



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO 437 OF 2016

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 27, 28, 35, 47 AND 50(1) OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 22, 23, 48, 165 AND 258 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

JEANE MATHENGE.....PETITIONER/APPLICANT

AND

VETERINARY LABORATORY SPORTS CLUB

(BEING SUED THROUGH ITS BOARD OF DIRECTORS

NAMELY KISA J. Z. JUMA NGIEYWA, ALLAN AZEGELE,

MARTIN MBUGUA, SUNDEEP SARVIA, MWAKAI SIO,

JAPHETH NJENGA, PETER SINKIRA, MARY MAINGI,

FRANCIS KIMATHI AND KISHOR PINDORIA).....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

In a petition dated 14th October 2016 and filed in Court on 17th October 2016, Jean Mathenge, the petitioner, sued Veterinary Laboratory Sports Club, (through its Board of Directors Kisa J.Z. Juma

Ngieywa, Allan Azegele, Martin Mbugua, Sundeep Sarvia, Mwakai Sio, Japheth Njenga, Peter Sinkira, Mary Maingi, Francis Kimathi and Kishor Pindoria), the first respondent and the Honourable Attorney General, the 2nd respondent and sought the following reliefs –

- a) A declaration that the 1st respondent's actions and conduct amounts to denial, violation and or infringement of the petitioner's fundamental rights and freedoms in Articles 27, 28, 47 and 50 (1) of the Constitution
- b) A declaration that the actions and conduct of the 1st respondent are in breach of the rules of natural justice and also violate the petitioner's legitimate expectation.
- c) An order of certiorari to quash the 1st respondent's proceedings of the 13th June 2016 through its Golf Committee and the decision dated 14th June 2016 suspending the petitioner from taking part in the competitions of the 1st respondent or Kenya Golf union affiliated clubs for a period of one year and also suspending he handicap for the same period.
- d) An order of mandamus directed at the 1st respondent to reinstate the petitioner as Lady Captain, with full membership of the club and all attendant roles, responsibilities, benefits, privileges and participations in Board of Directors' activities.
- e) An order of prohibition prohibiting the 1st respondent by itself, officials, committees agents or whatsoever from taking any disciplinary action against the petitioner pertaining to allegations purportedly arising out of the ladies (sic) which was held on 2nd April, 2016 and noted in its letter dated 14th June 2016.
- f) An order for compensation
- g) The respondents to bear the costs
- h) Such other orders as this Honourable Court deem just.

The petitioner filed an affidavit sworn on 14th October, 2016 and a further affidavit sworn on 22nd November, 2016. From the petition and Affidavits, the facts upon which the petition is grounded are that the petitioner, a golfer and lady captain in the 1st respondent club, participated in the lady's medal golf competition which was played at the 1st respondents golf grounds on 2nd April, 2016 and emerged one of the winners. She later received a letter dated 18th May, 2016 asking her to show cause why disciplinary actions could not be taken against her following a complaint lodged by a marker regarding some discrepancies on the scores played and those recorded by the petitioner during that competition. The allegations against the petitioner were that she had breached rules of the game.

The letter to show cause was signed by one Mr. Njenga a golf captain, which the petitioner says was irregular, *ultra vires* and wrong for a male Golf Committee to deal with the petitioner's issue instead of the lady's committee thus contrary to **section 6** of the 1st respondent Constitution.

The petitioner further stated that although at one time Mr. Njenga and Sankara assured her that disciplinary proceedings would not go on, Mr. Njenga went ahead and conducted disciplinary proceedings and suspended the petitioner from the club for one year which suspensions was only communicated to her by letter dated 20th June, 2016. Her appeal to the Board was declined and the Board advised her to direct the appeal to the Golf committee which she did by letter dated 28th July, 2016.

On 13th September, 2016, she was informed that she would appear before the committee on 20th September 2016 and although she sought information to enable her prepare her defence, she was not given. As this was going on, the petitioner was unlawfully removed from the position as lady captain for

one year. The petitioner therefore states that her right to equality and freedom from discrimination was violated, her human dignity, right to information, right to fair administrative action and fair hearing were violated, which is an infringement to her fundamental rights.

The 1st respondent filed a replying affidavit sworn on 14th November 2016 through Japheth Njenga, a golf captain himself in response to the motion and the petition. It was stated that the petitioner withdrew her notice of motion and the same having been so withdrawn, there was no evidence in support of the petition, that the annexures the affidavit went with that withdrawal, and that there being no evidence in support of the petition the same should be struck out. According to the 1st respondent by letter dated 18th May 2016, the petitioner was invited to show cause why disciplinary actions could not be taken against her but the petitioner never responded. She was given another letter dated 6th June 2016 inviting her to attend disciplinary proceedings on 13th June 2016 but again the petitioner still ignored to attend the hearing.

According to the deponent, as golf captain he had received a complaint about the petitioner's unfair sportsmanship where scores had been intentionally wrongly declared and that is why the petitioner was facing disciplinary action. Investigations had confirmed that there was a genuine complaint necessitating disciplinary action. He also averred that as the golf captain, he is in charge of enforcing rules regarding competitions in the golf committee.

It was further averred that when the petitioner sent an appeal to the Board, she was advised to appeal to the Golf Committee since her case had been dealt with by a subcommittee which the petitioner did not do. The 1st respondent maintained that the petitioner is still a member of the club, can play golf but cannot take part in competitions. They also denied removing the petitioner from the position of lady captain, saying it was the petitioner who stopped attending the club and for that reason members appointed a lady Vice captain to act as the captain which was not a decision of the board or club. The 1st respondent's position is that there was no violation of the petitioner's constitutional rights as alleged in the petition. They maintained that the petitioner was accorded an opportunity to be heard but failed to attend the planned hearings.

Parties filed written submissions which they highlighted. Mr. Ogeto, learned counsel for the petitioner, submitted that the show cause letter did not give the nature of investigations done and no witness statements were given despite the petitioner's request for details. Counsel submitted that the petitioner only saw some form of details after the reply affidavit was served. Counsel submitted that the petitioner's right to information was infringed and violated. He submitted that the petitioner did not get information or particulars as alleged by the respondent. Counsel further submitted that the rules of the club that govern the conduct and competitions were violated. According to Learned Counsel, the issues raised against the petitioner are covered under **section 6** of the rules under the golf ladies committee and therefore that committee should have dealt with the issue instead of the golf committee. It was further submitted that no explanation has been given why the ladies committee was side stepped. The competition was a ladies golf competition hence the ladies golf committee should have dealt with the issues and not another committee which had no jurisdiction over the matter. Counsel urged that subjecting the petitioner to the golf section committee instead of the ladies golf section was irregular.

Learned counsel further submitted that the petitioner's rights under **Articles 35v** and **47** of the constitution were violated and the decision to suspend the petitioner was taken in excess of jurisdiction because the entity that purported to take disciplinary action against the petitioner had no authority to do so. Regarding the withdrawal of the notice of motion, counsel submitted that the withdrawal did not affect the affidavit accompanying it. He submitted that the petition is properly before the court and urged the court to allow the petition. Counsel referred to a number of decisions which the court has considered to support his position. He prayed that the orders be granted.

For the 1st respondent it was submitted that the petitioner's right to fair hearing was not violated. According to Mr. Orange, the petitioner was given a show cause letter and was later asked to attend a disciplinary hearing both of which she failed to do. Learned counsel submitted that the decision of the

disciplinary committee suspending the petitioner's handicap was communicated to her, but the suspension did not affect her club membership the petitioner still remains a member of the golf club and enjoys all other benefits due to members. Counsel submitted that the purported letters seeking information were an afterthought since the petitioner had received all the letters and even the decision before she purported to seek information, and for that reason there was no violation of her right to fair administrative action.

According to learned counsel, the golf club has its rules which govern conduct of members and operations at the club and under **section 6** of the rules, the golf committee has jurisdiction to deal with general issues of discipline as it did in the case of the petitioner. Counsel submitted that the issue at hand fell under the golf committee section which has mandate to plan and manage golf competitions, management of golfing activities in the club, handling golf related disputes among others. Counsel submitted that it is that committee which deals with general management of golf activities as opposed the ladies golf section which has no mandate to plan and manage golf competitions. Counsel, submitted that having received a complaint, the committee was in order to deal with it.

Counsel further submitted that in making the decision there was no unreasonableness as alleged. Counsel maintained that there was procedural fairness hence sought dismissal of the petition. Regarding the reliefs sought, counsel argued that the petitioner was not removed from the position of lady captain or suspended from the club since the position is elective hence the order for a mandatory injunction is not available to the petitioner.

I have considered this petition supporting documents response thereto and submission by Counsel for both parties. I have also considered the authorities relied on. From the petition responses and submissions, there is only one issue that arises for determination; whether the petitioner's right to fair administrative action was violated. The answer to that question will then determine whether the petition should succeed and if so what orders the court should grant. But before I deal with the main issue, there is a preliminary question I must dispose of first. It has been submitted on behalf of the respondent that the motion was withdrawn and for that matter it went with the affidavit and annexure. For the petitioner it was submitted that the withdrawal did not affect the petition. Counsel for the petitioner relied on **Article 159** of the constitution and the case of **Trusted society of Human Rights Alliance v Mumo Matemu [2013] eKLR** and **John Kipngeno Koech v Nakuru County Assembly [2013] eKLR** to support his position that the petition could survive technicalities.

Where a pleading has been withdrawn from the record it ceases to be part of that record and no reference can be made to it. In this case the motion having been withdrawn the affidavit attached to it is not available for reference by the court. That is not a mere technicality but the reality. The annexures that were attached to the affidavit could not remain once the motion and affidavit were withdrawn.

However this being a constitutional petition, my reading of the constitution of Kenya (protection of Rights and Fundamental Freedoms) practice and procedure Rules, 2013, particularly rule 11 thereof is that it is not mandatory that a petition be accompanied with an affidavit. Where there is no affidavit a petitioner may attach documents to the petition and the court will hear and determine that petition. I do not therefore think that this petition can fail on the ground alone that the affidavit was withdrawn. That being my view, I will therefore proceed to determine the petition on merit.

The petitioner was a member of the 1st respondent, a golfer and lady captain. She states that she was not given information when she was called upon to show cause. She also says that she was disciplined and suspended by a body that did not have mandate to deal with the issue raised against her. She says she was denied information she had sought thus her right to fair administrative action was violated. The right to information and that of fair administrative action are intertwined. The right to information is a constitutional right. **Article 35** of the constitution provides-

1) Every citizen has the right of access to –

a) Information held by the state, and

b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.

2) Every person has the right to the correction or deletion of untrue or misleading information that affect the person.

3)

The right to give information is not an obligation to the state only but also to any person who holds information that is required. Where information is held by a private natural person or corporate entity, such information may be given to a party who seeks it. The right to information is enshrined in the constitution and is therefore a constitutional right. International conventions to which Kenya is a signatory form part of the law of Kenya by virtue of **Article 2(6)** of the constitution. These include **International convention on civil and political Rights (CCPR)**, **Universal Declaration of Human Rights (UDHR)**, and **The African Charter on Human and Peoples' Rights (The Banjul Protocol)**.all of which have provisions to do with the right to information and fair hearing. **Article 9** of the Banjul protocol in particular provides that every individual shall have a right to information.

A person who claims to be entitled to information must first request for that information, and if denied, may move the court under **Article 22 (1)** and institute proceedings to compel the party withholding such information to release it to him/her. There is now in place the **Right to Access Information Act No 31** of 2016 that was enacted to actualized **Article 35** of the constitution. The Act commenced on 21st September 2016. Under the Act, the information should be provided expeditiously and at a reasonable cost. The Act sets out the modalities for requesting for and giving of information. That request must though be in writing

The petitioner received a letter asking her to show cause why some disciplinary action could not be taken against her. That letter from her own admission was dated 18th May 2016. According to the petitioner, the letter contained some allegations against her regarding the competition held on 2nd April 2016. The petitioner has not shown that she sought information from the respondent immediately she received the letter or prior to the disciplinary action. The letters the petitioner is referring to as seeking information were after the action complained of had been taken. The petitioner had a right to seek information she may have wanted but did not do so. I do not see how the 1st respondent can be faulted for failure to give information when the petitioner did not ask for it when she needed it.

That brings us to the core issue in this petition. The petitioner has complained that her right to fair administrative action was violated. Fair administrative action just like the right to information, is a constitutional right and forms part of the Bill of Rights. **Article 47** of the constitution provides-

“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”

What used to be called right to hearing whose foundation was the common law, has now attained constitutional recognition under **Article 47** and is now the right to fair administrative action, This right has constitutional foundation and it is now a constitutional requirement that anybody who takes or contemplates to take administrative action, must do so expeditiously act reasonably and be procedurally fair. In the case of **Judicial Service Commission v Mbalu Mutava & Mother [2015] eKLR**, the Court stated-

“Article 47 marks an important and transformative development of administrative justice for it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of

rights... the administrative actions of Public Officers, State Organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of Ultra vires from which administrative law under common law was developed “

The right to fair administrative action as a constitutional right was again re stated in the South African case of **President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT 16/98)2000(1) SAI** thus-

“The right to a just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with constitutional standards of administrative justice...” (emphasis)

In compliance with Article 47(3), Parliament enacted the fair Administrative Act which provides at section 4 (3)

“where an administrative action is likely to adversely affect the right 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 reason for the proposed 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 administrative decision where applicable*
- d) A statement of reasons pursuant section 6*
- e) Notice of the right to legal representation, where applicable or*
- f) of the right to cross examine where applicable or*
- g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.”*

Section 6 of the Act provides that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for appeal or review. **Section 7** of the same Act provides that any person aggrieved by an administrative action may apply to court for a review of that action. And section 9 gives procedures for reviewing such administrative action. However such an application may not be made unless mechanisms including internal mechanisms for appeal have been exhausted. The court may still allow a party to seek redress in court without going through the internal dispute resolution mechanism in case of exceptional circumstances.

The petitioner was given a show cause letter. She has not said why she did not respond even though she was aware of it. The petitioner was once again invited to attend disciplinary proceedings but failed to attend. She has not explained why she did not. She says that she lodged an appeal to the Board and was advised to channel her appeal to the golf committee which she says she did. There is no indication however what the outcome of that appeal was or whether the appeal is still pending. That is an admission that there is an internal mechanism which has not been exhausted. She has not also shown that there are exceptional circumstances for which the court should have exempted her from following that internal mechanism.

I have seen the letter suspending the petitioner and her appeal dated 23rd June 2016. Her appeal is very detailed and refers to the allegations made against her point by point, a clear indication that she was aware of the allegations. I therefore do not find merit in the complaint that the petitioner's right to fair administrative action was violated. Where one is given an opportunity to attend an internal disciplinary process, but fails to do so without explanation she/he cannot be heard to complain that some action has been taken against her/him. The petitioner should have attended and raised any objections she may have had towards the contemplated disciplinary action.

The petitioner has also complained that she was denied a fair hearing under **Article 50 (1)** of the Constitution. **Article 50(1)** gives the right to have any dispute capable of being resolved by application of law, decided in a fair and public hearing before a court or another independent and impartial tribunal. This right, the petitioner's counsel submitted, was violated.

It must be appreciated that **Article 50 (1)** of the Constitution relates to hearing before a Court of law or tribunals. This is different and should be distinguished from the right to a fair administrative action. Although both have an element of the rules of natural justice, **Article 50 (1)** is more concerned with civil proceedings in courts or tribunals while **Article 47** concerns administrative actions by administrative bodies. The two Articles of the Constitution do not deal with the same rights. (see **Greenfield Investments Limited & another v State of the Republic of Kenya & 3 others [2013] eKLR**)

The petitioner has again raised the question of discrimination saying that her case was heard by an entity that did not have jurisdiction and for that matter she was discriminated against. According to the petition, her case should have been heard by the Ladies **golf committee** established under **section 6** of the club's Constitution. She maintained that the decision of the **golf section committee** is *ultra vires*. On the other hand the respondent says that the golf section committee was the right committee to deal with the petitioner's case.

I have seen the club's constitution and in particular **section 6** thereof. The section has two set of committees. There is the **golf section committee** which comprises Golf Captain, Golf Vice captain, Green Keeper and Four other members. All members of this section are elected annually. The functions of this committee are managing of golf activities in the club, planning and managing golf competitions, handling golf related disputes, dealing with disciplinary issues arising from golf activities, managing handicaps and liaising with Kenya Golf Union (KGU).of

The same section has a Ladies Golf section committee which on the other hand comprises the lady captain, vice lady captain and three other members. Members to this committee are also elected on annual basis. The mandate of this committee is to manage ladies golfing activities, **handling disciplinary issues relating to ladies golf activities** and liaising with Ladies Golf Union (KLGU).

As can be seen from the mandate of these committees, they both seem to have mandate to deal with disciplinary issues. However, the ladies golf committee deals specifically with disciplinary issues **relating to ladies golf activities**. This committee may not plan and manage golf competitions but there is no doubt that it deals with lady golfers' discipline in the club. The golf section committee has more representation and more mandate than the ladies golf section committee, but unlike the ladies section, this committee does not appear to have mandate over lady golfer disciplinary issues. If the intention was for the committee to have overall mandate, nothing would have been easier than saying so. It is clear from the club's constitution that the ladies golf section committee is the one that should deal with the issue of disputes that arise from golf activities touching on lady golfers. I therefore find and hold that the only committee that could deal with the petitioner's case was the ladies golf section committee. The committee that purported to deal with the issue had no mandate .and its action was therefore invalid, null and void.

The petitioner has prayed that she be reinstated to her position before the suspension, among other declarations and orders. From the petitioner's own admission, her position is elective. She was to serves from January 2016 to December of the same year. That means her term has ended. If that be the case I do not see how one can be reinstated to an expired term. Secondly the respondents have maintained that the petitioner was not removed as a lady captain, only her handicap was suspended but she remains a member

of the club with all privileges members are entitled to. The petitioner has not denied this.

From what I have said above, it is by now clear that the petition partially succeeds. And I make the following orders;

The petition dated 14th October, 2016 is hereby allowed as follows;

1) An order of certiorari is hereby issued quashing the 1st respondent's disciplinary proceedings conducted against the petitioner on 13th June, 2016 by the Golf section committee as well as the decision dated 14th June, 2016 suspending the petitioner's handicap, and the petitioner herself from taking part in competitions organized by the 1st respondent or Kenya Golf Union's affiliated clubs for a period of one year.

2) Each party do bear their own costs.

Dated and Delivered at Nairobi this 3rd Day of March 2017

E C MWITA

JUDGE