succession) Act*. The 1st respondent is overseen by a Board of Trustees and managed by a Management Committee in line with its Constitution which was amended in 2015.The Management Committee is elected at the Annual General Meeting (AGM).

13. He states that the 1st respondent is a 'members only' club though it can invite other people to be players for the club or just as visitors. He depones that in light of this, the 1st respondent invited Martin Okoth and Joseph Onyango to play for the 1st respondent in a match between the club and the Sir Ali Club.

14. It is alleged that during the match, the two were engaged in a violent clash with the opposite team which ended up in a fatality. As a consequence, the Management Committee in accordance with Clause 8 (xiv) and 14(i) of their Constitution declared the two players persona non grata. In effect they were not allowed to represent the 1st respondent in any way or appear in the Club premises. The persons involved in the altercation were also banned from playing 8 matches by the Nairobi Provincial Cricket Association (NPCA).

15. He asserts that the petitioner was then instructed to issue this communication to the two players which he did in an email communication dated 17th May 2023. The petitioner in addition notified the NPCA in a letter dated 14th July 2023 that the 1st respondent was not responsible for the penalty fines for the two players as they had been declared persona non grata by the 1st respondent.

16. The 2nd respondent asserts that despite being aware of this, the petitioner went ahead and paid the penalty fines that had been imposed on the two players by the NPCA. He asserts that this implied that the 1st respondent had condoned the two players conduct. It is further deponed that the petitioner in express violation of the Management Committee's order then went ahead and fielded the two players so that they would represent the 1st respondent in a cricket match scheduled for 27th August 2023.

17. In reaction, the Management Committee issued a Notice for a special meeting to discuss the matter. The petitioner was also invited for the meeting but did not attend. The Management Committee in the meeting went ahead and determined that the petitioner had indeed violated the express directions in view of the two players.

18. In addition, the Management Committee formed a Taskforce to determine the petitioner's and other persons involvement in the matter. The petitioner was equally invited to attend the Taskforce meeting however failed to appear before it. In the end, it was established that the petitioner was responsible for the breach of the 1st respondent's Constitution and Management Committee's order against the two players.

19. Upon receiving the Taskforce's report, the Management Committee yet again invited the petitioner to make a response however he failed to issue one and attend the special management meeting held on 1st September 2023.

20. The 2nd respondent avers that the petitioner in an email communication dated 8th September 2023 challenged the allegations levelled against him. In response, the Management Committee in a special meeting held on 14th September 2023 resolved to suspend the petitioner from the 1st respondent.

21. Aggrieved by the decision and at his request, the petitioner met the Board of Trustees on 3rd October 2023 to voice his concerns. Upon consideration of all the material and facts in the petitioner's case, the Board in its decision dated 9th October 2023 unanimously upheld the Management Committee's decision to suspend the petitioner.

22. Owing to the averments made herein, the respondents argue that the petitioner was granted an opportunity to be heard and also informed of the allegations that had been brought against him. In addition, the reasons for the decision were shared with the petitioner, including the meeting minutes.

23. Consequently, the respondents affirm that due process was accorded to the petitioner and as such they did not violate the petitioner's rights as alleged. He further avers that the petitioner has not approached the Court with clean hands.

**Petitioner's Submissions**

24. In support of his case, the petitioner through Obwogi J. and Company Advocates filed submissions dated 3rd May 2024 and rebuttal submissions dated 28th June 2024.

25. The issues for discussion were underscored as: whether the petitioner's right to be informed of the case against himself in writing was violated; whether the petitioner was given reasonable and adequate time to defend himself; whether the petitioner was given adequate documentation/information to prepare his defense; whether the petitioner's rights under Article 27(1), 36 and 50(1) of *the Constitution* were violate and whether the petitioner is entitled to compensation under Article 23(3)(e) of *the Constitution*.

26. Counsel affirmed that in the circumstances of this case, the petitioner's rights had been violated by the respondents. To begin with, Counsel referring to Article 47 of *the Constitution* submitted that the petitioner was not informed of the allegations against him in writing. Counsel added that there was no express communication that was issued to the petitioner concerning the conduct complained of.

27. Reliance was placed in Shollei v Judicial Service Commission& another [2022] KESC 5 (KLR) where it was held that:

> " Concerning the right to fair administrative action, article 47 of *the Constitution* guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Further that 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."

28. Like dependence was placed in Kenya Human Rights Commission v Non-Governmental Organizations Co-Ordination Board [2016] eKLR.

29. Additionally, Counsel submitted that the petitioner was not given adequate time to prepare for his defense. Counsel stressed that this was evident from the fact that there was no stipulated time frame within which he could defend himself and present his case before the Management Committee and the Board of Trustees. Counsel pointed out that this fact was also stated in the Management Committee's Meeting Minutes for 1st October 2023.

30. It was further stressed that the Board of Trustees meeting with the petitioner was not an appellate hearing as is clear from the account of that day. It was stated that as from the respondents' annexture marked RT12, the Board was even not aware why the petitioner had summoned the meeting.

31. Reliance was placed in Li Wen Jie & 2 others v Cabinet Secretary, Interior and Coordination of the National Government & 3 others [2017] eKLR where it was held that:

> " In my considered opinion, the speedy trial provided for in our constitution is not "a rushed and unconsidered justice." ...In my considered view, our constitution provides for a speedy trial process but it anticipates a trial with two sides, which must as of necessity exhibit the best antidote to both sides. It must demonstrate a justice system that is not too fast, and not too slow, but just right....The drafters of *the constitution* never anticipated a process that is too speedy to the detriment of an accused person."

32. Equal dependence was placed in Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4(E005) & 8 (E010) of 2022, Kenya Human Rights Commission (supra) and Shollei(supra).

33. In like manner, Counsel submitted that the petitioner was not issued with the requisite information and documentation to prepare for his defense. Dependence was placed in Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR, where it was held that:

> " Though the short title to Section 6 is entitled "Request for reasons for administrative action", the subject of the section is really access to information on administrative action. To this end, the section entitles persons affected by any administrative action to be supplied with information necessary to facilitate their application for appeal or review."

34. Counsel further submitted that owing to the respondents' action of suspending him, the petitioner's freedom of association envisaged under Article 36 of *the Constitution* was also curtailed. It was stressed that the respondents' decision did not satisfy the condition set out under Article 24 of *the Constitution* and neither did the respondents prove justification for the limitation of this right.

35. Counsel also challenged the 1st respondent's Constitution as fails to meet the threshold provided under Article 24 of *the Constitution*. This is since it lacks provisions that are couched with sufficient precision to enable one determine what might be an offense under it and regulate their conduct accordingly.

36. To buttress this point reliance was placed in Geoffrey Andare Vs Attorney General [2015] eKLR where it was held that:

> " ...The principle of law with regard to legislation limiting fundamental rights is that the law must be clear and precise enough to enable individuals to conform their conduct to its dictate..."

37. Equal dependence was placed in Mtana Lewa v Ngala Mwagandi, *CA No 56 of 2014*, and Margareta and Roger Andersson v. Sweden Application no. (12963/87).

38. It was also asserted that the petitioner's rights under Article 27(1) of *the Constitution* were violated by the respondents. Counsel submitted that while the team manager, one Bhavesh Gohil had engaged in similar conduct as the petitioner by paying the penalty fees, they were not treated in the same manner. It is said that Bhavesh Gohil was invited to meet the Taskforce while the petitioner was not. In the end, no punitive action was taken out against Bhavesh Gohil as was in the petitioner's case who was condemned unheard.

39. Reliance was placed in Shollei (supra) where it was held that:

> " Fair hearing in principle incorporated the rules of natural justice, which included the concept of audi alteram partem(hear the other side or no one was to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias."

40. In light of the foregoing, Counsel submitted that the petitioner was entitled to the compensation under Article 23(3)(e) of *the Constitution* for the respondents' actions. Owing to the nature of violations, Counsel submitted that an award of Kshs.700,000/- was sufficient as compensation.

41. Reliance was placed in Kenya Agricultural Research Institute versus Peter Wambugu Kariuki & others Nakuru Civil Appeal No. 315 of 2015 where it was held that:

> " Our construction of Article 23 of *the Constitution* of Kenya, 2010 is that, it simply makes provisions that where a violation of the guaranteed constitutional rights and fundamental freedom has been established, the court has a wide range of remedies to grant. Among these is payment of monetary compensation. In the instant appeal as already mentioned above, the Judge simply made a pronouncement that the cross-appellant's rights and fundamental freedom had been violated but made no provisions for an appropriate remedy in line with that finding."
>
> "We find nothing in the said Article to suggest that a particular relief for the alleged violation must be prayed for before it may be granted. We therefore find that there was jurisdiction for the Judge to grant the reliefs notwithstanding, lack of specific prayer for the particular appropriate remedy."

42. Comparable dependence was placed in Migori County Government & another v Migori County Transport Sacco [2021] KECA 7 (KLR), Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others [2019] eKLR, Commission on Administrative Justice v Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR, Simon N. Mwaniki & 25 others v Permanent Secretary Ministry of Defence & 3 others [2018] eKLR and Gulleid v Registrar of Persons & another ([2021] KEHC 110 (KLR).

**Respondents' Submissions**

43. Mogeni and Company Advocates filed submissions dated 18th May 2024 for the respondents and identified the issues for determination as: whether the petitioner's right to freedom of association was violated as read together with Article 24 of *the Constitution*, whether the petitioner is entitled to compensation under Article 23(3)(e) Constitution and whether the petition is merited.

44. In the first issue, Counsel submitted that a reading of Clause 3(viii) and 3(xiv) of that Constitution in view of the assertion that the respondents violated the freedom of association and its Constitution violates Article 24 of *the Constitution*, enlightens that this Article introduces the proportionality test. That is, the Court is to determine whether the limitation is justified so as to strike a balance between an individual's rights and the community.

45. Reliance was placed in Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others [2017] KECA 751 (KLR) where it was held that:

> " Even after establishing the existence of a law limiting any specific right and accepting that it was reasonable and justified the means chosen to achieve the objective had to pass a proportionality test by considering;
>
> a. The nature of the right or fundamental freedom:
>
> b. The importance of the purpose of the limitation:
>
> c. The nature and extent of the limitation;
>
> d. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual had not prejudiced the rights and fundamental freedoms of others; and
>
> e. The relation between the limitation and its purpose and whether there were less restrictive means to achieve the purpose."

46. Counsel submitted that the right to freedom of association was not absolute and as such can be limited where there is gross misconduct and breach of the 1st respondent's Constitution. In this case, it was asserted that the petitioner was in violation of the 1st respondent's Constitution and failed to comply with the directive of the Management Committee and the Board of Trustees. For this reason, the suspension which is temporary, was issued with a view of maintaining discipline in the 1st respondent and so as not to disrupt its functions.

47. To buttress this point reliance was placed in Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR where it was held that:

> " A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate. Although it is commonly used by courts to test the validity of laws that limit constitutional rights, proportionality tests can also be a valuable tool for law makers and others to test the justification of laws that limit important (even if not constitutional) rights and principles. Former President of the Supreme Court of Israel, Aharon Barak, said proportionality can be defined as 'the set of rules determining the necessary and sufficient conditions for a limitation on a constitutionally protected right by a law to be constitutionally protected."

48. Taking this into consideration, Counsel submitted that the petitioner was not entitled to an award of as he had not proved that his constitutional rights had been violated by the respondents. Further that the petitioner out of his own volition failed to comply with the decision of the Management Committee concerning the two players who were declared persona non grata.

49. Reliance was placed in Dendy vs University of Witwatersrand, Johannesburg & Others - [20061 1 LRC 291 where it was held that:

> " The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases."

50. Like dependence was placed in Siewchand Ramanoop v The AG of T&T, PC Appeal No. 13 of 2004.

51. In the last issue, Counsel submitted that the respondents having followed the due process which was reasonable and procedurally fair in this matter, attests that the petition was unmerited. Reliance was placed in Daniel Mutisya Kivuva v Machakos Golf Club (2019] eKLR where it was held that:

> " 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."

52. Comparable dependence was placed in Arun Kumar Jain & another v Board of Trustees Nairobi Gymkhana [20201 eKLR.

**Analysis and Determination**

53. From the outset, it is necessary that I point out that the petitioner's Counsel, brought up some issues that were not pleaded in the Petition or deponed to in the supporting affidavit, namely; that the 1st respondent's Constitution was not compliant with Article 24 of *the Constitution*.

54. The belated attempt to introduce new matters through submissions is unacceptable as it beats the whole purpose of pleadings which is to give a fair opportunity to the adverse party of the case against it to allow it to respond as appropriate.

55. The Supreme Court in Raila Amolo Odinga & Stephen Kalonzo Musyoka v Independent Electoral and Boundaries Commission, Chairperson Independent Electoral and Boundaries Commission & Uhuru Muigai Kenyatta [2017] KESC 31 (KLR) underscored this principle by stating thus:

> " (62) ... we note that as correctly argued by Counsel for the 3rd Respondent, a party must be bound by its pleadings... Any prayer in the application that would seem to be an expansion of the case for the Petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the Petition would and must be rejected."

56. Correspondingly, the Court of Appeal Independent Electoral and Boundaries Commission & another v Mule & 3 others [2014] KECA 890 (KLR) citing the Nigerian Supreme Court with approval observed that:

> " First, in Adetoun Oladeji (nig) Ltd v Nigeria Breweries PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;
>
> "....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."
>
> Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;
>
> "In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."
>
> ....
>
> As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce."

57. As firmly held in the above judicial precedents, I cannot allow the petitioner's counsel belated attempt to introduce, through submissions, new facts or issues that are not in the pleadings filed before the Court. That attempt must fail.

58. Consequently, this Court finds the following to be the only issues for determination in this Petition:

    i. Whether the due process from a Constitutional view-point was accorded by the respondents in ordering the suspension of the petitioner from the 1st Respondent.

    ii. Whether the petitioner is entitled to the reliefs sought.

59. Due process, in simple terms, refers to the procedures laid down by law or contained in legal principles which must be adhered to in dealing with a subject of the legal process for justice to not only be done but also seen to have been done. Due process in regard to administrative decisions is circumscribed by Article 47 of *the Constitution* and further reinforced by the Fair Administrative Actions Act.

60. Article 47 of *the Constitution* of Kenya provides as follows:

    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.

61. The *Fair Administrative Action Act* under Section 4; in particular Section 4(1) & (2) provides thus:

    (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

        a. prior and adequate notice of the nature and reasons for the proposed administrative action;

b. an opportunity to be heard and to make representations in that regard;

c. notice of a right to a review or internal appeal against an administrative decision, where applicable;

d. a statement of reasons pursuant to Section 6;

e. notice of the right to legal representation, where applicable;

f. notice of the right to cross-examine or where applicable; or

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to—

a. attend proceedings, in person or in the company of an expert of his choice;

b. be heard;

c. cross-examine persons who give adverse evidence against him; and

d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

62. Section 7 (2) of the *Fair Administrative Action Act*, further provides the grounds of review by the Court as: bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.

63. The importance of fair administrative action as a constitutional right was appreciated by the Supreme Court in Saisi & 7 others v Director of Public Prosecutions & 2 others [2023] KESC 6 (KLR) as follows:

> " Article 47(1) of *the Constitution* guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 165(6) grants the High Court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. In 2015, Parliament in adherence to article 47 of *the Constitution* enacted the *Fair Administrative Action Act*, No 4 of 2014, Laws of Kenya (FAA Act)."

67. Also instructive to the application of judicial review, is that article 10 of *the Constitution* sets out the national values and principles of governance, key among them being the rule of law. These values and principles bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions."

64. The Court went on further to note that:

> "74. It is our considered opinion that the framers of *the Constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority. It was a clarion call to ensure that the constitutional right to fair administrative actions permeated

every aspect of the lives of Kenyans, from their engagements with educational facilities such as universities, to employer-employee relationships, to engaging with public bodies in whatever capacity, or any body, person or authority that exercises quasi- judicial functions. We further take the view, that this approach is consistent with realizing the right of access to justice because justice can be obtained in other places besides a courtroom.

75. In order for the court to get through this extensive examination of Section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge."

65. Equally in Muigana & 16 others v County Government of [2024] KEHC 960 (KLR) the Court observed as follows:

"36. In general, the *Fair Administrative Action Act* has introduced six aspects that are important in enhancing access to administrative justice in Kenya. First, Section 3(1) has expanded the scope of judicial review to include the actions of public and private bodies. This implies that it is not only the actions of public bodies that are subjected to judicial review but also the actions of private actors that may be subjected to judicial review where they violate the rights or interests of affected individuals.

37. Second, the Act has expounded on the constitutional grounds for judicial review and codified the grounds for judicial review under common law such as ultra vires, procedural fairness, and reasonableness. Section 7(2) of the Act provides for the grounds upon which a court or tribunal may review an administrative action or decision.

38. Third, Section 9 of the Act outlines the procedure for judicial review Fifth schedule, under Part IV of the Act (titled 'Miscellaneous'), stated that the provisions of the *Fair Administrative Action Act* are additional to and not derogations from the rules of common law and natural justice. See M Akech, Administrative Law (2016).

39. The acknowledgment of common law principles in the review of administrative action has a significant impact on how Article 47 of *the Constitution* should be interpreted. According to OJ Dudley, in '*The Constitution* of Kenya 2010 and Judicial Review, Courts that interpreted the *Fair Administrative Action Act* have continued to appreciate and apply the principles of common law in the post-2015 jurisprudence. Courts have further interpreted Article 47 and the *Fair Administrative Action Act* in a way that ensures common law principles and rules of natural justice are further developed.

40. Lastly, the Act has elaborated the right to be given written reasons for administrative action. The requirement to give reasons for administrative action under the *Fair Administrative Action Act* has both substantive and procedural aspects. Substantively, Section 4(2) of the *Fair Administrative Action Act* recognizes that every person has a right to be given written reasons for any administrative action that is taken against him/her. See Chirwa (n 47); H Corder, 'Administrative Justice in the Final Constitution."

66. In like manner, the principles of natural justice require that a person receive a fair and unbiased hearing. The Halsbury's Laws of England, 5th Edition Vol. 61 at page 539 Paragraph 639 on the rule of natural justice states as follows:

> " The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard the (audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adopted to govern proceedings of bodies other than Judicial tribunals, and duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in right of the right under the convention for the protections of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination and civil rights or obligations on any criminal charge."

67. This principle has been discussed in a number of authorities. The Supreme Court of India in A.K. Kraipak v Union of India, AIR 1970 SC 150 stated as follows:

> " The aim of Natural Justice is to secure justice or to put it negatively, to prevent miscarriage of justice. These rules operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it."

68. Equally in Ramseth v Collector of Dharbang, AIR 155 PAT 345 the Court stressed as follows:

> " There must be ever present to the mind of men the fact that our laws of procedure are grounded on the principle of Natural Justice which require that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings which affect their lives and property should not continue in their absence and that they should not be precluded from participating in such proceedings."

69. Correspondingly, the Supreme Court of Canada in Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 expressed this fundamental principle in the following way:

> " The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."

70. The Court proceeded to outline several factors that should be taken into consideration as follows:

a. The nature of the decision being made and process followed in making it;

b. The nature of the statutory scheme and the term of the statute pursuant to which the body operates;

c. The importance of the decision to the individual or individuals affected;

d. The legitimate expectations of the person challenging the decision; and

e. The choices of procedure made by the agency itself.

71. In the same manner, the Court in Judicial Service Comission v Mbalu Mutava & another [2015] eKLR discussed as follows:

> "In exercise of its powers under *the Constitution* or under legislation, public officers, state officers, state organs and independent bodies or tribunals may make decisions which may be characterized as judicial, quasi-judicial or administrative depending on the empowering provision of *the Constitution* or the law. The landmark decision of the House of Lords in Ridge v. Baldwin [1964] AC 40 clarified the law, that the rules of natural justice, in particular right to fair hearing, (audi alteram partem rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:
>
> a. the right to be heard by an unbiased tribunal.
>
> b. the right to have notice of charges of misconduct
>
> c. the right to be heard in answer to those charges.
>
> On his part, Lord Reid when dealing with class of cases of dismissal from office "where there must be something against a man to warrant his dismissal" said at page 66:
>
> "There, I find an unbroken line of authority to the effect that an officer cannot be dismissed without first telling him what is alleged against him and hearing his defence or explanation."

72. This petition is premised on the suspension of the Petitioner from the 1st Respondent through a letter dated 07/09/2023 and Notice dated 09/10/2023 on allegations of misconduct that was considered injurious to the 1st Respondent's Constitution. The Petitioner through this Petition challenges the decision on the basis that he was not granted sufficient notice and reasons prior to the said action and was also condemned unheard contrary to the principles of natural justice.

73. Reacting to the said accusations, the Respondent through the affidavit of Rajendra G. Thakar refuted the allegations and insisted that the Petitioner was accorded the opportunity to be heard before the drastic action was taken but declined to take part in the proceedings all along and eventually, the decisions were taken in accordance with the 1st Respondent's constitution.

74. In a nutshell, the genesis of the controversy is what the Respondent said was the petitioner going against the decision of the Management Committee where the latter expelled two players pursuant to Clause 8 (xiv) and 14 (i) of the 1st Respondent Constitution but subsequently, the Petitioner despite being aware of that decision and in fact conveying the same to the said players (vide notice annexure RT3) , he went against the decision by paying fines for the expelled players (as shown in the email by the players dated 30th August, 2023-annexure RT6) and further allowing them to participate in competition on behalf

of the Club on 27th August, 2023. These actions triggered the process to inquire into the conduct of the Petitioner who at the time was the Honorary Secretary.

75. That was by convening a Special Meeting of the Management Committee to discuss the matter as indicated in annexure 'RT8'

76. The email correspondence reads:

Mon, August 28, 2023 at 2:06 PM

Noticeis hereby given that the management committee will be held on Tuesday,29th August at 6.oo p.m at the club's boardroom; meeting requested by chairman, outdoor sports secretary and indoor sports secretary agenda cricket march played on sunday, 27th august, 2023, wherein 2 persona non-grata persons played for nairobi gykhana team

Kalpeshi Solanki

Hon. Secretary

28TH August, 2023.

77. The Petitioner is shown as the person who sent out this email communication and this fact is not denied by him in his affidavits. He could not therefore have been the one to send out the communication and not invite himself to the said meeting.

78. The Minutes of that meeting that took place pursuant to the Notice described above are the minutes of the special meeting of the management committee held on Tuesday,29th August 2023 at 6.00 pm at the club's boardroom which are provided. They show the meeting was attended by 9 members who were present and 4 were absent with apology. Among those absent were Kalpesh Solanki- Hon. Secretary.

79. Among the highlights of this meeting were the following resolutions:

– A task force with the mandate on fact finding mission was formed consisting five members. The Team manager Bhavesh Gohil invited for a meeting on Wednesday, 30th August, 2023 to meet the task force. The task force to provide a report after the meeting of 30th August, 2023.

- With immediate effect, the Hon Secretary to step down from all sub-committees and a letter communicating the same be sent to him immediately

- a letter to Martin Okoth & Joseph Onyango informing them that they are in breach of Club directive hence they will not represent Nairobi GymKhana in any capacity

- Hon Assistant Secretary was tasked with arranging another meeting before the week ends.

- Management Committee to look for way to resolve this issue ensuring due process is followed. Subsequently, appropriate report to be sent to the Board of Trustees immediately for further advice/ action.

80. One important fact to note from the above is despite the Respondent stating in the affidavit of Rajendra G. Thakar sworn on 29th January, 2023 that a Task Force was formed to hear the persons involved in the alleged misconduct including the Petitioner, this is not the case as it is apparent that the Task Force was only directed to meet the Team Manager Bhaveshi Gohil on 30th August and file a report immediately.

81. Essentially, not only were drastic actions affecting the Petitioner taken by the Management Committee in its meeting of on 29th August 2023 in his absence (having been marked absent with apology) but also the subsequent decision that appointed the Task Force to carry out the fact finding did not recommend

that he be interviewed as purported by the Replying affidavit of Rajendra Thakar as all what the Task Force was directed to do was to interview Mr. Bhavesh Gohil and file a report.

82. Indeed, in the meeting of the Task Force held on 30th August, 2023; it is evident that only Bhaveshi Gohil- Nairobi Gymkhana Cricket Manager was interviewed and surprisingly, he made serious allegations against the Hon. Secretary in his absence yet the Hon. Secretary was not granted an opportunity to rebut them. Some of them even touched on the issues that were not under reference. For instance, the Minutes capture the following conversation:

> " On numerous occasions, he asked the Hon Secretary for a formal engagement letter, confirming that he was the official Nairobi Gymkhana Team Manager. This was not done.
>
> The Task Force Noted this request for the appointment had never been presented to the Management Committee in any sitting and this was the first they were hearing of this."

83. On the question of fines, the discussion between the Task Force and the Mr. Bhavesh goes on like this:

> " Task Force asked Bhavesh on who led him to believe that the Club might pay those fines:
>
> To which he replied the Hon. Secretary, and added that upon repeatedly enquiring, the Hon. Secretary always responded that he was in talks with the MC with regards to this. Task Force noted this was never discussed in any MC meeting."

84. All these deliberations were carried out in the absence of the Petitioner and the adverse information elicited and recorded without affording him a chance to respond. Although the Respondent at paragraph 24 of the replying affidavit asserts that the Task Force gave the Petitioner an opportunity to appear, no evidence of invitation to appear before the Task Force is provided. Further, from instructions at the point of constituting the Task Force, it is clear that the petitioner's interview was not included in the terms of reference which was only directed the task force to interview Mr. Bhaveshi Gohil and furnish a report immediately and this is what in fact happened.

85. Mr. Bhavesh who the Task Force fully relied on his evidence had some unresolved issue with the Hon. Secretary for not confirming him the official team Manager of Nairobi Gymkhana Club. That came out clearly from the meeting of August. The factual account he gave about the Honorary Secretary should be taken with a pinch of salt especially because the Petitioner was never accorded an opportunity to respond to the said allegations Mr. Bharesh made against him before the Task Force.

86. Yet, it this Task Force Report that the Management Committee received and deliberated upon in its Special Meeting of 1st September, 2023.

87. In this meeting, the Management Committee appears to beat a hasty retreat, by noting as follows among others:

Agenda1: cricket match played on Sunday,27th August 2023, wherein persona non-grata persons played for Nairobi Gymkhana team:

> " 3. Chairman further added that the Club's Constitution gave powers to the Management Committee to probe conduct of the members and take necessary action as required. There is no indication of MC's jurisdiction with regards to conduct of an office bearer of the Club, who is part of the same management committee.

4. The Board of Trustees are the highest level of authority in the Club. Furthermore, they have the power to interpret the Club's Constitution upon any matter affecting the Club and not provided in *the Constitution*. Bearing this in mind, the Management Committee was of the view this entire matter should be forwarded to the Board of Trustees for their action..."

88. Indeed, at paragraph 6 of the above agenda item, the Management Committee appears to acknowledge a mistake had occurred in the manner the Honorary Secretary had been handled that far; they noted:

> "Several MC members noted that the Hon. Secretary must be given an opportunity to be heard. However, after much deliberation it was felt that the task force or the Management Committee may not be the correct forum to handle this matter. Accordingly, it was found best to revert this matter to the Board of Trustees for deliberation, guidance and direction/ recommendation. MC agreed to go with the direction of BOT."

89. This shows that the Management Committee at this juncture had abandoned all that had been done, having found categorically it did not have jurisdiction over the Honorary Secretary and handing over the matter to the Board of Trustees.

90. This in my view meant that the Board of Trustees had to deal with the matter from the beginning, taking up and examining the complaint against the Petitioner, giving him notice of the complaint and allowing an opportunity to make response before deliberating on the matter.

91. Was that done? The Respondent states in the replying affidavit of 29th January, 2023 at paragraph *28* as follows:

> "That as stated above, and at the request of the Petitioner, the Board of Trustees met the Petitioner on 3rd October, 2023; where the Petitioner raised issues dealt with by the MC and the letter of 8th September, 2023. Copies of the Minutes between the Board of Trustees and Petitioner are now shown to me marked RT12"

92. In the meeting of the Board of Trustees held on 3rd October, 2023; it would appear that it was not even prompted by the Management Committee's request, but the Petitioner who had complained that he was unaware of the grounds of his suspension. Evidently, the Board was also not in the picture as is evident from its reaction that day.

93. At Minute 4; the Board recorded:

> "The Board agreed that this matter to be discussed in great length at its meeting of 9th October, 2023 and a conclusion be made thereto."

94. The question thus becomes, if the Management Committee had clearly and categorically noted it lacked jurisdiction to the extent that it referred the matter to the Board, why was the suspension still in force? Two, which accusation was the Petitioner faced with at the Board hearing for none appears to have been served upon him or read to him?

95. In the meeting of 9th October, 2023; even a greater travesty was occasioned; the Board without hearing the Petitioner rehearsed what had been done previously by the Management Committee which had acknowledged it had no jurisdiction notwithstanding all the inherent flaws already observing and finally resolved at 3 (iii), (iv) & (v).

3(iii) - The Chairman went through 3(iii) in great length

3(iv) – Following which the Board unanimously agreed that the suspension by the Management Committee dated 7th September, 2023 stands

3(v) The Board authorized the Chairman to sign the suspension notice stating that at the Board of Trustees meeting held on 9th October, 2023, the Board upheld the suspension notice.

96. I have conscientiously gone through the factual matrix surrounding this case so as to demonstrate the injustice orchestrated against the Petitioner was orchestrated. The Petitioner was initially accused and tried in his absence without any formal notice of the allegations levelled against him. In the first meeting which he is listed to be absent with apology, he was suspended without being heard yet he had no prior notice that his personal conduct was the subject of the said meeting of the Management Committee held on 28th August, 2023. As if this was not enough, the Management Committee went ahead and formed a Task Force that sat on 29th August with specific instructions to hear one Mr. Bhavesh Gohil who went on to make damning allegations against the Petitioner, yet again, the Petitioner was never given a chance to appear before the said task force which had instructions to compile and hand in its report by 30th August, 2023. On 1st September, the Committee sat and deliberated on the report and in this meeting conceded that the Petitioner ought to have been heard. It resolved that neither the Management Committee or the Task Force had the requisite jurisdiction over this matter hence it was resolved that the matter be left in the hands of the Board of Trustees.

97. Instead of the Board of Trustees thus taking up the matter and conducting a proper hearing, it purported to uphold the already flawed process initiated by the Management Committee that had acknowledged its failure in its meeting of 1st September, 2023 of not having granted the petitioner a hearing and which had equally doubted its jurisdictional competence to deal with the matter.

98. Clearly therefore, the right to fair administrative action of the Petitioner was violated. There was no notice of allegations made against him so as to formally respond, he was never accorded a chance to respond to the accusation or face his accusers and yet he was relieved of his position of the Honorary Secretary.

99. I find that his rights under Article 47 were violated in addition to the failure by the Respondent to abide by the clear provisions of Fair Administrative Actions Act, Sections 4 (3) and (4).

**Whether the petitioner is entitled to any reliefs sought**

100. The Petition has succeeded. It means that the Petitioner's rights were violated hence he is entitled to some reliefs. Looking at the Club's Constitution, the regulation 21 provides that Annual General Meeting shall be held normally in the month of March each year but not later than 31st March, upon a date and time fixed by the Management Committee for purposes stated thereunder and 21 (I) (f) is the elections of the Officers of the Management Committee.

101. A reinstatement of the Petitioner as the Honorary Secretary might thus not be a plausible option particularly if such elections have already taken place.

102. The payment of damages will thus be the most appropriated option in addition to quashing the unprocedural and unlawful suspension meted on the Petitioner.

103. As to what would guide the Court in arriving at the appropriates amount of damages, the Court of Appeal in Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others [2021] KECA 328 (KLR) held as follows:

> " 15. The relevant principles applicable to award of damages for constitutional violations under *the Constitution* were also explained by the Privy Council in the case of Siewchand Ramanoop vs The AG of T&T, PC Appeal No 13 of 2004. It was held by Lord Nicholls at Paragraphs 18 & 19 that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows:
>
> "When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under Section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.
>
> 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. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches."
>
> 16. The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss."

104. Correspondingly, in Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another [2019] KEHC 7530 (KLR) it was observed that:

> " 96. Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion. [46]The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Courts. The following principles clearly emerge from decided cases;
>
> i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;
>
> ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;

iii. This remedy would be available when it is the only practicable mode of redress available;

iv. Against claim for compensation for violation of a fundamental right under *the constitution*, the defence of Sovereign immunity would be inapplicable.

97. Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right, which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. However, this measure is no more than a guide, because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.

105. In the instant case, the Petitioner urged this Court to him award of Kshs. 700,000/-. However, I hereby grant the following reliefs:

a. In my assessment an award of Kshs. 400,000/- (Four Hundred Thousand Shillings) will fairly compensate the Petitioner for the constitutional violation he was subjected to.

b. A declaration is hereby issued that the decision to suspend the membership of the Petitioner from Nairobi Gymkhana Club leading to withdrawal of his rights, benefits and privileges as a member of the Club as conveyed in the letter and notice dated 07/09/2023 and 9/10/2023 was in violation of Article 47 and 36 of *the Constitution*.

c. An order certiorari is hereby issued quashing the decision against the Petitioner by the Respondents that was conveyed vide the letter and notice dated 07/09/2023 and 09/10/2023.

d. Costs of the Petition.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF APRIL, 2025.**

**.....**

**L N MUGAMBI**

**JUDGE**