



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 126 OF 2020

REPUBLIC.....APPLICANT

VERSUS

ROYAL NAIROBI GOLF CLUB.....RESPONDENT

EX PARTE APPLICANTS:

OOKO ERICK OBURA

RICHARD CYOI WAFULA

JUDGMENT

1. Ooko Erick Obura and Richard Cyoi Wafula, the 1st and 2nd *ex parte* Applicants herein respectively, are members of the Royal Nairobi Golf Club, which they have sued as the Respondent herein. The *ex parte* Applicants are aggrieved by the Respondent's decision suspending them as its members, which is contained in letters dated 17th March 2020, which were sent to them by the Respondent.

2. The *ex parte* Applicants consequently moved this Court by way of a Notice of Motion application dated 22nd June 2020, in which they are seeking the following orders:

1. An order of certiorari be and is hereby issued removing into the High Court for the purpose of it being quashed the decision of the board meeting of the Royal Nairobi Golf Club suspending the Ex-parte applicants from the club indefinitely pending finalization of the investigation which was communicated vide the Respondent's letters sent on email to the Ex-parte applicants dated 17th March, 2020.

2. An order of mandamus be and is hereby issued directed to the Honorary Secretary of the Royal Nairobi Gold Club to compel the said Honorary Secretary to cause and convene a disciplinary panel comprising of not less than five full members and not more than seven full members to hear and determine according to the Royal Nairobi Golf Club's Articles of Association and by-laws.

3. An order of prohibition be and is hereby issued prohibiting the Honorary Secretary and the General Manager from secretly further proceeding with the hearing and determination of the alleged wrong credit entries into the Applicants' account.

4. An injunction be and is hereby issued restraining the Honorary Secretary and the General Manager whether by themselves, their servants or agents or howsoever otherwise from interfering with the Applicant's membership, accounts and activities at the Nairobi Royal Golf Club pending hearing and determination of the disciplinary proceedings according to the provisions of the Royal Nairobi Golf club's Articles of Association and by-laws.

5. A declaration be and is hereby issued that the decision of the board meeting of the Royal Nairobi Golf Club suspending the Ex-parte applicants from the club indefinitely pending finalization of the investigation which was communicated vide the Respondent's letters sent on email to the Ex-parte applicants dated 17th March, 2020 was and is invalid and void and of no effect.

6. A declaration be and is hereby issued that the decision of the board meeting of the Royal Nairobi Golf Club suspending the Ex-parte applicants from the club indefinitely pending finalization of the investigation which was communicated vide the Respondent's letters under the Royal Nairobi Golf Club Articles of association and by-laws in that they failed to accord the Applicants a fair hearing before a disciplinary hearing.

7. An Order be and is hereby issued for damages arising from the matters herein and interest thereon.

8. An order for costs be and is hereby issued.

9. Such further and other relief be granted to the applicants as this court may deem fit.

3. The application is supported by the Statutory Statement dated 8th June 2020, and the verifying affidavits of the 1st and 2nd *ex parte* Applicants sworn on even date. The Respondents thereupon filed a Notice of Preliminary Objection dated 21st July 2021 to the said application. This Court directed that the *ex parte* Applicant's substantive Notice of Motion application dated 22nd June 2020 and Respondent's Notice of Preliminary Objection dated 21st July 2020, would be heard and determined together, and the same are the subject of this judgment.

4. The *ex parte* Applicants also filed three sets of further affidavits dated 22nd June 2020, 24th August 2020 and 25th January 2021; submissions dated 24th August 2020 on the Preliminary Objection, and submissions dated 25th August 2020 on the Notice of Motion application. The Respondent on its part filed a replying affidavit sworn on 10th August 2020 by Christine Sabwa, its Honorary Secretary, and submissions dated 9th November 2020.

5. The parties' respective cases are set out in the following sections of this judgment.

The *ex parte* Applicants' Case

6. The *ex parte* Applicants aver that they were both recruited as members of the Respondent's Golf club upon payment of the prescribed joining fees and subscription payments. However, that on 11th March, 2020, they received letters from the Honorary Secretary of the Respondent club notifying them that during a review of the club's accounts, their accounts had been credited with amounts which were not supported by corresponding entries in the club's bank account. That later on, the *ex parte* Applicants were summoned to a casual meeting on 13th March 2020 by the Honorary Secretary and the General Manager, who inquired about the aforesaid monies.

7. It is the *ex parte* Applicants' further averment that on 17th March 2020, the Respondent's Honorary Secretary sent letters to them indicating that the Respondent's Board meeting had resolved to punish them by suspending them from the club indefinitely with immediate effect pending finalization of the investigation. Further, that on 19th March, 2020 the said Honorary Secretary sent emails to the *ex parte* Applicants indicating that the Board had further resolved to reverse the disputed credits and to place the *ex parte* Applicants' account on hold denying them access to the club facilities, the bar and catering services until the issues were resolved. In addition, that the Honorary Secretary scheduled a meeting for 27th March 2020, which did not take place allegedly due to the Covid-19 pandemic.

8. It is the *ex parte* Applicants' case that the decisions of the Respondent's Board meeting are contrary to the rules of the Respondent, and were arrived at in a manner that violates the basic rules of natural justice and fairness. Further, that the actions to suspend their cards and in effect their membership on the basis of some account malpractice is unlawful and in violation of their rights as bona fide members of the Respondent Club. It was also averred that the purported meeting to clarify issues was an afterthought and an attempt to cover the illegal actions and unlawful suspension. In their view, the function of disciplining the Respondent's members is quasi-judicial in nature and members have a legitimate expectation that the function will be carried out fairly.

9. The *ex parte* Applicants annexed copies of the impugned letter by the Respondent dated 17th March 2020, extracts from the Respondent's by laws, and correspondence with the Respondent to support the averments they made.

The Respondent's Case

10. The Respondent contended in its preliminary objection that the instant application is fatally defective as it is not supported by an affidavit verifying facts as required by Order 53 Rule 3 of the Civil Procedure Rules. It was further contended that the supporting affidavit filed by Ooko Eric Obura, the 1st *ex parte* Applicant, is drawn by the firm of Kounah & Company Advocates who are not on record for any party in these proceedings and as such, should be struck out. Lastly, they contended that the Court in exercising its judicial review jurisdiction cannot grant prayers nos. 4-7 of the Notice of Motion application.

11. Be that as it may, the Respondent averred that upon becoming its member, each individual is presented with a pre-paid member card which is to be used to access the Respondent's premises as well as pay for catering and bar services at the Respondent's Club, and members are required to top up these pre-paid cards using M-pesa, card or bank transfer. However, that in January 2020, the Respondent's management team noted that there has been an increase in bar sales which has not been matched by corresponding increase in the Respondent's cash, prompting an internal review. Further, that the said review established that numerous member's cards were being topped up with Electronic Money Value transactions, but there was no corresponding entry of funds into the Respondent's bank account.

12. It was further averred that a handful of member's cards were flagged by the management team for having irregular transactions, including member cards of the *ex parte* Applicants. Consequently, that the Respondent's Honorary Secretary wrote to the *ex parte* Applicants, informing them of the discrepancy in their member cards, and asked them to supply the Respondent with supporting documentation for the Electronic Money Value transactions. In addition, that the *ex parte* Applicants were invited to a meeting at the Respondent Club where they provided their preliminary responses to the discrepancies. However, that the Respondent found the responses to be unsatisfactory and its Board resolved to reverse the impugned credits, which information was communicated to the *ex parte* Applicants on 17th March 2020.

13. The Respondent's case is that its by-laws provide that any outstanding balance on a member account attracts a surcharge of 10% on the

accounts that are not paid, and any member with an outstanding balance on their member account shall be denied access to the club facilities. Therefore, that on 19th March, 2020 the *ex parte* Applicants were informed that they were denied access to the club facilities, bar and catering services, until the discrepancies were resolved. Further, that the *ex parte* Applicants were requested to pay the amounts due, or alternatively provide evidence to the contrary for the expenses in the statements generated by the Respondent within seven (7) days on or before 25th March, 2020. In addition, that the *ex parte* Applicants were also advised that upon receipt of their responses, a hearing would be scheduled with the membership committee in line with Article 20 of the Respondent's Memorandum and Articles of Association as read with by-law 14.1.

14. The Respondent averred that the *ex parte* Applicants responded by way of letters dated 23rd March, 2020 and were invited to a hearing by way of a letter dated 25th March, 2020. Further that the *ex parte* Applicants were informed by the said letter that they were entitled to bring a witness provided they confirmed the attendance of such witness by 26th March, 2020. However, that on 27th March, 2020, the 2nd *ex parte* Applicant attended the meeting and maintained that he did not want the hearing to proceed in line with Article 20 of the Memorandum and Articles of Association, and insisted to have his two witnesses at the hearing. The Respondent in this respect annexed copies of its by-laws and the correspondence exchanged with the *ex parte* Applicants.

15. Consequently, that the hearing was suspended, whereupon the Respondent's Board temporarily closed the club arising from the COVID pandemic, and on 27th April, 2020 the *ex parte* Applicant were informed that a hearing would be scheduled as and when normal operations at the club resumed. In conclusion, the Respondent averred that the application herein is therefore pre-mature, as no formal decision has been made by the Respondent regarding the fate of the *ex parte* Applicants.

The Reply

16. In rebuttal, the *ex parte* Applicants deponed that they referred to the credits and debits made in their written denial of the allegations on the transactions in their account, and that the Respondent only reversed the credits leaving their accounts with a debit balance. Further, that the 2nd *ex parte* Applicant was not accompanied by two witnesses as alleged by the Respondent but by two advocates, whom he is entitled to. In addition, that in the letter dated 17th March, 2020, the Respondent's Board of Directors resolved to suspend them indefinitely with immediate effect pending finalization of the investigation, and whereas the Respondent maintains that no decision had been made, that letter was a clear indication that a decision had been made contrary to the Respondent's Articles of Association.

17. Lastly, the *ex parte* Applicants urged that the Covid-19 pandemic should not be a deterrent for convening a meeting since March 2020, since the Ministry of Health has already provided guidelines on how the same should be conducted.

The Determination

The Preliminary Issues

18. Two preliminary issues have been raised by the Respondent on the competence of the instant application. The first is on the propriety of the affidavits filed herein, particularly the lack of a verifying affidavit and format of the supporting affidavits filed by the *ex parte* Applicants. The second preliminary issue raised by the Respondent was on the prematurity of the instant application.

The Propriety of the ex parte Applicants' Affidavits

19. It is notable that the Respondent did not canvass this issue in its submissions, despite raising it in its preliminary objection. The counsel for the *ex parte* Applicants on the other hand relied on the pleadings filed herein to demonstrate that they had filed verifying affidavits, and admitted that their supporting affidavits inadvertently bore the name of a different law firm. They counsel submitted that striking out of the affidavits would have the ramifications of causing a great injustice, as the defect is a mere irregularity.

20. The *ex parte* Applicants in this regard relied on Order 19 Rule 7 of the Civil Procedure Rules and the case of **Kwik Fit Tyres and Autocare v Mohamed Salim Juma & 2 Others (2010) eKLR** where the court stated that section 72 of the Interpretation and General Provisions Act can cure even more serious omissions of affidavits. In counsel's view, the error in indicating the wrong law firm does not affect the substance of the affidavit as what is of importance is the contents. While citing Article 159(2)(d) of the Constitution, counsel submitted that the preliminary objection seeks to strike out the suit which is a draconian remedy that should only be resorted to in the clearest of cases as was stated in **Abdullahi Sheikh Ahmed vs Mandera County Government (2019) eKLR**.

21. Order 53 Rule 1 (2) of the Civil Procedure Rules in this respect provides that an application for leave shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The application filed herein was accompanied by two verifying affidavits sworn by the 1st and 2nd *ex parte* Applicants, and the objection that the application herein was not supported by verifying affidavits therefore has no basis.

22. As regards the objection that the law firm that filed some of the *ex parte* Applicants' affidavits is not on record, it is notable that no specific provision of law was cited by the Respondent to support its argument that the affidavits should be struck out on this ground. In addition, Order 19 Rules 5 to 8 specifically provide as follows as regards the format of affidavits:

“5. Manner of drawing affidavit [Order 19, rule 5.]

Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject.

6. Striking out matter [Order 19, rule 6.] The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.

7. Irregularity in form of affidavit [Order 19, rule 7.] The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.

8. Affidavit sworn before suit filed

[Order 19, rule 8.] Unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned”

23. Section 72 of the Interpretation and General Provisions Act likewise provides as follows on deviations from a prescribed form:

“Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead”

24. It is evident from the said provisions that a Court can admit an affidavit notwithstanding any defect in the misdescription of the parties or other irregularity in its format, and that a defect in an affidavit cannot and should not warrant the striking out of the suit as sought by the Respondent in the present application. This position is now reinforced by Article 159(2) of the Constitution, and was explained by Ringera J. (as he then was) in Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460 as follows:

“...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue....”

The Prematurity of the Application

25. The Respondent’s counsel submitted that the proceedings herein are premature on two accounts. Firstly, that the Respondent’s investigations into the discrepancies it discovered are still ongoing, and it has therefore not made a final decision which determines the *ex parte* Applicants’ membership at the Respondent Club. Further, that It is trite law that judicial review proceedings are concerned with the decision-making process and not the merits of the decision, and where no decision has been made, the alleged legality or propriety of the said decision-making process cannot be challenged through the judicial review process. Reliance was in this respect placed on the decisions in Republic v DPP & 2 Others, ex parte Francis Njakwe Maina & Another [2015] eKLR and Frederick Masagwhe Musaka v DPP & Others [2016] eKLR.

26. Secondly, that under section 9(2) of the Fair Administrative Action Act 2015 the *ex parte* Applicants are mandated to exhaust all internal remedies of the Respondent before initiating judicial review proceedings, and are circumventing internal disciplinary procedures without any justifiable reason. The cases of Republic vs Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited [2019] eKLR and Aviation and Allied Workers Union vs Kenya Airways Limited [2012] eKLR were cited in this regard. The Respondent also invited the Court to consider the doctrine of ripeness as articulated in Republic vs National Employment Authority & 3 Others Ex-parte Middle East Consultancy Services Limited (2018) eKLR.

27. The Respondent in this respect also submitted that there was non-disclosure by the *ex parte* Applicants that the 2nd *ex parte* Applicant precipitated a security incident when he arrived with two witnesses that had not been planned for, and subsequently refused to leave the premises when politely requested to do so. Further, that the said security incident garnered a hostile environment, and was part of the reason why the Respondent’s internal disciplinary procedures were not completed in good time and a decision made.

28. Reliance was placed on the holdings in The Matter of Title Number Chembe Kibabemshe/406, [2013] eKLR and Republic vs Vice Chancellor Moi University & 3 Others Ex Parte Benjamin J. Gikenyi Magare [2018] eKLR that material non-disclosure by an applicant seeking orders of judicial review is fatal. The Respondent further submitted that the *ex parte* Applicants have deliberately misled this court by painting an inaccurate picture regarding the processes and procedures that have been followed by the Respondent Club from the inception of its investigations to date.

29. The *ex parte* Applicants on the other hand submitted that judicial review proceedings are more concerned with the manner in which a decision is made rather than the merits or otherwise of the ultimate decision and cited the Court of Appeal case of Municipal Council of Mombasa v Republic & Umoja Consultants Limited, (2002) eKLR for that proposition. In his view therefore, counsel submitted that the purpose of the remedy of judicial review is to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to

decide the matter in question. To further buttress his argument, counsel cited the cases of **Republic vs Kenya Revenue Authority Ex-parte Yaya Towers Limited (2008) eKLR**, and **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others (2016) eKLR**.

30. Before analysis of this issue, it is important and necessary to restate the nature and purpose of judicial review proceedings. These are proceedings in which the Court is primarily asked to review the lawfulness of an enactment, decision, action or failure to act in the exercise of a public or administrative function. Article 165(6) of the Constitution in this regard provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person's rights. Judicial review is also now entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right to fair administrative action.

31. 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 said action or decision. An administrative action or decision is defined under section 2 of the Act to mean:

(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.

32. A number of factors may affect the extent of, and limit this Court's judicial review jurisdiction, including the nature of the dispute especially if of a private nature, availability of an adequate alternative remedy, prematurity of a claim, delay, and where the claim would cause great prejudice and hardship to third parties or the public interest. Lastly, there are also limits to this Court's judicial review jurisdiction set out in Article 165(6) of the Constitution, with respect to reviewing decisions of superior courts.

33. Therefore, while the *ex parte* Applicant's membership of the Respondent club may be of a voluntary nature, under the Fair Administrative Action Act, any decision of the Respondent that affects the rights or interests of its members will be amenable to judicial review. The *ex parte* Applicants in this regard provided evidence of the decision made by the Respondent in letters dated 17th March 2020, suspending their membership, and indicating that they owed stated sums of money. The Respondent does not dispute making the said decision, and its position is that the said decision was a preliminary step in the course of disciplinary process against the *ex parte* Applicants.

34. I am however of the view that the decision contained in the Respondent's letters dated 17th March 2020 was not merely interlocutory and procedural in nature, and was a substantive decision made by the Respondent, as it did expose the *ex parte* Applicants to some prejudice. To this extent the said decision is amenable to judicial review, and it cannot be said to be premature. It is notable in this respect that in **Republic vs National Employment Authority & 3 Others Ex-parte Middle East Consultancy Services Limited (2018) eKLR**, the Court explained that the goal of the doctrine of ripeness and prematurity is to prevent premature adjudication where a dispute is insufficiently developed, and any potential injury or stake is too speculative to warrant judicial action. The circumstances in the instant application are clearly distinguishable in this respect.

35. As regards the pending disciplinary proceedings against the *ex parte* Applicants, it is indeed the position that exhaustion of alternative remedies is now a constitutional imperative under Article 159 (2)(c) of the Constitution, and is exemplified by emerging jurisdiction on the subject, as explained by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (supra)** as follows:

“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 for a 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 which commands Courts to encourage alternative means of dispute resolution.”

36. In addition, sections 9(2) and (3) of the Fair Administrative Action Act require a party to exhaust internal mechanisms for appeal or review before a party seeks judicial review as follows:

The High Court or a subordinate court under subsection (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.

37. The Courts may however, in exceptional circumstances, find that the exhaustion of alternative remedies requirement would not serve the values enshrined in the Constitution or law, and permit the suit to proceed before it, particularly, where the dispute resolution mechanism is not competent to resolve the issues raised in an application, or where it is not available or accessible to the parties for various demonstrated reasons. The approach to be taken by the Courts when this issue is raised was suggested by the Court of Appeal in **R vs National**

Environmental Management Authority (2011) eKLR as follows:

“.. in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”

38. The main considerations to be taken into account by the Court in exempting an alternative remedy are the adequacy of the alternative remedy as a matter of substance, in that it should be convenient, expeditious and effective in practical terms, and its availability. Thus, in the case of Dawda K. Jawara vs Gambia ACmHPR 147/95-149/96, the African Commission of People and Human Rights held that:

"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

39. In the present application the *ex parte* Applicants contend that the disciplinary proceedings have been delayed without good reason, and are seeking various orders as regards the conduct of the said proceedings. The Respondent on the other hand avers that it had commenced the disciplinary proceedings against the *ex parte* Applicants, but that the same were interrupted by the COVID-19 pandemic, and the 2nd *ex parte* Applicant's conduct. The Respondent in its letter dated 27th April 2020 to the 2nd *ex parte* Applicant (annexed as "Annexure CS-9" to the Respondent's replying affidavit) in this respect stated as follows:

“...RE: ACCOUNT REVIEW

We refer to the above matter and communications; your letter dated 23.03.2020 in response to our letter of March 19, 2020, the subsequent invitation to hearing invitation on 27th March 2020, and your letter dated 31I March 2020 addressed to the Chairman.

We have noted your request to be provided an opportunity to be heard as well as to address all the queries in your letter. However, due to the current measures to manage the impact of Covid-19 and suspension of the Club's operations as directed by the Government, we are unable to schedule a hearing.

We will advise you accordingly once normal operations resume whilst taking into consideration the provisions as stipulated in our Articles of Association.”

40. It is my view that since the Respondent is not certain as to when it will be able to accord the *ex parte* Applicants a hearing, and in light of the prejudice likely to be suffered by the *ex parte* Applicants during this period, the alternative remedy under the Respondent's by-laws is neither effective nor available to the *ex parte* Applicants. Section 9 (4) of the Fair Administrative Action Act in this respect suggests an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. While a formal application to be exempt from the provisions of section 9(2) to (4) of the Fair Administrative Action Act is advisable, it will in the circumstances of this application not only cause unnecessary and undue delay to these proceedings, but will also not add any substantive value, as the relevant factors have already been canvassed by the parties, and considered by this Court.

41. This Court also has discretion under Article 159 of the Constitution and section 3A of the Civil Procedure Act to make such orders as are necessary to achieve substantive justice, and not to give undue regard to procedural technicalities in the process. The *ex parte* Applicants' application is therefore found to be competently before this Court for the foregoing reasons, and they qualify to be exempt from the provisions of the Fair Administrative Action Act on exhaustion of internal dispute resolution mechanisms.

42. Lastly, it must be pointed out that illegal and unfair preliminary procedural decisions can also undermine the fairness of the entire decision making process and the lawfulness of the eventual substantive decision, and merit intervention of this Court at an early stage of the decision making. The Court of Appeal sanctioned such an intervention in Fleur Investments Limited v Commissioner of Domestic Taxes & Another, [2018] eKLR as follows:

Whereas courts of law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

43. This Court shall therefore proceed to address the outstanding substantive issues, which are whether the decision by the Respondent on 17th March 2020 was made fairly and procedurally, and whether the *ex parte* Applicants merit the orders sought. These issues will be addressed in the remaining sections of this judgment.

The Substantive Issues

On Whether the Respondent acted Fairly and Procedurally

44. The counsel for the *ex parte* Applicants submitted that the Respondent suspended the *ex parte* applicants' membership to their club without following the due procedure as elaborated in their memorandum of articles of association, and without giving them an opportunity to be heard. Therefore, that the Respondent's actions were unconstitutional and against the rules of natural justice. Reliance was placed on the decision in **Republic vs The Honourable Chief Justice of Kenya & Others Ex-parte Lady Justice Nambuye, High Court Misc. Application No. 764 of 2009** that no man should be condemned unheard. Additionally, that the Respondent's Board of Directors in arriving at their decision of 17th March 2020 failed to adhere to the provisions of Article 47 of the Constitution.

45. The Respondent on its part reiterated that its by-laws and Articles and Memorandum of Association clearly state that when a member's card has an outstanding debit, the said member shall not be allowed access to the Respondent's premises and other catering services until the debits are fully settled. As such, the Respondent was acting within its mandate in denying the *ex parte* Applicants access to the Club facilities and services.

46. Article 47 of the Constitution provides as follows in this regard:

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

It is indicated in Article 47 that the situations where a duty to act fairly will apply is where the decision maker is taking a decision that will have a direct and specific impact on an individual.

47. Section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows in this regard:

“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

48. The core of the duty to act fairly therefore is the need to ensure that a person affected by a decision has an effective opportunity to make representations, before it is made and by an impartial decision maker. The Court of Appeal in this respect held as follows in **Judicial Service Commission vs Mbalu Mutava & Another [2015] eKLR**:

“The term “procedurally fair” used in Article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to right to fair administrative action.

49. In the present application, the obvious impact of the decision to suspend the *ex parte* Applicants from the Respondent club was the removal of certain benefits and privileges that had accrued as a result of their membership. The Respondent in this respect provided evidence of letters dated 11th March 2020 which it sent to the 1st *ex parte* Applicants prior to the decision of 17th March 2020, and was annexed as “Annexure CS-2” to the Respondent's replying affidavit, while the 2nd *ex parte* Applicant annexed a copy of a similar letter of the same date the Respondent sent to him, in the annexures to his verifying affidavit. The said letter requested the *ex parte* Applicants to provide supporting

documents on the disputed credits made in their accounts, which was to be followed with a meeting.

50. The Respondent's thereafter then made the impugned decision in a letter dated 17th March 2020, which was six days later, and the letter to the 1st *ex parte* Applicant was annexed as "Annexure CS-2" to the Respondent's replying affidavit and read as follows:

"....

RE: SUSPENSION FROM ROYAL NAIROBI GOLF CLUB

We refer to our letter dated 11 March 2020 and subsequent meeting held with yourself on nth March 2020 and your response dated 12 March 2020.

Given the gravity of the investigation and in accordance with Bye-Law 14.1 of Royal Nairobi Golf Club, the Board of Directors, at its meeting held on 16 March 2020, resolved to suspend you from the Club indefinitely with immediate effect pending finalization of the investigation.

As a result of your feedback

1. For the amounts that you confirm you did not top up, we have reversed them immediately and you now owe the club Kes 335,715 as attached that is payable immediately in addition to your routine due amounts.

2. From our review we noted that your account is still listed as honorary. Please provide the letter that admitted you into membership.

Kindly revert on or before 25th March 2020 by 5pm to the General Manager on gm@royal nairobi gc.com.

Upon receipt of your response, we will schedule a hearing in line with article 20 of the Memorandum and Articles of Association of Royal Nairobi Golf Club.

Yours faithfully,"

ROYAL NAIROBI GOLF CLUB

51. Similarly, the 2nd *ex parte* Applicant annexed a letter dated 17th March 2020 sent by the Respondent which read as follows:

"RE: SUSPENSION FROM ROYAL NAIROBI GOLF CLUB

We refer to our letter dated 11 March 2020 and subsequent meeting held with yourself on 13th March 2020 and your response dated 15 March 2020.

Given the gravity of the investigation and in accordance with Bye-Law 14.1 of the Royal Nairobi Golf Club, the Board of Directors, at its meeting held on 16 March 2020, resolved to suspend you from the Club indefinitely with immediate effect pending finalization of the investigation.

As a result of your feedback, please provide evidence for the items listed below on or before 25th March 2020 by 5pm to the General Manager on gm@royalnairobige.com .

1. For the amounts that you confirm you topped up, please provide evidence of top up by way of either bank statement or card statement

2 . For the amounts that you confirm you did not top up, we have reversed them immediately and you now owe the club Kes 670,900 as attached that is payable immediately in addition to your routine amounts due.

Upon receipt of your response, we will schedule a hearing in line with article 20 of the Memorandum and Articles of Association of Royal Nairobi Golf Club.

Yours faithfully,

ROYAL NAIROBI GOLF CLUB"

52. The Respondent subsequently sent the *ex parte* Applicants a letter dated 19th March 2020, informing them that further to the decision made on 17th March 2020, the Respondent's Board had resolved to reverse the disputed credits leaving the balance payable on their accounts, and that the reversal had caused the accounts to be placed on hold. Accordingly, that in line with by law 3.2, the *ex parte* Applicants were consequently denied access to the club facilities and the bar and catering services until resolved.

53. Two observations are pertinent. Firstly, it is evident that the decision to suspend the *ex parte* Applicants and deny them access to the club was made pending investigations, and prior to the commencement of disciplinary proceedings provided for in Article 20 of the Respondent's Memorandum and Articles of Association. Secondly, it is also evident that the Respondent did not comply with its own by laws in terms of the procedure required to be followed before such actions is taken.

54. The Respondent relied on its by law 14(1) as mandating it to undertake the actions it did. The said by law provides as follows:

“14.1 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 if 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 at hand will be an observer at the hearing.

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 both members within a month of the hearing.”

55. The said by law provides for a hearing to be undertaken before disciplinary action is taken on a member, and this is also a key tenet of fair action. The procedure of the hearing is also detailed in the by law, and the Respondent did not provide any evidence of this procedure having been complied with. In addition, the Respondent's by law 3.2 and 3.3 which provide for denial of access to its club and suspension of members on account of non-payment of accounts provide as follows:

“3.2 Payments of Accounts:

Accounts due shall be made up at the beginning of each month that the subscriptions are due and payment must be made before the end of the 1st month i.e. after 30 days. A surcharge of 10% on the balance outstanding will be levied on accounts not paid within this period and the Member shall further be denied access to the club facilities and the bar and catering services until the accounts are fully settled.

3.3 Posting/suspension/ expulsion and reinstatement of Members in arrears

Any Member who remains indebted to the Club for a period of three months from the date that the accounts are due, and to whom notice of the fact has been given by the Club within 14 days of the expiry of the said three months, shall immediately be posted and barred from utilizing the Club facilities .

Such posted member shall be struck off the list of the members at the expiry of Fourteen (14) days after the date of being posted if the Club dues are not fully settled in the manner herein after provided. A Member who is struck off the List of Members shall not be relieved of his obligation to pay his debts to the Club.”

56. The said by laws provided for certain timelines that are required to apply, and procedures to be followed before disciplinary action is taken against the Respondent's members, and particularly, before suspension of a member on account of nonpayment of accounts. The said timelines were evidently not applied in the present application, as the notice to, and suspension of the *ex parte* Applicants on account of the balance payable on their accounts took place over a period of less than thirty days, and the procedures in the Respondent's by laws 3.2, 3.3 and 14 (1) were not followed.

57. Lastly, the Respondent is also now under a Constitutional duty to act fairly and to comply with the provisions of the Fair Administrative Act in this regard. The duty to act fairly is also more onerous with respect to disciplinary proceedings that might result in the imposition of a penalty or sanctions as happened in the present case. It is in this regard apparent that the Respondent did not give the *ex parte* Applicants any opportunity to make representations on the decision to suspend them and deny them access to the club premises. To this extent this Court finds that the Respondent acted unprocedurally and unfairly in making the decisions in the letters dated 17th March 2020 and 19th March 2020.

On the Relief Sought

58. Regarding the orders of mandamus and certiorari sought, counsel for the *ex parte* Applicants cited the case of **Dragan vs Canada (Minister of Citizenship and Immigration)** for the submission that the Respondent owed the *ex parte* Applicants a legal duty to act fairly, and that the failure of the Respondent to follow the laid down procedure in their own by-laws merited the quashing of the impugned decision, and compelling of the Respondent to follow the right procedure.

59. On prohibition, the counsel submitted that the *ex parte* Applicants were seeking that order to stop the Respondent from secretly arriving at decisions which are detrimental to the socio-economic status of the Applicants. With regard to an injunction, counsel cited the case of **Kenleb Cons Ltd v New Gatitu Service Station Ltd & Another (1990) eKLR** where the court held that to succeed in an application for injunction, an applicant must not only make a full disclosure of all the relevant facts but also show that he has a right, legal or equitable, which requires protection by injunction which in counsel's view had been demonstrated by the Applicants.

60. The Respondent on the other hand submitted that the Court of Appeal in the case of **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** held that the only three orders available to a party moving the court under judicial review proceedings are orders of certiorari, mandamus and prohibition. Further, that it is well established that this court's judicial review jurisdiction is *sui generis* and is derived from the provisions of section 8 of the Law Reforms Act, Order 53 of the Civil Procedure Rules and common law, as explained in **Republic v MRK & 3 Others (2020) eKLR**, **Cortec Mining (K) Limited v Cabinet Secretary, Attorney General & 8 Others [2015] eKLR**, **Ndungu Ngethe & Others v Chief Land Registrar and Others [2008] eKLR**, and **Stanbic Bank Kenya Limited v Kenya Revenue Authority [2008] eKLR**

61. It was thus submitted that an injunction is an equitable remedy and private law remedy granted under Order 40 of the Civil Procedure Rules and is not available in proceedings of the nature currently before this Court, since judicial review is concerned with public law remedies. Similarly, that this Court does not have the mandate or jurisdiction to grant orders of a declaratory nature, and the holdings in the cases of **Republic v Eldama Ravine Alcoholic Drinks Control Committee & Another Ex parte Solomon Chuchu Ruiru & 4 Others [2019] eKLR** and **Sangani Investment Limited vs Officer in charge, Nairobi Remand and Allocation Prison (2007) 1 EA 354** that declarations remains the preserve of regular civil and constitutional procedures and not judicial review procedure and require *viva voce* evidence, were cited in this respect. Lastly, it was also submitted that damages are not recoverable under judicial review procedures, as pronounced in the case of **Republic v County Government of Mombasa Ex parte Outdoor Advertising Association of Kenya [2018] eKLR**.

62. The *ex parte* Applicants have sought the remedies of certiorari, mandamus, prohibition, injunction, declarations and damages. An order certiorari nullifies an unlawful decision or enactment, while an order of prohibition restrains a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct. An order of mandamus on the other hand requires a public body to do some particular act as specified in the order, to enforce public law duties.

63. The Court of Appeal in the case of **Republic v Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances under which these orders can issue, and they are available where unlawful conduct or a breach of duty has been demonstrated on the part of a public body or official.

64. The remedy of a declaration is normally granted to state authoritatively the lawfulness of a decision, action or failure to act, the consequences that follow from a quashing order, the existence or extent of a public body's powers and duties, the rights of individuals or the law on a particular issue. The only limitations as to grant of declarations is in purely moral, social, or political matters in which no issue of law or rights arises; where it will serve no practical purpose; or where a court has not heard contested argument on the issue to which the declaration relates, and it is likely to affect other parties who are not party to the case. (See **Jonathan Moffart et al, Judicial Review: Principles and Procedures** (2013) at chapter 30.16 to 30.24). These limitations however do not apply to the present application, as the issues on which the declarations are sought are specific to the disciplinary proceedings facing the *ex parte* Applicants and were canvassed by the parties.

65. The *ex parte* Applicants also sought an injunction, which is an order prohibiting a person from doing something or requiring a person to do something. Injunctions are however normally in principle granted where there has been a breach of private law rights, and not with respect to public rights or duties, and are therefore not an appropriate remedy in the present application. The Court of Appeal in **Cortec Mining Kenya Limited vs Cabinet Secretary, Attorney General & 8 others (2015) eKLR** held as follows as regards the grant of injunction in judicial review proceedings: -

“34. Can this court grant an order of injunction in a judicial review matter such as this one? For starters, to grant an injunction would amount to giving a relief or remedy that was not even sought in the High Court in the first place.

The High Court could only grant these three prerogative orders. It could not in the judicial review under Section 8 of the Law Reform Act grant an order of injunction such as is sought in the motion before us for the simple reason that injunction is not authorized by and falls outside the amplitude of the reliefs available under Section 8 of the Law Reform Act. An injunction is also not exclusively within the amplitude of public law remedies.”

66. Likewise, the Supreme Court of Kenya, when explaining the distinction between injunctions, and order of stay and conservatory orders in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) eKLR** held as follows:-

“(85)These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

(86) "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest..."

67. Lastly, the *ex parte* Applicants also sought damages, and in certain circumstances, a claim for a monetary award can also be included in a claim for judicial review, where an individual has suffered loss or damage as a result of infringement of a right. However, such claims are still subject to the rules as regards proof. The Privy Council in **Siewchand Ramanoop vs The AG of T&T, PC Appeal No. 13 of 2004**, held as follows in this regard:

"When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damage will often be a useful guide in assessing the amount of this compensation. "

68. Section 11 (1) of the Fair Administrative Action Act also provides for additional orders that this Court can make in judicial review proceedings, which have now been greatly expanded. Section 11 (1) (a) of the Fair Administrative Act in this respect empowers this Court to declare the rights of the parties in respect of any matter to which the administrative action relates, while section 11(1) (j) provides that the Court can make an award of costs or other pecuniary compensation in appropriate cases. The inherent powers of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court are also expressly saved by section 3A of the Civil Procedure Act and Article 159 of the Constitution.

69. Applying these principles to the present case, it is notable that the decision and actions of the Respondent to suspend the *ex parte* Applicants from its club and deny them access to the said club has been found to have been made unprocedurally and unfairly. To this extent, the remedy of certiorari is merited, so as to nullify the legal effect of the said decision and action.

70. The orders of mandamus, prohibition and injunction are however not merited in the manner and terms in which they are sought by the *ex parte* Applicants, to the extent that they if granted, they may unduly prevent the Respondent from discharging its functions and duties, including disciplinary action against the *ex parte* Applicants in future if there is good reason, and provided the proper procedure and due process according to the law is employed. The declarations sought by the *ex parte* Applicants though merited, are not necessary, as the legality of the Respondent's actions has been implicitly addressed by the remedy of certiorari granted herein, which is an effective and adequate remedy in the circumstances.

71. Finally, on the claim for damages and compensation, I note that the *ex parte* Applicants did not elaborate the loss and damage they have suffered as a result of the Respondent's decision and actions in her pleadings, so as to lay sufficient basis for this claim, and to enable the Respondent respond to it. This particular relief is therefore not merited.

The Disposition

72. In light of the foregoing observations and findings, the *ex parte* Applicants' Notice of Motion application dated 22nd June 2020 is found to be merited only to the extent of the following orders:

I. An order of Certiorari be and is hereby issued to remove into this Court for purposes of quashing, the decision of the board meeting of the Royal Nairobi Golf Club suspending the Ex-parte applicants from the club indefinitely pending finalization of the investigation and denying them access to the said club which were communicated vide the Respondent's letters sent to the Ex-parte applicants dated 17th March, 2020 and 19th March 2020 respectively.

II. Each party shall bear costs their own costs of the *ex parte* Applicant's Notice of Motion dated 22nd June 2020.

73. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF JULY 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 1ST DAY OF JULY 2021

J. NGAAH

JUDGE