Republic v Board of Directors, Royal Nairobi Golf Club & 2 others; Okeke & another (Exparte) (Judicial Review Application E058 of 2021) [2023] KEHC 3989 (KLR) (Judicial Review) (5 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3989 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E058 OF 2021

JM CHIGITI, J

MAY 5, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

BOARD OF DIRECTORS, ROYAL NAIROBI GOLF CLUB .... 1ST RESPONDENT

CAPTAIN, ROYAL NAIROBI GOLF CLUB ..... 2ND RESPONDENT

DR. CONSTATINE BARASA MEMBER AND DIRECTOR FINANCE, ROYAL NAIROBI GOLF CLUB ..... 3RD RESPONDENT

AND

CHRISPINE OKEKE ..... EXPARTE

RICHARD OGWENOH OYARE ..... EXPARTE

JUDGMENT

1. The ex-parte Applicant was granted leave to file a substantive motion on 7th May 2021 under Section 8(2) and 9(1)(b) of the *Law Reform Act*, Cap 26 Laws of Kenya, Article 47 of *the Constitution* of Kenya 2010, Section 11 of the Fair Administrative Act No.4 of 2015, Laws of Kenya; and Order 53 Rule 1(2) of the Civil Procedure Rules.

2. Informed by the said leave, the Exparte Applicant filed the Notice of Motion dated 21st May 2021 wherein it sought the following:

    i) AnOrder of Certiorarito remove to this Honourable Court to be quashed the decision of the and Respondent in purporting to suspend the Applicants for one (1) month from golfing activities in the club.

    ii) An Order ofMandamus compelling the Respondents to immediately remove and/or expunge from the Applicant's records as the club any purported disciplinary records as per the letter from the 2nd Respondent dated 12th February 202O.

    iii) An Order ofMandamuscompelling the Respondents to issue an official, unequivocal and public apology read out by the 2nd Respondent during the next four (4) club night presentations.

    iv) An Order of Mandamuscompelling the Respondents to publish a copy of the said apology to the Applicants be placed and maintained on the Respondents' Notice Boards at the club for a period of 30 (thirty) days.

    v) This Honourable court be pleased to order the Respondents to compensate the Applicants for the harm caused to their reputation amongst their peers at the club.

    vi) Costs.

3. The Application was supported by a Verifying Affidavit, and a Statutory Statement evenly dated 22nd April 2021; and a Supplementary Affidavit dated 20th September 2022.

4. It is noteworthy, that the counsel for the ex-parte Applicants, on 26th July 2022 informed the court that the 2nd ex-parte Applicant, Richard Ogwenoh Oyare, was deceased; and thus, only the 1st Applicant's case would be pursued.

5. It was the ex-parte Applicant's case that on 12th February 2021, he received a disciplinary letter from the 2nd Respondent, which arbitrarily suspended him for a period of one (1) month from golfing activities in the club, as from 16th February 2021.

6. The ex-parte Applicant maintains that he was neither served with any complaint by the 2nd Respondent, nor given notice of any disciplinary hearing, yet the by-laws of the club under Rule 13 provides that service of notice for at least a period of seven (7) days' notice should be issued in disciplinary matters.

7. Further, the ex-parte Applicant alleged that he was denied an opportunity to respond, and that in any case, the committee was formed by the 2nd Respondent - with the authority of the 1st Respondent.

8. It was the ex-parte Applicant's claim that he wrote letters to the 2nd Respondent seeking to appeal the arbitrary decision, which letters were never responded to.

9. In sum, it is the Applicant's case that the decision and actions of the Respondents were ultra vires, illegal, irrational, unreasonable, disproportionate, and based on irrelevant considerations for failure to provide any valid reason for the same decision. Resultantly, the ex-parte Applicant prays for the quashing of the Respondents' decision made on 12th February 2021, amongst other prayers.

10. The ex-parte Applicant, Chrispine Okeke, in his Supplementary Affidavit and in responding to the Respondents' Replying Affidavit, averred that the Respondents did not adhere to the club's by-laws, particularly Rule 13 – which gives procedure for conducting disciplinary hearing.

11. Further, the Applicant's challenges the said Replying Affidavit, on the grounds that at all material times the deponent was not part of the facts in question, thus that her evidence is merely hearsay.

12. In opposing the Application, the Respondents filed their Replying Affidavit dated 25th October 2021 and sworn by Christine Sabwa, the honorary secretary of the Royal Nairobi Golf Club. It was the Respondents' case that a complaint was made by the 2nd Respondent against the ex-parte Applicant and others, which complaint was referred to the Club's Rules and Enforcement Sub-Committee of the Match and Handicap Committee, herein referred to as "the sub-committee".

13. Subsequently, that the sub-committee scheduled a hearing, on the complaint, on 4th February 2021 granting parties a fair opportunity to state their case in regard to the complaint. That the Applicant was represented in the hearing, and as such he cannot turn around and claim that he was unaware of the complaint against him.

14. The Respondents contends that the Club Captain made the decision of suspending the team (including the ex-parte Applicant) for a period of one (1) month from golfing activities at the Club - pursuant to the recommendations of the sub-committee and in invoking by-law 8.2 of the Club's by-laws.

15. That the suspension letter dated 12th February 2021 indicated reasons for arriving at the decision, and the relevant by-law provision that provided for such action.

16. On the allegation that the suspension was disproportionate and unreasonable, the Respondent averred that the suspension was limited deliberately due to this being the first time a complaint had been made against the ex-parte Applicant.

17. The Respondents further denied the claim that the 2nd Respondent participated as part of the sub-committee, but that his participation was as a complainant, which the same is reflected in the sub-committee letter dated 11th February 2021.

18. Additionally, the Respondents stated that the ex-parte Applicant's prayer for orders to quash the Respondents' impugned decision, are and have been overtaken by events, as at the time of filing of this Application. For the public apology, the Respondents insisted that they cannot be compelled to issue an apology for making a legal and rational decision. Also that in any case, a prayer for a public apology is in a defamation suit as opposed to being in judicial review. In the end, the Respondents averred that the Application is frivolous, vexatious, and an abuse of the courts process.

19. The Application was canvassed by way of written submissions. On one hand, the Applicant on inadmissibility of the Respondents Replying Affidavit, sworn by Christine Sabwa, as being hearsay evidence; the Applicant cited the case of Life Insurance Corporation of India vs. Panesar [1967] EA 614, where the court stated that, "Whereas it is true that the *Evidence Act* does not apply to affidavits tendered to the court, it is also true that the basic rules of evidence nevertheless apply to evidence tendered by affidavit and if those basic rules are not complied with then the evidence is of no probative value whatsoever and should be rejected."

20. The ex-parte Applicant submitted that judicial review orders can be issued against the Respondents. Reliance was placed on the case of Zakayo Karimi & Another -vs- Royal Nairobi Golf Club [2017] eKLR, where the court stated that, "...that pursuant to the provisions of Article 47 as read with the

provisions of the *Fair Administrative Action Act*, 2015, judicial review orders may where appropriate issue against the decisions of the Respondent."

21. It was the ex-parte Applicant's position that the Respondents' actions of condemning him (the ex-parte Applicant) unheard, violated *the Constitution*, and the rules of natural justice. Republic vs The Honourable Chief Justice of Kenya & Others Ex-parte Lady Justice Nambuye, High Court Misc. Application No. 764 of 2009; and Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR cases were relied upon; wherein the courts held that no man should be condemned unheard; and elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response.

22. Therefore, that the Respondents' decision suspending the ex-parte Applicant ought not to stand. Relied on the cases of Onyango Oloo v Attorney General [1986-1989] EA 456, General Medical Council v Spackman [1943] 2 All ER 337, R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007 and Ridge vs. Baldwin [1963] 2 All ER 66. In the cases, the courts in main observed that, if the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision. A decision given without the principles of natural justice is void.

23. For compensation, the ex-parte Applicants cited Section 11(1)(j) of the *Fair Administrative Action Act* which provides that the Court can make an award of costs or other pecuniary compensation in appropriate cases. In the end, the ex-parte Applicant beseeched this court to allow the Application and grant the prayers sought.

24. On the other hand, the Respondents submitted that the Applicant was granted a fair hearing, before the decision to suspend him. That the ex-parte Applicant attended the hearing dated 4th February 2023, via phone call, as evidenced by the sub-committee letter dated 11th February 2021, addressed to the Club's Captain.

25. The Respondents posited that whereas the incident occurred on 28th January 2021, the hearing was not scheduled until 4th February 2021. That the ex-parte Applicant therefore had seven (7) clear days within which to file a written response (if any), and bring a witness to the hearing in accordance with the Club's by-laws; which option the Applicant did not exercise. To that end, that the rules of natural justice were applied before making the impugned decision. Reliance was placed on the case of Egal Mohamed Osman v. Inspector General of Police & 3 Others [2015] eKLR and Andrew Nthiwa Mutuku v. Court of Appeal & 3 Others [2021] eKLR wherein the court observed that, "It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn' and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

26. It was the Respondents submissions that the Applicant served a suspension for a period of one (1) month from 16th February 2021 to 16th March 2021; whereas this instant Application was instituted on 22nd April 2021. Therefore, that the Application had been overtaken by events, and as such this honourable court ought not to issue orders in vain. Anita Cheleagat O'donovan & 2 Others v. Fredrick Kwame Kumah & 2 Others [2015] eKLR, and Salim Juma Onditi v. Minister for Local Government & Others [2008] eKLR cases were relied on; where the courts observed that to issue orders for injunction

would be after the matter has been overtaken by events. Orders may not be made which cannot be enforced or which may be ineffective for practical purposes.

27. The Respondent posited that the Applicant prayer for compensation and for a public apology are brought in the wrong forum, as such reliefs are not granted in judicial review proceedings, but in a defamation suit. Further, that the Applicant has the burden to prove his claims against the Respondent. Relied on the case of Muriungi Kanoru Jeremiah v. Stephen Ungu M'mwarabua [2015] eKLR where the court stated that, "As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed ... The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant ... The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove."

28. On the claim that the Replying Affidavit is defective for having been sworn by Christine Sabwa, on account that she was never a party to the complained incident, the Respondent submitted that the 3rd Respondent herein is a legal entity that can sue and is capable of being sued. Also, that the 1st Respondent (being the Club's Board of Directors) and the 2nd Respondent (being the Club's Captain) are officers of the Club and have been sued by the Applicant on account of their actions and/or omissions as said officers of the Club.

29. Consequently, that Christine Sabwa swore the Replying Affidavit, on behalf of the club, as the Club's Honorary Secretary - who was also at all material times apprised of the administrative goings-on in the club, including the events which culminated in ex-parte Applicant's suspension. Therefore, that the Replying Affidavit is properly on record before this court. That admissibility of Affidavits sworn on behalf of legal entities was clarified, in the case of Peter Onyango Onyiengo v. Kenya Ports Authority [2004] eKLR where the court stated that, "From these definitions, it is clear that an affidavit is a sworn statement usually given to be used as evidence. So anybody swearing an affidavit on behalf of a corporation can also give evidence for or on behalf of a corporation. To suggest, therefore, that everybody who testifies for or on behalf of a corporation has to have authority from the corporation given under seal as required by Order 3 rule 2 (c) is in my view not correct. In the circumstances, I hold that other than verifying affidavits, which as I have stated must be sworn by the plaintiffs themselves or authorized agents, all other affidavits filed and used in courts are not among the acts covered by Order 3 rules 1 to 5. All other affidavits can be sworn on behalf of individuals or corporations by anybody as long as that person is possessed of the facts and/or information that he depones on, that in the rules of evidence would be admissible, mere failure to state that the deponent of such an affidavit has the authority of the corporation on whose behalf he swears it does not invalidate the affidavit. That is an irregularity courts can under Order 18 rule 7 of the Civil Procedure Rules ignore."

30. In the end, the Respondents beseeched this court to dismiss this instant Application with cost.

Analysis and determination

31. After a careful consideration of the Application, Responses thereto, annexures, and the counsel's submissions; I have identified the following issues for determination:

    (i) Whether the Applicant has established the legal threshold for the grant of the judicial review orders sought.

    (ii) Whether this court can order compensation and an apology to the Applicant, by the Respondent, in the circumstances.

32. On the first issue, the grounds upon which judicial review orders can be granted were well explained in the case of Pastoli v Kabale District Local Government Council & Others (2008) 2 EA 300, where the court held;

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety... Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards... Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

33. This instant Application is not an appeal; it is a judicial review proceeding. A Judicial review and an appeal are distinguishable. In Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR, the Court of Appeal stated;

> "Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether the in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision".

34. This courts duty is to supervise the process before the decision making body, and confirm that the said decision is not tainted with illegality, irrationality, or procedural impropriety.

35. A merit review of the decision making body is permissible in limited circumstances under judicial review, but still it is a restricted power and the court can neither usurp the role of the decision making body nor substitute its decision for that of the body. Resultantly, this instant suit does not call for a review on merit. This position was reaffirmed in the case of Republic v Public Procurement Administrative Review Board & 3 others Ex parte Techno Relief Services Limited [2021] eKLR, where the court stated,

> "Judicial review has now also been entrenched as a constitutional principle pursuant to the provisions of Article 47 of *the Constitution*, which provides for the right to fair administrative action, and Section 7 of the *Fair Administrative Action Act* in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.

In addition, it was emphasized by the Court of Appeal in Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others, [2016] KLR that Article 47 of *the Constitution* as read with the grounds for review provided by Section 7 of the *Fair Administrative Action Act*, reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.

23. The standards of merit review set out in Section 7 (2) of the Act are as follows:

(2) A court or tribunal under Subsection (1) may review an administrative action or decision, if -

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to-

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power

24. From the above provisions I have no doubt that this court has jurisdiction to review the decisions of subordinate courts and quasi-judicial bodies, of which the Respondent is one. It is also inaccurate and one-dimensional to classify this court's review jurisdiction as being limited to the decision making process of an administrative body or subordinate court, as it is evident that the court can also review the merits of a decision in judicial review. The applicable restraints in the exercise of its judicial review jurisdiction are that the court must be careful not to usurp and interfere with the matters entrusted to an administrative body or subordinate court to decide in the first instance, as its jurisdiction is supervisory. In addition, the court cannot substitute its decision or preferred outcome with that of the said bodies or courts, hence the restrictions on the extent of merit review that can be undertaken in judicial review.

25. Coming to the permissible merit review, firstly, as shown by the applicable standards of review in Section 7 of the *Fair Administrative Action Act*, the legality of decision making extends beyond merely the process, and include aspects of reasonableness, proportionality and fairness of the decision. Secondly, the merit review by a judicial review court may extend to correcting any errors made by a decision making body as to the existence of precedent facts, and in the application and interpretation of the law, in reviewing the legality of the decisions, and if the bodies have acted within their powers. Hence the remedies available to a judicial review court in this regard of quashing illegal decisions and requiring public bodies to apply the correct law and procedure."

36. In the main, the ex-parte Applicant is challenging the Respondents' decision on the ground that he was not afforded a fair trial, for being denied an opportunity to state/defend his side of the case, as rules of natural justice demand.

37. There is no dispute that the Applicant was suspended from the club via a letter dated 12th February 2021, addressed from the Respondents, for a period of one (1) month. I have had a chance to examine the evidence on record and from the sub-committee report dated 11th February 2021, it is indicated that hearing was held on 4th February 2021 - wherein the ex-parte Applicant is noted to have attended the hearing through a phone call. The Applicant admitted that he received a call and communicated with a member of the club on the hearing date, but that there were challenges with the connections as he was driving at the time.

38. Notably, I find no evidence that the Applicant was served with a notice indicating the complaint that was received and neither did the Respondents requested a written response from the Applicant within seven (7) days, as required by Rule 13.1 (ii) of the Respondents by-laws, in disciplinary process of a member.

39. Rule 13.1 (ii) of the Respondents club by-laws states, "13.0 CONDUCT OF MEMBERS 13.1 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... (ii) notice will be given to the member indicating the complaint received and requesting a written response within 7 days ..."

40. In absence of the expressly required said notice, the hearing could not have amounted to granting the Applicant a fair hearing, and the same is in direct contravention of the Club's by-laws. The ex-parte Applicant having been denied an opportunity to defend himself - as stipulated by the by-laws - before the said decision was reached, it is obvious that in reaching the said decision the Respondent was acting with procedural impropriety.

41. On the second issue, it is not upon this court to determine the guilt or otherwise of the Applicant or of the Respondent, as the case may be. This court is a speciality court to the extent that it mainly deals with judicial review reliefs.

42. The prayers, by the ex-parte Applicant, for an apology and for compensation would necessitate a full merit review of the facts and evidence, to which would also be usurping the powers of the decision making body of the Club. Therefore, those issues/prayers are beyond the purview of this court, and the same cannot be issued in this forum, in the given circumstances.

43. This court is to determine whether in reaching the decision to suspend the ex-parte Applicant, the Respondents acted within the confines of the law, which in the instant case, it has been determined that the Respondents did not.

Orders

44. Flowing from the aforementioned determination, I make the following orders:

    1. An order of Certiorari is hereby issued quashing the Respondent's letter dated 12th February 2021 suspending the ex-parte Applicant.

    2. An order of Mandamus is hereby issued compelling the Respondents to immediately remove and/or expunge from the Applicants, records of the club and any purported disciplinary records as per the letter from the 2nd Respondent dated 12th February 2021.

    3. An order of Mandamus is hereby issued compelling the Respondents to issue an official, unequivocal and public apology read out by the 2nd Respondent during the next four (4) club night presentations.

    4. An order of Mandamus do issue compelling the Respondents to publish a copy of the said apology to the Applicants be placed and maintained on the Respondents Notice Boards at the Club for a period of thirty (30) days.

    5. Prayer No. (V) is disallowed.

    (6) The Applicant shall have the cost of the suit.

Dated, signed and delivered virtually this 5th day of May, 2023.

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J. CHIGITI, (SC)

JUDGE