



Republic v Rift Valley Sports Club; Macharia (Exparte Applicant) (Judicial Review Application 15 of 2023) [2024] KEHC 3158 (KLR) (2 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
JUDICIAL REVIEW APPLICATION 15 OF 2023
SM MOHOCHI, J
APRIL 2, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

RIFT VALLEY SPORTS CLUB RESPONDENT

AND

RICHARD NDERITU MACHARIA EXPARTE APPLICANT

JUDGMENT

1. Before me is a Chamber Summons Application filed Under Sections 8 and 9 of the [Law Reform Act](#) and Order 53 Rules 3 and 4 of the Civil Procedure Rules and all other enabling provisions of the law pursuant to the leave granted on 29th September, 2023 seeking the following reliefs;
 - a. AN ORDER OF CERTIORARI to remove to this Court to be quashed the decision of Rift Valley Sports Club made on 8th March, 2023 expelling the Ex-Parte Applicant as a member of Rift Valley Sports Club.
 - b. The costs of this application be met by the Respondent.

Ex-Parte Applicant’s Case

2. The Application is based on the grounds set out in the Statement filed in this Court on 6th September, 2023, and the verifying affidavit of Richard Nderitu Macharia sworn on 5th September, 2023.
3. By the Respondent’s letter dated 8th March 2023 the Ex-Parte Applicant was informed of his expulsion as a member of the Respondent.



4. That, prior to the decision to expel him, the Ex-Parte Applicant was not informed of the complaint against him and the evidence thereof and he was not given a hearing at all.
5. That the decision to expel Ex-Parte Applicant, was made in fragrant breach of the rules of natural justice.
6. That on 14th March, 2023 Ex-Parte Applicant appealed against the decision of the Respondent, but the Respondent refused and/or neglected to include the appeal as an agenda item in its next Annual General Meeting that was held in May, 2023.
7. Which Application is supported by the Statement and Verifying Affidavits of Richard Nderitu Macharia that, no allegations, complaint or Show-Cause letter were ever given or communicated to him and given a chance to respond.
8. That, on 14th March, 2023 he made his appeal pursuant to Rule 22 of the Rules and by Bylaws of the Respondent.
9. That, he was denied access to the club house of the Respondent with effect from 8th March, 2023 and his name was subsequently posted on its notice board. And that, the Respondent did not include his appeal as an agenda item in its next general meeting that he later learnt was held in the month of May, 2023.
10. That, he has been condemned unheard in breach of rules of natural justice and his rights as a life member of the Respondent have been violated.
11. That, he has not accessed facilities of the Respondent at its club house at Nakuru and in the reciprocating clubs since 8th March, 2023 and it is only fair and just that an order of certiorari do issue of his expulsion from membership of the club.

Respondent's Case

12. Respondent opposed the motion by Notice of Preliminary Objection dated 23rd October 2023, filed on 10th November 2023 on the following points of law:
 - a. That the Respondent is a private body limited by guarantee and does not fall under the ambit of Judicial Review.
 - b. That this suit offends the provisions of Order 53 Rule 2 of the Civil Procedure Rules 2010, in that this suit is time-barred.
13. By a Replying affidavit dated 23rd October 2023 filed on 11th of November 2023 Emmy Lagat, the Manager of the Respondent and the Secretary of Motion, the Board of Directors of the Respondent opposed the said Application for the following reasons:
 - a. That, the Ex-Parte Applicant herein is guilty of material non-disclosure and has approached this Honourable Court with unclean hands.
 - b. That, the Ex-Parte Applicant was aware of the formal complaint made against him and the subsequent disciplinary meeting in relation to the same.
 - c. That, the Ex-Parte Applicant was a member of the club and the Respondent received a formal complaint against him from a club member, Mr. Lincon Miano, alleging that on 17th February 2023, the Ex-Parte Applicant herein attacked him verbally leading to a physical altercation.



- d. That, on the other hand, the Ex-Parte Applicant alleged he had been assaulted and was invited to make a formal complaint on the same but never made a formal complaint in regard to his allegations.
- e. That, the Ex-Parte Applicant was invited to a disciplinary hearing held on 27th February 2023 by the club membership sub-committee but failed to attend the said disciplinary meeting and based on the evidence adduced against him, the membership committee recommended that the full board expels him.
- f. That, a special full board meeting was held on 6th March 2023, wherein in the members reviewed the evidence adduced against the Ex-Parte Applicant and the Board concluded that the Ex-Parte Applicant had infringed on the club rules and by-laws and unanimously agreed to expel the Ex-Parte Applicant as per clause 22 of the said by-laws.
- g. That pursuant to this disciplinary hearing, and the decision to expel the Ex-Parte Applicant, The Respondent wrote to the Ex-Parte Applicant a letter dated 6th March 2023 informing him of the club's decision and the Ex-Parte Applicant's option of appealing against the said decision as per the provisions of clause 22 (2) of the club by-laws.
- h. That the Ex-Parte Applicant failed to exercise his available remedy of appeal and has instead rushed to this Court instead of exhausting all the club's internal mechanisms.
 - i. That contrary to the Ex-Parte Applicant allegation, he never made a formal appeal against the decision of the board as per the provisions of clause 22 (2) of the club's rules and by-laws.
- j. That, the Respondent as a private club, has internal mechanisms regulated by the club's rules and by-laws and which mechanisms the Ex-Parte Applicant herein should have utilized and he was given a chance to be heard but he failed to utilize this chance.
- k. That, the Respondent as a private club, fully complied with the club's rules and by-laws before the decision to expel the Ex-Parte Applicant was made.
- l. That, contrary to the Ex-Parte Applicant's allegations, the club complied with the rules of natural justice and his rights were not violated. And that the Respondent board acted as per *the constitution*, the *Fair Administrative Action Act*, and its rules and by-laws prior to the suspension of the Ex parte Applicant and as such the application should be dismissed with costs.
- m. That this application by the Ex-Parte Applicant is unmerited and is made in bad faith and that the same should thus be dismissed.

Determination

- 14. Having considered the motion, the pleadings for and against the application, the submissions for and against the grant of the orders sought and the authorities cited on behalf of the parties thereto, the Court has formed its views as follows;



15. It is trite where a preliminary objection is raised that goes to the jurisdiction such objection ought to be determined at the earliest opportunity. This was the position in *Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 where the Court of Appeal expressed itself as follows:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a Court on its own motion must be decided forthwith on the evidence before the Court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the Court. A party who fails to question the jurisdiction of a Court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the Court should hear and dispose of that issue without further ado.”

16. The Respondent is of the view that the Judicial Review remedies are unavailable against the Respondent that is a private entity. This Court disagrees with the Respondent assertion observing that, the entrenchment of judicial review under *the Constitution* of Kenya, 2010 elevated it to a substantive and justiciable right under *the Constitution*. Accordingly, Judicial Review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in *the Constitution*.

17. Human rights cannot be observed, they cannot be enjoyed, if a duty is not imposed on the other party to observe them, Over time, fundamental rights have evolved to include an obligation on individuals and private entities to uphold them in recognition of the fact that rights abuses can also be caused by private actors a view that is well captured in the following words; Rights can only make sense in the social and political arena when they are coupled with duties on individuals¹ and private entities. This Court thus appreciates the Horizontal Application of Rights in exceptional circumstances such as this one.

18. Article 165(3) grants jurisdiction to this Court in the following terms: -

- “(3) Subject to clause (5), the High Court shall have—
- (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a

¹ F Viljoen, ‘Africa’s Contribution to the Development of International Human Rights and Humanitarian Law’ (2001)



person from office, other than a tribunal appointed under Article 144;

- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.

19. Article 23 of *the Constitution* also grants this Court authority to uphold and enforce the Bill of Rights in the following terms:

“23.

- (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

20. From the above constitutional provisions, it cannot be in dispute that this Court has jurisdiction, in the wider sense, to superintend over the matter at hand in as far as a breach of the Bill of Rights is alleged. What appears to be in contention is whether the Court has jurisdiction in the narrower sense, that is, power to enter into an inquiry into the dispute at hand, the question being whether affairs of private entities such as private members’ clubs ought to be brought under the purview of our Courts, and to this extent, whether constitutional provisions can and ought to be infused into management and affairs of such private entities.

21. Section 3 of the *Fair Administrative Action Act*, extends the scope of fair administrative action and judicial review to the administrative actions of public and private persons or bodies. The section expressly states that the Act applies to all state and non-state agencies including any person exercising administrative authority; performing a judicial or quasi-judicial function under *the Constitution* or any written law; or whose action, omission or decision affects the legal rights or interests of any person to whom the action, omission or decision in question relates.

22. Having said so, this Court thus finds the Notice of Preliminary objection dated 23rd October 2023, filed on 10th November 2023, to be without merit and the same is disallowed. This Court has jurisdiction to hear and determine the judicial review.



23. Upon considering the respective party's positions, I find that the following issues fall for determination:
- a. Whether the impugned decision is tainted with procedural impropriety?
 - b. Whether the Respondent violated the Ex-Parte Applicant's right to Natural Justice?
 - c. Whether the Ex-Parte applicant has established any grounds to warrant issuance of the judicial review orders?
24. On the 1st Issue the Ex-Parte Applicant contends that he was subjected to disciplinary proceedings without notice and that he was thus denied an opportunity of being heard. The Respondent on the contrary alleges that the Ex-Parte Applicant was aware of a formal complaint made against him and that a Notice was issued on the 28th of February 2023 inviting him to lodge a formal complaint.
25. This Court has considered this and finds that the Respondent never invited the Ex-Parte Applicant to the proceedings of the Membership Sub-Committee dated 27th February 2023 where a decision was reached recommending his expulsion.
26. The Minutes of the Membership Sub-Committee dated 28th February 2023 do not indicate if the Ex-Parte Applicant was ever invited to the proceedings.
27. There is no indication by the Respondent ever having presented the complaint against the Ex-Parte Applicant by Mr. Lincoln Miano to invite him to respond to any specific allegation.
28. That the Special Full Board Committee meeting dated 6th March 2023 as deduced from the minutes equally reveal that the sole agenda therein was deliberation of a member's disciplinary matter.
29. There is no indication of the Special Full Board Committee inviting the Ex-Parte Applicant to appear, answer to any allegation(s) and generally be heard before any decision adverse to him is taken.
30. In *Joseph Wambugu Kimenju v AG {2013} eKLR* the Court held that;
- “the fundamental principles of natural justice are that a person affected by a decision will receive notice that his or her case is being considered in addition to being provided with details of the case”
31. This Court is persuaded that the Ex-Parte Applicant was denied his natural justice to be heard in two instances by the Respondent and this Court finds the contravention of the principle of natural justice 'Audi alteram partem'.
32. The Respondent's handling of the Ex-Parte's Appeal leaves a lot to desire, his Appeal has not been scheduled as was envisioned by the by-laws and the only rational deduction therefrom is that the fate of the Ex-Parte Applicant was sealed by the Membership Sub-Committee recommending expulsion, mutating into a full Special Full Board Committee to ratify the said expulsion.
33. The Ex-Parte Applicant's Appeal was never included as an Agenda item in the month of May, 2023 and no special general meeting was ever convened to afford him a hearing.
34. The Respondent is urged to review its procedures, rules and bylaws to align the same to our constitutional standards



35. In the premises the Orders which commend themselves to me and which I hereby grant are as follows: The full Special Full Board Committee Decision dated 6th March 2023 expelling from membership, the Ex-Parte Applicant is hereby quashed. The Respondent shall forthwith restore to Full Life Membership the Ex-Parte Applicant.
36. Finally, on the issue of costs. I was urged to consider awarding costs in these proceedings. In my view, if there are any proceedings in which public interests is a factor to be considered, these must be such. In my view the intricate relationship between the Respondent and the Ex-Parte Applicant of over 30 years is such that the parties are expected to revert back to the ante status and that the disagreement herein only related to decision making. I am thus inclined to find that parties shall bear their respective costs.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAKURU

ON THIS 2ND DAY OF APRIL 2024.

MOHOCHI S. M.

JUDGE

