REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 512 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF JUDICIAL REVIEW OF PRIVATE BODIES- THE MANAGEMENT OF A PRIVATE CLUB

AND

IN THE MATTER OF ARTICLE 47 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ROYAL NAIROBI GOLF CLUB

ZAKAYO KARIMI……..…..…1ST APPLICANT

STANLEY KIRUI….……..……..…..…2ND APPLICANT

VERSUS

ROYAL NAIROBI GOLF CLUB…….....…….. RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 28th October, 2016, **Zakayo Karimi** and **Stanley Kirui** who have described themselves inappropriately in the Motion as the applicants seek the following:

> **a) The court ne pleased to issue an order of certiorari removing to the High Court and quashing the decisions of the special board meeting of the respondent suspending the applicants from the club for a period of 6 months communicated vide the respondent's letters to the applicants dated 19/10/2016.**

b) The costs of this application.

c) Such further order or relief that the court may deem just and fit to issue.

Applicant's Case

2. According to the Applicants, the Respondent herein, Royal Nairobi Golf Club (hereinafter referred to as "the Club") is registered as a public company limited by guarantee and not having share capital and its officials are elected to serve for a one year term with the elections for the new team scheduled to take place during or before the first week of December 2016 and, under club rules, notification for the process of nominations for candidates was bound to begin soon.

3. The 1st applicant averred that he was the Vice-Chairman of the Board of Directors of the Club while the 2nd applicant was a member of the same Board and that they were elected to their respective positions by the general membership during a general meeting and election held on the 19th December, 2015.

4. According to the 1st applicant, he had publicly expressed his intention to vie for the position of chairman in the forthcoming elections of the club while the 2nd applicant was eyeing the position of club captain. However, differences of opinion and disagreements arose within the board of directors in the manner the reigning chairman was handling the affairs of the club and on the 16th October, 2016 the 2nd applicant wrote an email to the members of the club responding to allegations made against him by the chairman during a club night held on the 13th October, 2016, a position that was supported by the 1st applicant.

5. It was averred that on 18th October, 2016 at about 4 P.M the Honorary Secretary of the Club issued a notice of special board meeting scheduled for 6.30pm on the same day and listed agenda of the meeting of the board of directors as, among other things, to discuss the applicants' conduct. It was averred that at the meeting the applicants were served with a written summary of complaints against them and required to respond but they objected to the proceedings and requested that the meeting be adjourned to enable have sufficient time to respond to the allegations. They also pointed out that the board of directors, however constituted, had no power under the rules of the club to discipline fellow members of the board but our requests were not heeded effect and instead, they were asked to leave and meeting proceeded in their absence.

6. It was deposed that on the 19th October, 2016 the Honorary Secretary of the club handed letters to the applicants at the club house indicating that the special board meeting had resolved to suspend them from the club for a period of six (6) months with immediate effect and a notification of the suspension was also published on the notice board at the club house on the same day.

7. The applicants contended that the effect of the decision was to lock them of the imminent club elections since a suspended member cannot vie for elective positions in the club. In their view, the decisions of the special board meeting was contrary to the rules of the club and was arrived at in a manner that violated the basic rules of natural justice and fairness.

8. The applicants disclosed that the club recruits its membership from qualified members of the public upon payment of the prescribed joining fee and subscription payments and its main objective is to promote the game of golf and other athletic sports and pastimes. Therefore function of disciplining members is quasi-judicial in nature and members have a legitimate expectation that the function will be carried out fairly.

Respondent's Case

9. In opposition to the application the Respondent averred that the orders granting leave to commence these proceedings were obtained on the foot of the Applicants' deliberate suppression and/or concealment of material facts regarding the entire disciplinary process that the Respondent took them through and their

own full participation in the process.

10. According to the Respondent, it is a private limited company operating as a private members club and its operations, governance structures and relationship with its members is guided by among others, its Memorandum and Articles of Association and its By-Laws as amended from time to time. The Applicants, it was disclosed are members of the Respondent club and also double up as directors and members of the Board of Directors and are therefore bound by the provisions of the Respondent's by-laws, code of ethics and its other constitutive instruments.

11. According to the Respondent, sometimes in October 2016, the Respondent received complaints against the Applicants who were accused of committing various acts which the Respondent particularized and given the sensitivity of the said complaints and the need to urgently deal with all the issues in a fair and expedient manner, the Respondent acting through its Board's Secretary, issued a Notice of a Special Board meeting on 18th October, 2016 at 10.19 a.m. for a meeting scheduled to take place on the same day at 6.30 p.m. and a summary of the complaints against the Applicants were sent together with the Notice of Special Board meeting on the same day and at the same time. Further, it was averred, that it is common practice that special Board meetings of the Respondent Club are convened at the shortest notice regard being given to the gravity of the issues to be addressed and their urgency and the Applicants have never complained of such short notices before and in any event, the Applicants have, in the past, circulated papers for Board's deliberation even 1 hour before the commencement of its meetings.

12. The Respondent stated that contrary to the Applicant's allegations, the Respondent forwarded the complaints against the Applicants at 10.19 a.m. and at the same time it sent the Notice of the special Board meeting and indeed the Applicants had the opportunity to view the complaints way before the meeting commenced. It was confirmed that the scheduled meeting indeed took place (commencing at 6.30pm and ending at 11.55pm) with a total of twelve (12) participants including the Applicants herein fully taking part in it. According to the Respondent, on account of the insults made by the 2nd Applicant to the Directors in his WhatsApp communication of 17th October, 2016 at 23.42 pm and threats to make further publications to the membership and further to the email published to the Club members by the 1st Applicant on 16th October, 2016 at 10.02 p.m., all in violation of by-law 13.3, the members resolved as follows:-

a) The issues raised required to be dealt with as a matter of urgency due to the anxiety already created amongst the membership of the Respondent hence the 7 days' notice period was waived.

b) Since most of the issues raised were serious and delve into the core of the leadership of the Respondent Club, the same needed to be addressed immediately and a communication made to the members.

c) The evidence that was being sought were the threats and insults in the emails and WhatsApp communications authored by the Applicants themselves.

d) The Applicants having ascended to their Directorship positions on account of being members at the first instance, they were not immune from any complaints being made against them as members and the complaints against them would be addressed as those against other members are usually handled.

13. The Respondent however denied the Applicants' allegations that they were thrown out of the meeting as being completely false and averred that the Applicants sat throughout the entire session and at no time were they excluded from taking part in the deliberations of the Respondent Board meeting. To support this position, the Respondent exhibited a copy of the minutes of the meeting and the email correspondences of members present who confirmed that the Applicants were also present during the meeting.

14. It was confirmed that during the meeting, the Applicants were again informed of the complaints against them and were afforded adequate chance and time to respond to the complaints and subsequently,

the Respondent's Board found that the Applicants had violated the provisions of the Respondent's Articles of Association and the By-laws of the club and more particularly by-law 13.3. Pursuant to the aforesaid finding, the Board decided to suspend the Applicants for a period of six (6) months which decision had nothing to do with the upcoming elections. In any event, the issue of the upcoming elections was not part of the matters for consideration during the Board meeting and it only happens that the election date fell within the suspension period.

15. It was asserted that there is no provision either in the Respondent's Articles of Association or the by-laws that stipulates that hearing of complaints against Directors who are members of the Respondent and power to discipline them is an exclusive preserve of the general meeting. Contrary to the Applicants' allegations, the Respondent contended that the entire disciplinary process against the Applicants and the subsequent decision was made in full compliance with the law governing the Respondent club and without any bad faith.

16. With respect to the allegations that there have been differences of opinion within the Respondent's Board of Directors in the manner in which the current Chairman has been handling the affairs of the Club, the Respondent stated that this is not entirely correct and averred that the 1st Applicant has always roped in the 2nd Applicant in a series of political power struggle games and actions directed at usurping the powers bestowed upon the Chairman and the Board as a whole which actions have from time to time been such as to amount to misconduct of any member of the Club. It was disclosed that the 2nd Applicant is on record for having admitted to their misconduct, whose particulars were disclosed. The Respondent reiterated that the publication of the emails and WhatsApp messages was in utter violation of the Respondent's by-law 13.3 and further, the contents of the email was a deliberate and malicious fabrication . In the Respondent's view, I was therefore quite clear that the Applicants were driven by ill will and malice in publishing the emails and WhatsApp communications, the subject matter of the disciplinary proceedings hence the Respondent's decision to suspend the Applicants from its club was reasonable, rational, fair, lawful and in compliance with the rules of natural justice.

17. According to the Respondent, it learnt about the institution of these proceedings from the social media when the Applicants circulated the ex parte orders to the members and the public at large on different platforms including Great Rift Golfing Society whose membership is countrywide and this conduct clearly demonstrates their recklessness, lawlessness, impunity and complete disregard of the *sub judice* rule and more specifically of by-law 13.30 of the Club.

18. It was the Respondent's case that the Respondents conduct (sic) aforesaid exposed these proceedings to public debate and the membership to great anxiety hence the Applicants' instant application lacks merit and is deserving of only one order, that of dismissal with costs to the Respondent.

Determinations

19. I have considered the application, the affidavits in support of and in opposition to the application and the submissions filed.

20. The first issue for determination in this application is whether judicial review orders may issue against the Respondent, a private limited liability company. In this case, it is clear that the Respondent is not just a commercial enterprise but is a company in form of a club whose objective include the establishment, maintenance and conduct of a golf club for the accommodation of its members and their friends and generally to afford them all the usual privileges, advantages, conveniences and accommodation of the club. In otherwise the Respondent is both a social and a recreational club where members socialise and enjoy freedom of association. Article 36(1) of the Constitution provides that every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

21. The question that arises is whether in taking disciplinary action against a member of a club such as the Respondent herein, the Respondent is taking an administrative action. It must be appreciated that the Article that specifically deals with judicial review of administrative action is, Article 47 of the

Constitution. Pursuant to the said Article, Parliament enacted the ***Fair Administrative Action Act, 2015*** which in section 2 thereof defines "administrative action" to include:

> ***(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or***
>
> ***(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;***

22. The same section defines "administrator" as "a person who takes administrative action or who makes an administrative decision." Section 3 on the other hand provides:

> ***(1) This Act applies to all state and non-state agencies, including any person***
>
> ***(a) exercising administrative authority;***
>
> ***(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or***
>
> ***(c) <u>whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.</u>*** [Underlining Mine].

23. From the provision of Article 36(1) of the Constitution, it is clear that the Respondents decision to suspend the applicants affected the legal rights or interests of the Applicants. It is therefore my view and I so hold that pursuant to the provisions of Article 47 as read with the provisions of the ***Fair Administrative Action Act, 2015***, judicial review orders may where appropriate issue against the decisions of the Respondent. This must be so because it is now appreciated that judicial review is an important control, ventilating a host of varied types of problems. The focus of cases may therefore range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. In my view where the issue of enjoyment of fundamental rights and freedoms under the Constitution calls for determination, that removes the matter from purely a private affair as it then becomes a matter of "acute personal interest." This must be so because Article 19(1) of the Constitution recognises that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

24. The Applicants in this application contend that their rights to be heard was violated as they were not given appropriate notice in order to enable them adequately prepare their case. ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 539 at para 639 states:

> **"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge."**

25. The minimum ingredients of fair hearing are provided in Article 47 of the Constitution. I say the minimum because under Article 20 of the Constitution every person is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom and in applying a provision of the Bill of Rights, a court is enjoined *inter alia*

develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. The said Article 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.***

26. It is my view that fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

> **"The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice…*Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter.*"** [Underlining mine]

27. In **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR** it was held that:

> **"20. Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including "*(c) responsive, prompt, effective, impartial and equitable provision of services*" and "*(f) transparency and provision to the public of timely, accurate information.*"**
>
> **28. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. *Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response*. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272,* notes that, "*Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision.*"**
>
> **29. Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in *TV3 v Independent Radio and Television Commission* [1994] 2 IR 439).**
>
> **30. In many jurisdictions around the world, it has long been established that notice is a**

matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (*See Charkaoui v Canada* [2007] SCC 9*, Alberta Workers' Compensation Board v Alberta Appeals Commission (*2005) 258 DLR (4th), 29, 55 and *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750)."*

28. Section 4(3) of the ***Fair Administrative Action Act, 2015*** provides as follows:

(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.

29. In this case it is clear that the notice inviting the applicants for the meeting was less than one day. According to the Respondent due to the urgency of the matters in issue the seven days' notice was waived. It is clear from the minutes of the disciplinary proceedings that the applicants raised the issue of inadequacy of the notice. There is however no indication that the Respondent dealt with this issue before proceeding with the proceedings. Whereas, the Respondent may well have been entitled to truncate the notice period, my understanding of section 4(4)(d) of the ***Fair Administrative Action*** is that where an issue arises as to the inadequacy of the notice the administrator must deal with the matter before carrying on with the proceedings. In this case it is clear that the issue was not dealt with and considering the fact that the Respondent's own regulation provided for a seven days' notice, it is my view that before proceeding further, this obviously prejudicial action ought to have been addressed and justified. The failure to do so in my view rendered the disciplinary proceedings as conducted by the Respondent unfair.

30. That being the position the decision cannot stand. This was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at*...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the

charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio*." [Emphasis mine].

31. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

> **'If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."**

32. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

> **"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."**

33. Having considered the material placed before me it is my view that the applicants' case is merited.

Order

34. Consequently, I hereby issue an order of certiorari removing into this Court for the purposes of being quashed the the decisions of the special board meeting of the respondent suspending the applicants from the club for a period of 6 months communicated vide the respondent's letters to the applicants dated 19th October, 2016 and the same are hereby quashed.

35. As the application was wrongly intituled by bringing the same in the names of the ex parte applicants rather than the Republic there will be no order as to costs. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779**; **Mohamed Ahmed vs. R [1957] EA 523**; and **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486.**

36. Orders accordingly.

Dated at Nairobi this 2nd day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kavage for Mr. Chacha for the Respondent

CA Mwangi