



**Solanki v Nairobi Gymkana & another (Constitutional Petition E480 of 2023)  
[2024] KEHC 2977 (KLR) (Constitutional and Human Rights) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2977 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E480 OF 2023  
LN MUGAMBI, J  
MARCH 15, 2024**

**BETWEEN**

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

**AND**

**THE NAIROBI GYMKANA ..... 1<sup>ST</sup> RESPONDENT**

**CHAIRPERSON, BOARD OF TRUSTEES ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Pursuant to the amended Notice of Motion application dated February 26, 2024 supported by the affidavit of the petitioner/applicant Kalpesha Solanki sworn on even date, the Petitioner/Applicant approached the court seeking the following orders: -
  - a. This application be certified urgent and service be dispensed within the first instance.
  - b. Pending the hearing and determination of this application inter partes, a conservatory order in the form of an interim measure of protection be and is hereby issued stopping, suspending and/or staying elections of the 1<sup>st</sup> Respondent herein scheduled on March 21, 2024 specifically for the position of Honorary Secretary.
  - c. Pending the hearing and determination of this application inter partes, a conservatory order be and is hereby issued restraining the Respondents from clearing, allowing campaigns, issuing nomination papers and/or in any way preparing for the election of the position of Honorary Secretary.
  - d. The costs of this application and the petition herein be borne by the Respondents.



2. The Applicant deponed that he has been a member of Nairobi Gymkhana Club which is the 1<sup>st</sup> Respondent (hereinafter referred to as “the Club”).
3. On May 25, 2018 the club promulgated a new Constitution (the club Constitution) which formulated management structures and also laid down the rights and obligations of the leadership of the club and the members.
4. On February 22, 2024, the club published in the Daily Nation Newspaper a notice of Annual General Meeting to be held on March 21, 2024. One of the specified agendas is the election of Club Officials as confirmed by the annexed copy of the notice and the agenda (exhibit KS-1-2).
5. The petitioner averred that should that meeting be allowed to go on and transact its business as specified in the notice fully, then this petition will be an exercise in futility.
6. The Petitioner stated that despite being a fully paid up member with a clean record who has had no disciplinary matter before; the Chairman of the Board of Trustee of the club on October 9, 2023 circulated a notice to the members notifying them that the Petitioner had been suspended from the club with effect from September 7, 2023, which information he learnt from fellow members. The notice was made while he was away in India where he had taken his son for treatment.
7. He wrote a letter protesting the unprocedural action and also sought a review. However, the club instead went ahead and removed him from the official WhatsApp groups of the club and also withdrew all the privileges of a member that not only barred him from accessing the club facilities but also those of reciprocating clubs.
8. The applicant contended that he was not given an opportunity to be heard. He swore that he stands to be greatly prejudiced should this court not grant a conservatory order pending the hearing of the petition.

### **Response by the Respondent**

9. The Respondent through Rajendra G Thakar, the Chairman of Board of Trustees of the Club deposed that the Applicant was suspended after an opportunity to be heard as provided as per the Club Constitution of which his conduct was given due consideration.
10. That since the applicant is on suspension, he cannot participate in the club activities which includes its elections.
11. That the applicant was suspended for allowing persons who had been barred from involvement in club affairs to participate contrary to the rules of the Club.
12. That the position of Secretary is not a preserve for the Applicant and may participate in other subsequent elections when the suspension will have been served.
13. Further, that the petition before this court does not seek to stop the holding of General Election hence this application is an afterthought.
14. The Respondent asserted that the applicant was invited by the management committee of the club to appear before it but he declined. That when he appealed to the board of Trustees, he was given a hearing and his responses were considered before he was suspended.
15. The Respondent asserted that holding the annual General meeting has nothing to do with the applicant’s suspension which the court will consider. However, the failure to hold the AGM will destabilize the club as a general meeting has a wider implication on the general affairs of the Club.



16. That the court should consider balancing the conduct of the applicant in which he allowed prohibited persons to participate in the affairs of the Club, his refusal to appear before the management committee and the fact that a hearing was in fact accorded to him by the Board of Trustees.
17. In a further affidavit by the Applicant sworn on March 6, 2024, he disputed the averments contained in the replying affidavit of the Respondent sworn on March 5, 2024. He pointed out that the Respondent made allegations that a hearing was granted to him yet he provided no proof in form of any letter that invited him to any disciplinary hearing nor exhibit minutes of any meeting to that effect.
18. That while the Respondent pleads in paragraph 6 of the replying affidavit that “the suspension of applicant was not related to the position of “Honorary Secretary” the letter annexed to the affidavit of applicant dated September 7, 2023 – ‘KS-03’ is contradicts this allegation as one cannot be Honorary Secretary without becoming a member first.
19. That it was evident from Respondents’ affidavit that the effect of suspension was also to bar the Petitioner from participating in the elections hence the more reason why the issuance of a conservatory order is merited.
20. That under the Club’s Constitution, the Petitioner is the only person allowed to issue notice of Annual General Meeting, hence this Petition impacts on the Annual General Meeting.

### **Applicant’s Submissions**

21. The Applicant submitted that the conservatory order should issue stopping the Annual General Meeting slated for March 21, 2024 insisting that this petition has a high chance of success.
22. He argued that allowing the Annual General Meeting to proceed will deny him an opportunity to become an official of the club in the position of Honorary Secretary thereby rendering his Petition futile.
23. That the court has a duty to preserve the status quo by ordering that no election should be conducted, and if conducted, the one concerning the position of Honorary Secretary should not be held as his suspension was done contrary to the Club’s Constitution.
24. That the substance of the petition is that Petitioner gets a fair hearing.
25. The Petitioner relied on the following cases: -
  - i. Civil Application No. 5 of 2014 – *Gatirau Peter Munya vs Dickson Mwenda Kitbinji & 2 Others* (2014) eKLR.
  - ii. Nairobi Civil Appeal 151 of 2011 *Invesco Assurance Co. Ltd vs M W (Minor suing thro’ next friend and mother (HW))* (2016) eKLR.
  - iii. *Judicial Service Commission Vs Speaker of the National Assembly & Another* [2013] eKLR.
26. The Petitioner further assailed the notice of AGM for contravening Clause 21 of the 1<sup>st</sup> Respondent’s Constitution asserting what it contains, that “All Notices concerning any meeting shall be issued by the Honorary Secretary”.
27. He contended that the role of issuing notices for any meeting is exclusively the function of the Honorary Secretary and that cannot be delegated. That the only time the role of Honorary Secretary can be delegated is during a meeting. Consequently, the AGM scheduled for March 21, 2024 will be



improperly convened as the Petitioner who was legally mandated to call for such meeting was arbitrarily and unconstitutionally suspended from his official position.

28. On costs, the Petitioner/Applicant urged the court to award him costs of the application as it is the Respondent's action that un-procedurally suspended him that has precipitated this application. He relied on *Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd* [No. 6 of 2014] where the principle of costs following the event was restated by the High Court.
29. The Respondent filed submissions dated March 5, 2024. It was argued on behalf of the Respondent that the Applicant/Petitioner filed an application dated February 22, 2024 which the court gave directions but the applicant did not serve that application, instead the Applicant served an application dated February 26, 2024 which was without a supporting affidavit.
30. As such, it was the Respondent's contention that application dated February 26, 2024 was improperly before the court.
31. The Respondent asserted that the real dispute before the court was whether the Petitioner rights were violated by being suspended from the club for a period of one year and not the holding of the AGM on March 21, 2024 which was not raised in the application of February 22, 2024.
32. That the Applicant has not even denied/disputed allegations levelled against him in the supporting documents of the Respondents affidavits to the effect that he allowed prohibited persons to engage in the activities of the club.
33. The Respondent rehearsed the facts stated in his replying affidavit that led to suspension of the Applicant/Petitioner from the Club and actions taken to facilitate hearing of the Applicant/Petitioner.
34. The Respondent refuted the claim that the Petitioner/Applicant was not given adequate notice and opportunity to appear and respond to the allegations levelled against him.
35. He submitted that the Applicant is on suspension and has not sought orders to lift the suspension, hence the court cannot be asked to suspend the AGM or the election of position of the Secretary. That under Clause 6 (iv) of Club Constitution mandates "the Management Committee with power to fill any vacancy or vacancies as and when they occur."
36. Further Clause 21(1) provides that the AGM shall be held every year on a date not later than 31<sup>st</sup> March, hence it is not probable to suspend the AGM on account of applicant who does not even qualify to participate in the said meeting by reason of suspension. That the Applicant has not shown he has made a prima facie case with probability of success to warrant issuance of orders sought.
37. The Respondent relied on *Republic vs Chairman Nyanza Club* [2020] eKLR, where the court stated: -

“... if this court were to lift the suspension, when the dispute was still pending, the practical effect would be to impose the Applicant upon the Respondents' when the Applicant appear to have little or no regard for the committee which had the requisite mandate to determine issues between club members and the club...”
38. Other decisions cited by the Respondent were: -
  - (i) *Daniel Mutisya Kivuva versus Machakos Golf Club* [2019] eKLR
  - (ii) *Githua versus Samuel Munyua & Others* [2022] KEHC 10356 (KLR)
  - (iii) *Arun Kumar Jain & Another versus Board of Trustees Nairobi Gymkhana* [2020] eKLR.



- (iv) [\*Yellow House Inn Ltd versus Nduachi Company Ltd & 2 Others\*](#) [2017] eKLR.
- (v) [\*Republic versus Nyalı Golf Club Ex parte Simon Maina\*](#) [2020] eKLR.

### **Analysis and Determination**

39. There are two issues to determine
- i. Whether the application dated February 26, 2024 is properly before the court.
  - ii. Whether the instant application has merit.
40. In his submissions, the Respondent’s Counsel wondered which application the Parties were expected to canvass. On the day the matter came up for brief highlighting he once more raised the issue.
41. In his brief address to the court on March 7, 2024, Mr. Mogeni pointed at the lack of clarity in regard to which application was being heard, he stated:-
- “You had issued orders on November 29, 2023, subsequently he filed an application dated February 22, 2024 which you gave directions for today. Subsequently, he filed on the application dated February 26, 2024. I do not know which application he wants to refer”
42. Mr. Mwalo for the Petitioner’s stated in reply as follows: -
- “We were before you for direction on February 23, 2024. You certified the application urgent. It was dated February 22, 2024. It is the one we amended and is before you as amended application dated February 26, 2024. We filed and served the Respondents, they complied and filed submissions. We are before you to get a ruling date.”
43. I have carefully perused the directions given by the court in respect to the applications since this Petition was filed. They can be summarized as follows: The last of the directions were in regard to the application dated February 22, 2024. Before that, the directions had been given in respect of the Notice of Motion dated November 27, 2023 and much earlier, directions had been given by Justice E.C Mwita in the application dated December 4, 2023.
44. Clearly, no directions had been taken in respect of the application dated February 26, 2024 which the Petitioner/Applicant now calls “The Amended Notice of Motion”. Not only did the Court not give directions on an application dated February 26, 2024 but also, no leave was sought to amend the application dated February 22, 2024 in respect of which it issued directions on February 23, 2024.
45. Rule 18 of [\*Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules\*](#), stipulates that:
- “A party that wishes to amend its pleadings at any stage of proceedings may do so with leave of the court”
46. The application which was served on the Respondent and purporting that directions had been issued for the hearing of the same on the 7/3/2024 was misleading in two ways, first, the court had not given directions in respect of that application but to the one dated 22/2/2024. The Petitioner/Applicant never sought the leave of the Court to amend it.
47. Notwithstanding the procedural flaw, I am required by Article 159 of the [\*Constitution\*](#) to do substantial justice hence the need to go an extra mile and consider if this application has merit. I have carefully read



through the entire Petition filed herein. It is pertinent to note there is no allegation made in the petition concerning the notice to convene the AGM of the Respondent or that is in contravention of any of the clauses of the Club Constitution. On what basis therefore would the Court invited to stop the AGM?

48. From the Petitioner's point of view, the meeting should be stopped until his suspension as member and official of the club is addressed through the hearing of this Petition. He says that if the meeting goes on, the Petition will be futile. How does the Petition become futile when the Petitioner has pleaded nothing in his Petition about elections or the irregularity in holding the meeting? He only pleads that he was suspended as a member irregularly but now introduces a totally new dimension through the application. In my view, what is the Petition and what the Petitioner now seeks through this application is at variance. There is no correlation between the application and the Petition and as such, the application floats. It is not anchored on the facts disclosed in the Petition. It is thus incapable of any further consideration.

49. For the reasons given in the foregoing, the application is dismissed. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup>/ DAY OF MARCH, 2024.**

**L N MUGAMBI**

**JUDGE**

