



**Isika v Royal Nairobi Golf Club (Constitutional Petition E227 of 2022)
[2023] KEHC 486 (KLR) (Constitutional and Human Rights) (3 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E227 OF 2022**

M THANDE, J

FEBRUARY 3, 2023

BETWEEN

KEVIN ISIKA PETITIONER

AND

ROYAL NAIROBI GOLF CLUB RESPONDENT

JUDGMENT

1. The petitioner filed this petition against the respondent, of which he is a member. He seeks the reliefs that:
 - a. This Honourable Court doth be pleased to issue a declaration that the provisions of article 3, 10, 20, 22, 23, 25(c), 27, 28, 36(1), 47 and 50 of the *Constitution of Kenya* have been violated; therefore the actions of the Respondent are null and void.
 - b. This honourable court doth be pleased to declare that the hearing of the April 5, 2022 together with the intended second hearing demonstrable through the letter dated May 12, 2022 and the purported disciplinary process were illegal, null and void thereby setting them aside.
 - c. This honourable court doth be pleased to bar, too the intended second hearing demonstrable through the letter dated May 12, 2022, upon finding that it is illegal, not supported by any law and *ultra vires*, therefore it is null and void *ab initio*.
 - d. This honourable court doth be pleased to issue general damages arising from the Constitutional violations demonstrated hereinabove.



- e. This honourable court doth be pleased to issue any further orders and directions that it may deem fit for the ends of justice to be met.
 - f. That costs of this Petition be provided for.
2. The petitioner's claim is that he was on 5.4.22, required to attend a hearing before the respondent's disciplinary committee (Committee) to answer to a complaint lodged by one the Respondent's staff member. The complaint was contained in a letter dated 22.2.22, which the Petitioner claims was not sufficiently explicit or detailed to enable him mount a proper defense. On the hearing date, the Committee proceeded with the hearing in the absence of the complainant and witnesses and did not supply the Petitioner with the complainant's witness statement, contrary to Clause 13 of the Respondent's By-Laws. In a letter date 12.5.22, the Respondent informed the Petitioner to attend a second hearing on 16.5.22. The hearing did not however proceed as the Petitioner was not available.
3. The Petitioner's case is that by subjecting him to a hearing in which they have withheld relevant material, statements and witness testimony and the identity of the witnesses to be called thereby curtailing his right to mount a defense, the Respondent through the Committee is in breach of the rules of natural justice, the Petitioner's rights to equality before the law and equal benefit of the law under article 27(1) and (2), freedom of association under article 36(1), fair administrative action and fair trial under articles 47, 25(c) and 50 of the [Constitution of Kenya](#) . The Petitioner further contends that by conducting the hearing in the absence of the Complainant and without providing him with witness statements, the Respondent is in breach of articles 10, 19(1) and 20 of the [Constitution of Kenya](#) and right to. The hearing will also go against the principle of rule of law under article 10. of the [Constitution of Kenya](#) .
4. By an application of even date, the Petitioner sought interim orders. On 30.5.22, the Court granted orders staying the disciplinary proceedings and action against the Petitioner pending the hearing and determination of the application.
5. The Respondent opposed the petition and application *vide* its grounds of opposition dated 7.11.22 and a replying affidavit sworn by Lucas Oluoch (Lucas), the Honorary Secretary on even date. The grounds are firstly that the Petition runs afoul the doctrine of exhaustion in that the Respondent has in its Memorandum and Articles of Association and By-Laws a clearly defined procedure for dealing with disciplinary proceedings. Secondly, that the Petition runs afoul of the doctrine of avoidance in so far as it seeks to challenge the Respondent's disciplinary procedures of disciplinary hearing of its member. Thirdly that the Petitioner has fallen short of the threshold set out in [Anarita Karimi Njeru v the Republic](#) [1976-1980] KLR by failing to demonstrate with reasonable precision the rights violated by the Respondent and the manner of violation.
6. In addition to reiterating the grounds of opposition, the Respondent denied violating the Petitioner's rights as alleged and asserted that it had at all times made every effort to ensure that the Petitioner's right to a fair, and transparent process is upheld. Lucas averred that a complaint was on December 12, 2020 lodged by on Christine Imembi, a staff member. The Complainant claimed that the Petitioner gained access to the Staff Only section of the Club's Halfway Banda and on inquiring if she could assist him, the Petitioner yelled at her and used abusive language. The matter was reported to the Acting Food and Beverage Manager who escalated it to the then Honorary Secretary and investigations commenced. By a letter dated 22.2.22, the Respondent informed the Petitioner of the Complaint against him and requested him to respond to the same. His attention was draw to his rights under the Clubs memorandum and articles of association and by-laws. In his letter dated 28.2.22, the petitioner took a very combative approach and did not address the specific allegations which were detailed in



the letter of 22.2.22. At the hearing on 5.4.22 the Petitioner stated that he had no recollection of the incident in question. The Respondent then fixed hearing on 16.5.22 when the Complainant would be present.

7. Lucas further stated that contrary to the Petitioner's allegations, the letter dated 22.2.22 contained the name and designation, date, time and place of the incident and the particulars of the allegations against him. Although the Complainant was absent on the 1st day of hearing having left the Respondent's employment, the Respondent took steps to secure her attendance at the next hearing. He further deposed that the By-Laws do not require the attendance of a complaint but that that an opportunity must be granted to a member against whom allegations have been made to respond in writing prior to a hearing and to call a witness. The Respondent urged that the Petition be dismissed with costs as it is an attempt by the Petitioner to interfere with its disciplinary processes and is an abuse of the Court process.
8. In his supplementary affidavit sworn on 18.11.22, the Petitioner urged the Court to enter judgment in his favour as the Respondent has admitted that the Complainant was not present at the hearing, which is a breach of the disciplinary procedures and rules of natural justice as well as the Petitioner's rights. Further that the incident report exhibited by the Respondent does not demonstrate the manner in which the investigation was done, whether an investigation team/committee was constituted or witnesses interrogated. Additionally, the doctrines of exhaustion and avoidance do not apply herein due to the aforementioned breaches which render the Respondent incapable of proportionately and regularly address his grievances and defence. Further that the Respondent has not told the Court of the alternative forum before which the Petitioner would have placed his grievances for resolution. He maintained that he has demonstrated with sufficient precision the manner in which the Respondent has violated his constitutional rights and freedoms and continues to do so be requiring him to attend a second hearing. He urged that Court to interrogate the manner in which the disciplinary procedure was undertaken and not the merits of the subject matter.
9. The Court directed that the Petition and Application be heard together. The Application which sought interim prayers similar to those in the Petition is subsumed in the Petition. Parties filed their respective submissions which I have duly considered. The issues that fall for determination are:
 - i. Whether the Petition runs afoul the doctrines of exhaustion and avoidance.
 - ii. Whether the Petitioner's rights have been violated.
 - iii. Whether the Petitioner is entitled to damages.
 - iv. Whether the Petition runs afoul the doctrines of exhaustion and avoidance
10. In the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR, the Court of Appeal addressed its mind to the doctrine of exhaustion expressed itself thus:

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with article 159 of the *Constitution of Kenya* which commands Courts to encourage alternative means of dispute resolution.



11. And in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR, a 5-Judge bench substantively dealt with the doctrine of exhaustion and stated as follows:

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. This encourages alternative dispute resolution mechanisms in line with article 159 of the *Constitution of Kenya* and was aptly elucidated by the High Court in *R v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR, where the Court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:

"Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution of Kenya* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

43. While this case was decided before the *Constitution of Kenya* of Kenya 2010 was promulgated, many cases in the post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 *Constitution*. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:

"It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is 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. The *ex parte* applicants argue that this accords with article 159 of the *Constitution of Kenya* which commands Courts to encourage alternative means of dispute resolution."

12. Flowing from the foregoing, it is quite evident that the doctrine of exhaustion promotes alternative dispute resolution mechanisms in line with article 159(2)(c) of the *Constitution of Kenya* and may be a complete bar to the jurisdiction of a court.



13. It is the respondent's case that the filing of the petition while all the while actively participating in the respondent's internal disciplinary process, the petitioner failed to first exhaust all the administrative remedies available under the Respondent's By-laws. He ought to have allowed the respondent's pending disciplinary process to run its course and only thereafter come to this Court if aggrieved. His move to this court is thus an abuse of the court process.

14. To properly understand the respondent's contention, I have had a look at the respondent's memorandum and articles of association and by-laws exhibited by the Petitioner with a focus on disciplinary mechanisms. Article 20 provides as follows:

20. Disciplinary Measures

- a. If any member shall willfully refuse or neglect to comply with the provisions of the Memorandum and Articles or Bye-Laws of the Company, or shall be guilty of any conduct deemed by the Board to be unworthy of a Member of the Company, or commits any act likely to be injurious to the Company, as the case may be, a Complaint shall be made against him through the Hon. Secretary.
- b. The Hon. Secretary shall thereafter provide the Member with a written summary of the Complaint(s) made against him and seek his written response.
- c. The hearing shall be conducted before a disciplinary panel comprised of not less than 5 full members and not more than 7 full members of the Company drawn from the Committee of the Board for the time being responsible for Membership and Ethics, and which number shall also include 3 eminent members of the Company of not less than 10 years good standing appointed by the Board.
- d. At the hearing, a Member shall have the liberty to call his witnesses who shall be Club members and upon determination, the panel shall table its recommendations to the Board as to whether such a Member should be suspended, expelled, or any other disciplinary measures should be meted against him as the Directors may deem fit.
- e. Any Member expelled by the Board under this Article shall forfeit all right in and claim upon the Company and its property. Any Member aggrieved by the expulsion shall have the right of appeal to an Extra-ordinary general meeting of the Company where a majority of two-thirds of the Full Members present shall be required to vote in favour of the appeal to rescind the resolution of the Board.

15. By-Law 13.0 provides as follows:

13. Conduct of Members

- 1 The Board of Directors may from time to time take disciplinary action as they deem fit in their absolute discretion against a member for incompatible conduct, including non-adherence to the Club's Constitution and By-Laws. Where a member is required to attend a disciplinary hearing the below will be the procedure followed:



- i. a written complaint will be sent to the Honorary Secretary clearly indicating the nature of the complaint, the name and number of the member who caused the complaint and any other relevant information.
- ii. notice will be given to the member indicating the complaint received and requesting a written response within 7 days.
- iii. the Membership Committee (as constituted in the memorandum and articles) will receive written statements from all affected parties, club security officer and any other stakeholder eg outsourced security firm involved.
- iv. a member desiring to attend a hearing with a witness will submit the name, membership number and written statement of the member in good standing at least 24 hours before the hearing. Any witness not directly involved in the incidence (sic) at hand will be an observer at the meeting.
- v. The Membership Committee member, member attending hearing and witnesses will sign attendance once the hearing is completed.
- vi. Once the hearing is complete the Committee will deliberate on all submissions and make recommendation to the Board of Directors. Where required further clarification may be sought by the Committee from any of the parties.
- vii. Written feedback will be provided to bot members within a month of the hearing.

13. 2 ...

16. The above provisions clearly show that there is an elaborate internal mechanism for resolving disputes relating to the conduct of members of the Respondent as well as for disciplining errant members.
17. The record shows that the Petitioner was by a letter dated 22.2.22 informed of the complaint against him. The name of the Complainant was indicated therein, as was a summary of the complaint. The Petitioner was asked to respond in writing by 1.3.22. His attention was then drawn to Article 20 of the Memorandum and Articles of Association and By-Law No. 14. The letter was by the Hon. Secretary.
18. The Petitioner responded vide a letter dated 28.2.22 in which he stated he had no recollection of the incident in question and further made allegations of witch hunt and character assassination.
19. The hearing was nevertheless fixed for 5.4.22. The Petitioner attended but the Complainant did not attend. Another hearing was set for 12.5.22 and the management was tasked to secure the attendance of the Complainant and other witnesses. The Petitioner's complaint as I understand it is that he has been called for a second hearing and he opposes the same. This is why he moved to this Court to seek a halt to the said proceedings.
20. Our courts have repeatedly stated that the doctrine of exhaustion serves to ensure 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.
21. The doctrine of exhaustion has statutory underpinning in the *Fair Administrative Action Act* (FAAA). Section 2 of the FAAA provides that an "administrative action" includes–
 - i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or



- ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;
22. The decision made by the Respondent to summon the Petitioner for a second hearing, constitutes an administrative action within the above definition. It is a decision or action relating to the Petitioner and which the Petitioner claims has affected his legal rights and interests. The Petitioner has urged that Court to interrogate the manner in which the disciplinary procedure was undertaken and not the merits of the subject matter.
23. Section 9 of the [FAAA](#) sets out the procedure for judicial review of an administrative action as follows:
 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 of Kenya](#).
 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.
24. Section 9(2) of the [FAAA](#) is explicit that courts shall not review an administrative action unless all the mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
25. I have already reproduced the internal disciplinary mechanisms as contained in the Respondent's governing documents. The internal mechanisms provided by the Respondent required the Petitioner to attend the hearing and to call such witnesses as he wished to call. By filing the Petition herein and obtaining orders restraining the Respondent from proceeding with the hearing, the Petitioner curtailed and short circuited the internal mechanisms. It is now well settled that judicial proceedings only come in as a last resort, not as the first port of call and only after applying and exhausting the available alternative dispute resolution mechanisms.
26. The Petitioner complains that at the first hearing, the Complainant was not present. He was however invited to a second hearing on 16.5.22 vide the letter dated 12.5.22. A careful reading of the said letter reveals that the Petitioner was informed that at the hearing, a witness will be in attendance to testify.



27. The record shows that the Petitioner responded to this letter in which he accused the Respondent of abusing his rights, witch hunt, harassment and intimidation and other accusations which need not be repeated here. He further stated that he had written an email saying he had an out of town trip and would thus not be available for the hearing and that the notice was too short.
28. Shortly thereafter, the Petitioner filed the Petition herein. His complaint is that by summoning him to the second hearing without providing the identity of the witness, copy of the witness statement and failing to detail the gist or probative value of the testimony of the witness, the Respondent contravened the rules of natural justice, principles of fair administrative action and tenets of a fair hearing. The Petitioner ought to have requested the Respondent to supply him with all information necessary, to enable him prepare his defence and then present himself at the hearing to face his accusers. This is the course of action that would have accorded with the doctrine of exhaustion.
29. The Court is alive to the provisions of article 22(1) of the *Constitution of Kenya* :
- Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
30. While the right of the Petitioner to approach this Court claiming that his rights have been denied, violated, infringed or threatened by the Respondent is guaranteed under article 22, he could only exercise this right after exhausting the internal mechanisms available under the respondent's articles of association and By-Laws. By failing to do so, his right notwithstanding, he shot himself in the foot by violating the doctrine of exhaustion.
31. For this Court to assume jurisdiction by by-passing the Respondent's internal dispute resolution mechanisms, it must be demonstrated that exceptional circumstances exist to warrant such action by the Court. The Petitioner has not demonstrated or even stated that any exceptional special circumstances do exist to warrant a departure from the internal mechanisms nor has he applied for such exemption.
32. The law is plain that only after exhausting alternative statutory mechanism provided for, should a party move to court. The Petitioner was required to first to exhaust the mechanisms provided for in the Respondent's Articles of Association and By-laws, before instituting the Petition herein.
33. Closely related to the doctrine of exhaustion is the doctrine of constitutional avoidance. This doctrine was elucidated in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, where the Supreme Court stated as follows:
- The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
- "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.
34. A court will decline to decide a constitutional question if there was an alternative basis upon which the case could have been disposed of, notwithstanding that the same was properly before the court.



35. Similarly, in the case of *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Mativo, J. (as he then was) considered the doctrine of constitutional avoidance and stated:

Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved.¹⁴ As a principle, constitutional avoidance has been linked to the doctrine of justiciability.¹⁵ In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain. It encompasses three main principles which are standing, ripeness and mootness.¹⁶ The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor*¹⁷ in which Ebrahim JA said the following:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the declaration of rights..”

36. As demonstrated herein, there is an alternative process provided by the Respondent. The issues raised by the Petitioner herein could have been resolved at the hearing of the complaint before the Respondent’s disciplinary panel.

37. In light of the foregoing, I find that the Petitioner ought to have utilized and exhausted the alternative remedies available, before seeking judicial review of the administrative action complained about. Further the Petitioner did not demonstrate any exceptional circumstances for exemption from the obligation to exhaust the available remedies as required under section 9(4) of the *FAAA*, nor did he apply for such exemption. In the premises and by dint of Section 9(2) of the *FAAA*, I find and hold that this is a fit and proper case for this Court to invoke the doctrines of exhaustion and constitutional avoidance and decline to entertain the matter.

38. Without jurisdiction, the Court has no basis to proceed to consider any of the prayers sought herein.

39. In the end, having carefully considered this Petition, response, the rival submissions and the relevant authorities and having applied my mind to the *Constitution of Kenya* and applicable law, the conclusion I come to is that the petitioner filed this petition prematurely thereby rendering it unsustainable. The result is that the petition dated 19.5.22 is hereby struck out with costs.

DATED and DELIVERED in NAIROBI this 3rd day of February, 2023

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioner**

..... **for the Respondent**

..... **Court Assistant**

