



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 51 OF 2016

**IN THE MATTER OF: ARTICLES 1,2, 3, 19, 20, 21, 22, 23, 27, 28, 47,
159, 165 AND 259 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: VIOLATION OF SECTIONS 4, 5, 6 AND 12 OF
THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

AND

**IN THE MATTER OF: VIOLATION OF THE MEMORANDUM AND
ARTICLES OF ASSOCIATION OF NYALI GOLF & COUNTRY CLUB LIMITED**

BETWEEN

SAMMY MWANGI KAMAU.....PETITIONER

VERSUS

1. THUSHARA DE SILVA

2. ALLAN MOLA

3. EDWIN MIANO

4. KELI MUINDI

5. JON STOKES

6. MATTHEW GITHINJI

7. KEN MWIGE

8. PAULINE GACHIHI (Sued in their individual

capacities and in their capacity as members of the

main committee of NYALI GOLF CLUB LIMITED)

9. NYALI GOLF & COUNTRY CLUB LIMITED.....RESPONDENTS

JUDGMENT

The Petition

1. By an Amended Petition dated 23/11/2018 brought under Articles 1,2, 3, 19, 20, 21, 22, 23, 27, 28, 47, 159, 165 and 259 of the Constitution, the Petitioner seeks the following orders:

a) A DECLARATION that the Respondent's decision as contained in the letter dated 19th September, 2016 and in the main committee's order dated 21st October, 2016 and signed by ALLAN MOLA is unconstitutional, illegal, null and void *ab initio*

b) A DECLARATION that the Petitioner's constitutional rights have been infringed by acts on the part of the Respondents through the decision contained in the letter dated 19th September 2016 and in the main committee's order dated 21st October, 2016 and signed by ALLAN MOLA.

c) A DECLARATION that the Respondents were in breach of the Memorandum and Articles of Association and the By-laws governing the affairs of the 9th Respondent.

d) An order of certiorari be issued to quash the decision by the Respondents contained in the letter dated 19th September 2016 and in the main committee's order dated 21st October, and signed by ALLAN MOLA.

e) An order of mandamus be issued directing the Respondents to forthwith and unconditionally reinstate the Petitioner to his status in the club as full member entitled to all rights and privileges as conferred under the Memorandum and Articles of Association of the club

f) Damages

g) Costs of and/or incidental to these proceedings

2. The Amended Petition is based on the grounds set out therein and those in the supporting affidavit sworn by the Petitioner on 26/9/2016 and a further affidavit sworn on 10/10/2016.

3. The Petitioner is a male Resident of Mombasa County. The 1st to 8th Respondents are residents of Mombasa County and members of the Main Committee of Nyalı Golf & Country Club Limited. The 9th Respondent is a private company limited by Guarantee.

4. The petitioner has been a member of the 9th Respondent since 2005. In 2016 he was elected the club chairman by the general membership of the club through a popular vote under Article 19 of the Memorandum and Articles of Association. He avers that he has never been accused of any breach of his duties neither has there been any complaint nor accusation leveled against him in the course of his tenure of service at the club.

5. The Petitioner avers that on 14/09/2016 he received a letter of the same date issued by the Main Committee, relieving him of all his duties and privileges as the chairman of the club. That prior to the letter, he had not been served with any notice convening the meeting or the agenda thereof in line with the Memorandum and Articles of Association and the management By-laws.

6. The Petitioner avers that he sent his communication to the club members advising them to ignore the letter and its contents since it was unprocedural. He received another letter dated 19/9/2016 from the secretary purporting to suspend his membership at the club. He was not notified of the meeting when the Main Committee passed a resolution to suspend his membership. Therefore, the resolution according to the Petitioner was illegal and contrary to the Constitution, the Fair Administrative Action Act, rules of natural justice and the Club's memorandum and articles of Association.

7. The Petitioner avers that on 20/9/2016 he received yet another letter of the same date requiring him to appear before the disciplinary committee of the 9th Respondent on 26/9/2016 for purposes of answering undisclosed complaints. He attended the disciplinary committee but was not given the chance to address the committee.

8. The Petitioner states that this Court had earlier directed that the matter herein be resolved through the Club's Memorandum and Articles of Association. However, the Main Committee comprising the Respondents issued a letter to the general membership dated 4/10/2016 laying out the allegations against the Petitioner. On 21/10/2016 the Petitioner received a letter from the Main Committee informing him of a suspension decision. He was suspended for two years. The Petitioner avers that subsequent to what he calls the unprocedural and invalid suspension the disputed account has since been settled but there is no acknowledgement or apology issued by the Respondents to the Petitioner.

The Response

9. In response to the Amended Petition, the Respondent filed a Replying Affidavit sworn by **THUSHARA DE SILVA** on 10/10/2016, with the authority of the other Respondents. On the same date, a Supplementary Affidavit sworn by **EUNICE MUTIE MASSILA**, a Manager of the 9th Respondent, was filed.

10. The deponent avers that it is true that Mr. Mola sent the aforesaid letters to the Petitioner but also informed the petitioner that he would not be suspended from membership of the 9th Respondent without according the Petitioner an opportunity to be heard.

11. The deponent avers that even though the petitioner had not been formerly notified of the complaints against him, he must have been aware what the complaints were. The Respondents' case is that the Petitioner diverted the Club's funds and failed to attach for this honorable court, the documents in relation to the diversion of funds.

12. However, the Respondents admit that the process of suspending the Petitioner was not handled properly and that, indeed is the reason the Respondents withdrew or recalled earlier letters.

13. Eunice Mutie Massila in the Supplementary Affidavit stated that in 2015 the Petitioner instructed her not to follow on the overdue payment from the Kenya Power. The Respondents aver that they have a legitimate complaint against the petitioner and therefore the disciplinary process is not a witch hunt. They confirmed that the disciplinary process would be handled properly in accordance with the articles of association. However, they state that they shall not provide witness statements to the petitioner since the complaint against him is not a civil or a criminal suit.

14. The Respondents further state that this petition was filed prematurely considering that no decision had been taken against the Petitioner.

Submissions

15. **Mr. Asige Jr**, learned counsel for the Petitioner submitted that the Respondents as decision makers have acted against their duty to act fairly; have acted in breach of their statutory discretion to act reasonably; have acted in abuse of the said discretion; and have acted in a manner to frustrate the purposes of the constitution of Kenya 2010, the Fair Administrative Action Act and the 9th Respondent's own Memorandum and Articles of Association. That those alleged violations entitle the Petitioner to reliefs sought herein.

16. **Ms. Muyaa**, learned counsel for the Respondents submitted that this Court cannot issue an order of certiorari to quash the decision made on 19/9/2016 since there is no such decision, the same having been withdrawn on 29/9/2016. Counsel further submitted that an order of mandamus can also not be issued against the Respondents to reinstate the petitioner to full membership because after his suspension he appealed to the general membership under Article 17 (c) of the of the Memorandum and Articles of Association.

17. Counsel submitted that the power to discipline errant members including office bearers vests in the Main Committee and not the general membership; that the grounds raised in the amended petition are not arguable; therefore, are not sustainable and have not been proved. The amended petition is incompetent, premature, abuse of process and lacks merits and ought to be struck out with costs.

Determination

18. Having considered the pleadings and submissions of the parties, only one issue comes out for determination.

Whether the Petitioner is entitled to the reliefs sought

19. The Petitioner has prayed that the decision as contained in the letter dated 19/9/2016 and in the main Committee's Order dated 21/10/2016 be declared unconstitutional, illegal, null and void *ab initio*.

20. The Petitioner received a letter dated 19/9/2016 from the Respondents, marked "SMK-7" informing him that a special meeting had been held the same day at 1900hrs as per Article 21 (a) of the Memorandum and Article of Association of the Club; that a resolution had been passed to suspend his membership by a vote of majority but the resolution would take place after he had been accorded an opportunity to be heard.

21. In the Respondent's Replying Affidavit, the deponent who is the Club's secretary assured that the disciplinary process would be handled properly in accordance with the Memorandum and Articles of Association. The Petitioner's Advocate in their letter dated 27/9/2016 and marked "SMK-10" addressed to the Respondents expressed their disappointment in the way the disciplinary hearing was conducted. The letter states that the Petitioner and his legal representative were not accorded audience in the disciplinary hearing; that there was **a clear breach of the Petitioner's right to fair hearing, which entails giving every party to a dispute an opportunity to be heard. This was not the case in the Petitioner's disciplinary hearing. The Petitioner has also argued that he was not in the meeting where the resolution was passed, yet the Memorandum and Articles of Association require one to be present in such a meeting, except that one cannot vote.**

22. Article 17 of the 9th Respondent's Memorandum and Articles of Association provides:

"17. If any member be guilty, either in or out of the club, of conduct which in the opinion of the Committee is unbecoming to a member or injurious to the welfare and interest of the club or if he or she be adjudicated bankrupt, the Committee shall have the power to expel such member from the club or to suspend him or her from the use of the club for such period as the Committee shall deem fit, provided that:-

(c) a member thus expelled or suspended under this rule shall be notified in writing by the Honorary Secretary of such expulsion or suspension within 48 hours of the relative resolution provided that delay in notifying such member shall not in any way affect the Committee's resolution. No resolution for the expulsion or suspension of a Member shall be carried before the member concerned is given an opportunity to be heard in his own defence.

23. From the foregoing, it is clear the impugned decision also violated the constitution and Memorandum and Articles of Association of the 9th Respondent. From this, this Court has no hesitation granting declaratory prayers (a), (b) and (c) of the petition.

24. Through prayers (d) and (e), the Petitioner has prayed for an order of certiorari to quash the decision by the Respondents contained in the letter dated 19th September 2016 and in the Main Committee's order dated 21st October, and an order of mandamus to issue directing the Respondents to forthwith and unconditionally reinstate the Petitioner to his status in the club as full member entitled to all rights and privileges as conferred under the Memorandum and Articles of Association of the club.

25. In Kenya National Examinations Council v Republic *Ex parte* Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR the Court held *inter-alia* that:

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way... These principles mean that an order of mandamus compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

26. The Petitioner's argument is that the Respondent's letter of 19/9/2016 contains a decision made by the Committee in exercise of a power that was above their powers meaning it was an *ultra vires* decision. However, the Respondents have stated in their Replying Affidavit and submissions, that they withdrew that letter and other incidental letters. This averment or deposition was not refuted by the Petitioner, and that being so, there are therefore no orders or decisions to be quashed by this Court.

27. On the issue of Mandamus, the Petitioner argues that he was relieved of all his duties and privileges as the chairman of the 9th Respondent and has prayed this Court to grant mandamus to compel the Respondents to restore him to his position with his duties and privileges. The Respondents have argued that there would be no need to grant mandamus since the Petitioner has already served suspension for two years. In my view, and inasmuch as the Petitioner was wronged by the unlawful action of the Respondents, this Court cannot compel the 9th Respondent by an order of mandamus to reinstate the Petitioner as the Chairman of the Club. The matters complained of here took place more than five years ago. During that time, the Petitioner served a suspension. During that time also, the 9th Respondent has been fully operating through other Chairmen. This Court cannot therefore impose the Petitioner to be the Chairman of the 9th Respondent. To do that would amount to unmerited interference with internal management of organized groups like the 9th Respondent. The Court must refrain from that interference.

28. The Petitioner has also sought for damages. The Petitioner seeks damages because of the unlawful manner his matter was conducted by the Respondents. The Petitioner has however not assessed the damages leaving this Court to provide a guess for the same. The Petitioner in his pleadings stated that he and the Respondents had already settled the matter but that he had not received an acknowledgement and an apology from the Respondents. This Court has found out that the Petitioner was indeed treated unfairly procedurally. The Petitioner would be entitled to damages. However, there was no attempt to provide the basis of assessment for damages. Under Articles 22 and 23 of the constitution, this Court has powers to grant damages once it has established an infringement of a constitutional right. In this regard while this Court declines to issue a mandamus to compel the Respondents to reinstate the Petitioner to his original position, this Court is satisfied that the Petitioner is entitled to damages in answer to violations declared in prayers (a), (b) and (c) herein. I hereby assess those damages, which I call nominal, at Kshs.70,000/= based on the fact that the Petitioner served the 9th Respondent in a senior and responsible position of Chairman.

30. In the upshot this Court grants prayers (a), (b) and (c) of the petition; and damages of Kshs. 70,000/= in terms of prayer (f) of the petition.

Costs shall be for the Petitioner.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF MAY 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Asige for Petitioner

Ms. Muyaa for Respondent

