



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NUMBER 160 OF 2013

BETWEEN

ROSE WANGUI MAMBO.....1ST PETITIONER
MARTHA WANJIRU VINCENT.....2ND PETITIONER
CAROLINE WANGARI NGUGI.....3RD PETITIONER

AND

LIMURU COUNTRY CLUB.....1ST RESPONDENT
YASSIN AWALE.....2ND RESPONDENT
ROBERT BARUA.....3RD RESPONDENT
PETER MUNGAI.....4TH RESPONDENT
ERICK KIMURI.....5TH RESPONDENT
KAGOCHI MUTERO.....6TH RESPONDENT
VICTOR GICHURU.....7TH RESPONDENT
ANTHONY WANGARI.....8TH RESPONDENT
TOM WAIHARO.....9TH RESPONDENT
THE ATTORNEY GENERAL.....10TH RESPONDENT
ALFRED KARIUKI, FRANCIS OKWARA, PETER WARUI (Sued on
behalf of The Kenya Golf Union).....11TH TO 13TH RESPONDENTS

DORCAS MBALANYA, ANASTACIA CHUBI, JOYCE WAFULA (Sued on behalf

of The Kenya Ladies Golf Union).....14TH TO 16TH RESPONDENTS

AND

FEDERATION OF WOMEN LAWYERS (FIDA)...1ST INTERESTED PARTY

LAW SOCIETY OF KENYA.....2ND INTERESTED PARTY

JUDGMENT

Introduction

1. The issues giving rise to the present petition concern internal wrangles in a private members' club known as the Limuru Country Club. "(the Club") At the crux of the controversy is whether this Honourable Court should intervene in affairs of private members' clubs, and in particular, whether and to what extent this Honourable Court has jurisdiction to address alleged violations of fundamental rights and freedoms arising from dealings between the private club and its membership.
2. The petitioners challenge a resolution by the Board of Directors of the Club amending part of the Club's by-law. They contend that the amendment not only discriminates against the female membership contrary to the constitution of the Club but is also in breach of their fundamental rights and freedoms enshrined in the Constitution of Kenya. The petitioners also take issue with the disciplinary process employed by the 2nd to 9th respondents leading to the petitioners' suspension and expulsion of their handicaps, which process they claim did not accord with due process and was in violation of their fundamental rights and freedoms.

The Parties

3. The petitioners are female fully paid up members of the Club. They have served in various senior positions at the Club, with the 1st petitioner serving as Vice-Chair and Director of the Club until early 2013 when she was removed from office. The 2nd and 3rd petitioners have served as lady golf captains and were at the time of filing the suit suspended from the Club and subsequently from the Kenya Ladies Golf Union where they were officials.
4. The Club, which is a member of the Kenya Golf Union, is a company limited by guarantee and not having a share capital. It was incorporated on 24th September 1945 under the Companies Act, Chapter 486 of the Laws of Kenya. It has since incorporation been governed by the provisions of the Companies Act and the Club's Articles of Association as amended from time to time. By its Articles of Association, the executive authority of the Club is exercised by the Board of Directors.
5. The 2nd, 3rd, 4th, 7th, 8th and 9th respondents are members and current directors of the Club, while the 5th and 6th respondents are former directors of the Club. The 11th, 12th and 13th respondents are sued in their capacity as officials of the Kenya Golf Union ("**KGU**"), an umbrella society registered under the **Societies Act, Chapter 108 of the Laws of Kenya**. KGU is the body that runs golf in Kenya with the main objective being to promote the game of golf and to ensure that it is played in accordance with the rules set by the governing body and that there is a unified handicapping system. KGU draws its membership from private members clubs affiliated to the Union and individual members restricted to past chairmen and presidents of the Union.
6. The 14th, 15th and 16th respondents are officials of the Kenya Ladies Golf Union, a union exempt from registration under the Societies Act vide a certificate of exemption dated 10th May 1977. The

Union is the body that runs ladies golf in Kenya with the main objective of promoting golf as a game and ensuring that lady golfers in Kenya play golf in accordance with the rules set out in the union's constitution.

The Facts

7. The controversy leading to the present petition can be traced back to a resolution of the Board of Directors passed in a General Meeting of the Club held on Saturday 22nd December 2012. It is in this meeting that the Golf Captain and Golf Vice-Captain were to be elected in accordance with the Club's Articles of Association and bylaws.
8. At the centre of the controversy is a by-law allegedly made by a majority of the 2nd to 9th respondents as directors of the Club at a Board meeting held on 18th December 2012. The by-law has the effect of excluding the lady golf members from participating in the Golf General Meeting Election. The relevant part of the impugned by-law reads as follows; ***“The golf committee being a male only affair, only full male members with valid handicaps, and who are fully paid up, will be allowed to participate in the meeting and that lady golfers will attend the meeting as guests.”***
9. The petitioners complain that this by-law was made only three days to the General Meeting and was communicated only to select members through email. This, the petitioners claim, denied them and the entire membership an opportunity to raise objections to the decision. The 1st petitioner, then a Director of the Board and a lawyer by profession, contends that her legal advice that such a proposal was unconstitutional was ignored.
10. It is the petitioners' case that the General Meeting of 22nd December 2012 was conducted by the 2nd respondent as the chairman of the Club in a skewed manner calculated to have the discriminatory Board resolution sail through; and in a way that ensured those who wished to raise serious protestations were not given a chance to air their grievances. Further, that the respondents had ensured that they marshaled the numbers calculated to 'shout down' any opposition to the passing of the proposed impugned by-law. As a result, the petitioners complain, the impugned by-law was passed and consequently, the elections of the Golf Captain and members of the Golf Committee were held without any votes from the lady golf members being allowed.
11. The petitioners further complain that in a Board of Directors meeting held on 14th January 2013, the 2nd to 9th respondents passed a 'vote of no confidence' in the 1st petitioner as Vice Chairperson of the Club, accusing her of breaching collective responsibility and challenging their personal authority; and the 1st petitioner consequently lost her position as Chairman of the Membership and Disciplinary Committee.
12. In letters dated 2nd January 2013 addressed to the 2nd and 3rd petitioners, the Golf Captain of the Club expressed displeasure at the conduct of the petitioners during the Golf General Meeting. The letter noted that the members "disrespected the office of the Golf Captain" and required the petitioners to, within 7 days from the date of the letters, show cause why disciplinary action should not be taken against them.
13. This was followed by the suspension for a period of three weeks of the 2nd and 3rd petitioners on 15th January 2013. Later, on 22nd January 2013, the Chairman of the Club suspended the 2nd and 3rd petitioners from the Club for a period of six months and one month respectively for alleged misconduct. Following this suspension, the Kenya Ladies Golf Union (11th to 13th respondents) on 24th January 2013 suspended the 2nd and 3rd petitioners. This action, the petitioners claim, was contrary to Rule 24 of the Kenya Unified Handicapping Committee of Council of National Golf Union (CONGU) which requires that before such action is taken, the affected party must be given a hearing.

14. Aggrieved by the actions and events set out above, the petitioners filed the present matter on 12th March 2013 seeking this Court's intervention. The Court (Lenaola J) granted the temporary Orders staying the petitioners' expulsion, which orders have since been extended from time to time to date.
15. On 27th March 2013, by consent of parties, the Court appointed Mr. Mwaniki Gachoka and Dorcas Mbalanya as mediators under **Article 159** of the Constitution to report back after 21 days. The attempt at arriving at an amicable settlement of the matter was however, unsuccessful, and on 14th June 2013, following an application by the 5th and 6th respondents, it was certified as raising constitutional issues of public interest under Article 165. The current three-judge Bench was then constituted to hear and determine the matter.
16. At the hearing of the matter before us on 18th December 2013, Counsel for the petitioners informed the Court that the 2nd petitioner had reached a settlement with the 1st -9th respondents, and that this matter stood withdrawn with regard to her. Consequently, reference to the petitioners hereafter shall mean the 1st and 3rd petitioners.

The Petitioners' Case

17. Through their counsel, Mr Murgor, the petitioners' contend that they joined a Club that was compliant with the Constitution and one that respected their fundamental rights and freedoms; that in **Article 28** of the Club's constitution, members are entitled to vote at any general meeting; and that the Club takes equal subscription and admission on equal basis.
18. It is the petitioners' case that the effect of the impugned by-law was to disenfranchise the petitioners from voting during the proposed elections of the male golf captain at the Golf General Meeting slated for 22nd December 2012 and the subsequent Golf General Meetings. This, they submit, is contrary to not only the Constitution of Kenya but also the Club's Articles of Association which grant all members the right to vote in all general meetings. The petitioners express their fears that if the gender insensitive amendment to the Club's by law is allowed to remain in force, it will defeat the purpose of the Bill of Rights in the Constitution of Kenya, particularly Article 27 which guarantees the right to equality and non-discrimination.
19. With regard to disciplinary matters, it is the petitioners' case that the respondents' actions violated the right to due process and natural justice in the manner in which they conducted the disciplinary process against the petitioners. They argue that the purported disciplinary process was flawed and conducted in violation of **Article 27**, the rules of natural justice and the Club's own Articles of Association and its by-laws. They aver that the Club's Disciplinary Committee did not afford the petitioners any chance to either appear before it to defend themselves or to file any substantive response to the allegations against them. According to the petitioners, they were expelled from the Club as punishment for exercise of their constitutional rights to freedom of speech, and for 'whistle-blowing' by going public about infringement of their constitutional rights by the making and implementation of the impugned by-law.
20. The petitioners claim that despite their commitment to have the matter amicably settled through mediation, the 2nd to 9th respondents have been uncooperative and have instead frustrated the process. The petitioners depose at paragraph 54 of the 1st petitioner's deposition that; ***"[T]he 11th and 13th Respondents, through the Chairman, sought to bring the parties together for the purposes of mediation but were unsuccessful since, while the petitioners were always available, the 2nd to 9th respondents were unable to confirm their availability for any meeting."***
21. They depone further at paragraph 83; ***"THAT in all meetings held with the 11th to 13th Respondents and the Commissioner of Sports to attempt an amicable resolution of the dispute by way of mediation, the 2nd to 9th respondents rotated their attendance in such a manner as to***

ensure that there would always be no quorum as provided in Article 52 of the 1st Respondent's Articles of Association and then be able to claim that they were unable to make a decision for lack of quorum."

22. It is their contention that all attempts to amicably resolve the matter within the confines of the Club's rules and regulations have been met with continued harassment against the petitioners; that left with no option, the petitioners had to approach the Court for resolution.

23. In their petition dated 12th March 2013, the petitioners seek the following reliefs:

- i. *A declaration that to the extent that the by-law made by the Board of Directors of the 1st Respondent on 19th December 2013 is discriminatory on lady golf members of the 2nd respondent on the basis of gender, Articles 19, 20, 27, 28, 29, 33, 36, 40, 47, 50, 73 and 259 of the Kenya Constitution 2010 have been contravened, and the said bylaw is therefore null and void, ab initio.*
- ii. *A declaration be issued that any arbitrary suspension, expulsion and or removal of the 1st petitioner from her positions as Vice Chairperson of the 2nd respondent without considerations of due process and all the tenets of natural justice is a violation of Article 27 and 47 of the Constitution, therefore, null and void ab initio.*
- iii. *A declaration be and is hereby issued that any arbitrary suspension and or expulsion of the 2nd and 3rd petitioners positions as Council Member of the Kenya Ladies of Golf Union, and the subsequent unconstitutional suspension of their handicaps without considerations of due process and all the tenets of natural justice is a violation of Article 27 and 47 of the Constitution, therefore, null and void ab initio.*
- iv. *An order quashing the purported expulsion of the petitioners from the membership of the 1st respondent and reinstating them to the membership to the 1st respondent*
- v. *An order directing the 1st to 9th respondents and the 11th and 16th respondents to reinstate the 2nd and 3rd Petitioners' handicaps*
- vi. *An Order directing the 10th respondent on behalf of the Ministry of Youth Affairs and Sports to take all necessary action to protect the fundamental rights of the petitioners and the adherence to the rule of law by the 1st to 9th respondents.*
- vii. *An Order directing the 11th to 13th Respondents to investigate the actions of the 1st to 9th respondents with a view to taking appropriate disciplinary action or violating Article 7 of its Constitution*
- viii. *An Order directing the 14th to 16th respondents to reinstate the CONGU handicaps of the 2nd and 3rd petitioners.*
- ix. *An order directing the 14th to 16th Respondents to reinstate the 2nd and 3rd Petitioners to their official positions in the Kenya Ladies Golf Union.*
- x. *An Order of compensation*
- xi. *Costs*

The Case for the Respondents

24. All the respondents save for the Attorney General oppose the petition. The Attorney General ("AG") concurs with the petitioners that the amendment introduced into the Club's by-laws offends **Article 27**. Describing the respondents' action as 'chauvinistic', it was submitted on behalf of the AG that such a move could not be entertained in a progressive society like Kenya. Mr Opondo, Litigation Counsel presenting the Attorney General's case, contended that a private members' club is not exempt from the provisions of the Constitution. Counsel submitted in response to the contention by Mr. Kihara, Learned Counsel for the 1st - 4th, 7th, 8th, and 9th respondent, that private members' clubs in other jurisdictions had discriminatory provisions, that what other clubs or jurisdictions did was irrelevant in the face of clear non-discrimination provisions in the Constitution of Kenya. He urged the Court to allow the petition.

The Case for the 1st, 2nd, 3rd, 4th, 7th, 8th and 9th Respondents

25. In opposing the petition, the 1st, 2nd, 3rd, 4th, 7th, 8th and 9th respondents (“the respondents”) rely on affidavits of Yasin Awale of 21st March 2013 and 16th August 2013 and that of Anthony Wangari sworn on 21st March 2012.
26. Their basic contention is that under the constitution of the Club, the directors have power to make, alter and repeal all such by-laws as it may deem necessary from time to time and that, such by-laws, “...*shall remain in force pending consideration and approval of the same by a General Meeting of the Company.*” They emphasize that this is the position in accordance with Article 58 of the Club’s constitution.
27. Through their counsel Mr Kihara, the respondents contend that the gender discrimination the petitioners complain about is one that is permissible in the game of golf; and that discrimination in private clubs is not fully outlawed, citing in support a number of authorities including that of **RWDSU v Dolphin Delivery Ltd (1986) 2 S.C. R. 573; Portmarnock Golf Club & Others [2005] IEHC 235** and the **Boy Scouts of America v Dale, 530 US, 640(2000)**. It was their case that the Club had both the Golf Committee and a Ladies Golf section, and that other clubs have similar discriminatory provisions, urging the Court therefore to avoid an issue that may affect other clubs.
28. The respondents further contend that the petitioners ought to have pursued the internal mode of dispute resolution provided in the Club’s Articles of Association; that they also had two venues to resolve their grievances: one, at the General Meeting when the by-law was presented for discussion and approval; or the second, to sponsor a special resolution at a General Meeting of the Company to set aside the by-law.
29. Mr. Kihara further submitted on behalf of the respondents that the present matter lay in the realm of company law and that being private issues, this court lacked jurisdiction to step in.
30. The respondents urged the Court not to interfere with age-old practices in the game of golf and its Committees; and to hold such discrimination as permissible. They referred the Court to a few clubs’ by-laws and constitutions where, according to the respondents, gender discrimination similar to that in their club were exhibited.
31. The respondents further urged the court not to intervene and attempt to write down the law as there was yet to be enacted a legal framework to substantively address issues of gender equity as anticipated under **Article 27(6)** of the Constitution. They cited various authorities in support of their contention, among them **International Centre for Policy and Conflict v The Attorney General & Another, Petition No. 398 of 2012**, in which they submitted that the court had declined to intervene where other alternative modes had not been exhausted.

The Case for the 5th & 6th Respondents

32. The 5th and 6th respondents are former directors of the Club. Their case centres on the issue of the appropriate forum for resolution of the present dispute. First, they feel that the law provides a specific mode of dispute resolution and that therefore this Court is divested of jurisdiction until such mechanism is exhausted. In their view, the petitioners ought to have pursued their complaints through the National Gender and Equality Commission (hereafter “Commission”) which is vested with the power to, among other things, “adjudicate on matters relating to equality and freedom from discrimination,” under **Section 26 (c)** of the **National Gender and Equality Commission Act, 2011**. It is therefore their contention that the present matter ought to have been tabled before the Commission.
33. Their second argument, which also goes to the question of this Court’s jurisdiction and is related

to the first, is the existence of a pending complaint before the Commission. They aver that the petitioners had earlier on lodged a complaint before the Commission, and they cite paragraph 57 of the 1st petitioner's deposition which reads: ***"THAT on 5th February 2013, an investigation was commenced by the Gender and Equality Commission. The Commission wrote to the 1st to 9th Respondents notifying them of its investigative powers and requested them to submit to its jurisdiction."*** They assert that the petitioners have not demonstrated that they withdrew the complaint or that the Commission declined to investigate their complaint contained in their letter of 5th February 2013 on either of the grounds specified under **section 34(b)** of the Act, which include that the complaint **'was trivial, frivolous, vexatious, or made in bad faith.'** They therefore contend that, as long as the complaint before the Commission had not been formally terminated, it remains live and thus this Court ought to down its tools at the earliest opportunity.

34. The third alternative avenue of resolving the dispute, according to the 5th and 6th respondents lies within the framework of the Club's own rules. It is their submission that the petitioners are members of the Club and must therefore play by its rules. They aver that according to the Club's Articles of Association, there lies a dispute resolution mechanism the Club's Special General Meeting that the petitioners ought to have first invoked before approaching this Honourable Court, to canvass the perceived violations of their constitutional rights rather than rush to this Court.

35. The 5th and 6th respondents conclude by pointing out that golf is primarily a sport, and therefore governed by the provisions of the **Sports Act, 2013**. They urge the Court to be slow to interfere with internal mechanisms of procedure and regulation of a sport such as golf, as to do so would create a bad precedent whereby parties avoid the laid down mechanisms for conflict resolution within a sport and invoke the Court's intervention at a whim.

The Case for the 11th, 12th & 13th Respondents

36. The 11th, 12th and 13th respondents were sued in their capacity as officials of the Kenya Golf Union (KGU). They distanced themselves from responsibility concerning the allegations forming the subject of the petition. It is their case that individual clubs are independent legal entities, each with its constitution and by-laws, and that the Union was not involved in their internal processes such as enacting and amending their respective constitutions or by laws. They termed as 'normal' for clubs to each have a men's golfing section and a ladies golfing section and submitted that the manner in which those sections were governed remained internal matters which the KGU was not concerned with.

37. It was KGU's further submission that it was wrongly joined in the matter as the issue at hand involved the constitution and regulations of the 1st respondent which matters do not fall within its jurisdiction. According to KGU, the matter was squarely between the petitioners on the one hand and the 1st to 9th respondents on the other.

The Case for the 14th, 15th & 16th respondents

38. The 14th, 15th and 16th respondents, who were sued in their capacity as officials of Kenya Ladies Golf Union (KLGU) opposed the petition terming it an abuse of court process. Their Counsel, Mr Lempaa, submitted that his clients were no longer directors of the KLGU as there were new officials after elections held in October 2013. It was counsel's contention that his client had therefore been wrongly joined as parties in the matter.

39. In the Replying Affidavit sworn by **Dorcus Mbalanya**, the union's Chairperson dated 30th July 2013, KLGU reiterated that it does not interfere with the running of any affiliated club but only acts on recommendation of the affiliated clubs. It was its deposition that each club is an independent legal entity with its constitution and by-laws and that the Union is not in any way involved in the process of enacting and amending constitutions of individual clubs.

40. KLGU's position was that it lacks the powers to investigate actions of the 1st to 9th respondents and termed the petitioners' prayers as a misapprehension of their constitution. According to KLGU's deposition, the Union could only interfere with club affairs where the rules governing the game of golf are violated.

41. Regarding the disciplinary procedure it followed in expelling the 2nd and 3rd petitioners from its membership, KLGU maintains that it acted in accordance with its constitution, in co-opting a joint secretary and councilor to replace the 2nd and 3rd petitioners respectively and suspending them from office. It contended that KLGU does not initiate any disciplinary proceedings against a member of any club for acts committed in its affiliate clubs and that therefore, the petitioners' allegation that the Union denied them due process was misplaced as the same was owed to the petitioners by their club.

42. In any case, KLGU submits, the orders sought cannot lie against KLGU as it has no power in the matter, being a union that deals with ladies golf. Further, KLGU states that as a union, it does not give handicaps as they are given by affiliated clubs in accordance with the rules of the Council of National Golf Union (CONGU) system, and as such, only the clubs can reinstate the petitioners' handicap.

Submissions by the Interested Parties

43. Both the 1st and 2nd interested parties, the Federation of Women Layers (FIDA) and (LSK) The Law Society of Kenya respectively, support the petitioners' position. Ms Mbanya representing LSK agrees with the petitioners' submissions that being fully paid up members of the Club, the petitioners are entitled to vote at meetings of the Club in accordance with **Article 28** of the Club's constitution, and had a legitimate expectation to do so. They support the petitioners' case that the impugned by-law is contrary to the Club's Articles of Association, is discriminatory in nature, and is therefore unconstitutional.

Determination

44. From the pleadings and submissions of the parties before us, we take the view that there are three main issues that fall for determination in this matter:

0. *The question of jurisdiction: Whether this court has jurisdiction to conduct an inquiry into affairs of a private members club*
0. *Discrimination and Equality: Whether the impugned by law is discriminatory or otherwise offends constitutional provisions*
0. *Disciplinary process; The constitutionality of the disciplinary process employed by the respondents.*

Preliminary Issue: Misjoinder of Parties

45. Before embarking on an analysis of the matters raised in this petition with regard to the three issues set out above however, we believe it is necessary to determine first the issue of misjoinder of parties which has been raised by virtually all the respondents in this matter.

46. The 2nd to 9th respondents contend that being directors of the Club, which is a company, they cannot be held liable for the acts of the company and are therefore wrongly made parties to this suit. Basing their argument on the doctrine of corporate legal personality, they submit that as directors of the company, they acted on behalf of the company, their actions are therefore deemed to be the acts of the company, and they cannot therefore be properly sued in their individual capacities.

47. The issue of misjoinder was also raised by the 5th and 6th respondents as former directors of the

company. They claim that they cannot be held legally liable for constitutional violations that occurred while they were out of office. According to their counsel, Mr. Kinyanjui, the 5th and 6th respondents ceased to be directors of the Club on 23rd August 2013; and further, that being directors they ought not to be held liable for acts of the Club, and they call in aid the case of **Salomon v Salomon (1897) AC 22**.

48. The 11th, 12th and 13th respondents as KGU officials and the 14th to 16th respondents being officials of KLGU also claim wrongful joinder in the petition. Mr Lempaa for the KLGU told the Court that his clients as directors were wrongly sued as they assumed office in October after the KLGU's elections.

49. **Rule 2 of the Constitution (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013** (hereafter "the Rules") defines the term 'respondent' to mean, "***a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom.***" Further, **Rule 5(a)** of the Rules states that "***Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.***"

50. It is also worth mentioning that according to the Rules, a petition cannot be defeated by reason of the misjoinder or non-joinder of parties. The Court in such an instance is mandated to deal with the matter in dispute according to Rule 5(b) of the Rules, while Rule 5(d) allows the Court at any stage of the proceedings, (either upon or without the application of either party) to order that the name of any party improperly joined be struck out and that the name of any person who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court adjudicate upon and settle the matter be added.

51. The 2nd to 9th respondents have invoked the doctrine of corporate legal entity to claim that they are wrongfully enjoined as respondents. Without appearing to trample on the age old doctrine of corporate legal personality which we do not find necessary to delve into, we think that the issue must be approached more from a practical perspective rather than a purely legalistic manner; and in a way that best advances the cause of justice with regard to all parties concerned.

52. From the definition of the term 'respondents' set out above, we understand the implication to be that any person can be joined as a respondent so long as there is an allegation that the person has infringed or threatens to infringe the petitioner's fundamental rights. It is perhaps worth noting that at this point, we are not talking of determination of culpability or liability, as that we think is an issue for the Court to eventually determine.

53. Firstly, we do not take it as a blanket rule that directors as the hands and minds of the Corporate are completely shielded from personal liability arising from their own acts. There are in fact a number of instances in which the law provides for liability of the company's officers for various offences. For instance **section 116 of the Income Tax Act** provides that where an offence under the Act has been committed by a corporate body of persons, every person who, at the time of the commission of the offence, was a director, general manager, secretary, or other similar officer of the body corporate, or was acting or purporting to act in that capacity, shall also be guilty of the offence unless he proves that the offence was committed without his consent or knowledge; and that he exercised all the diligence to prevent the commission of the offence that he ought to have exercised having regard to the nature of his functions in that capacity and in all the circumstances.

54. It is, we believe, generally accepted that corporate entities do not have hands and mind through which they can act; they act through the officers at the helm.

55. According to Halsbury's **Laws of England, 4th Edition 2004(Re issue) Vol. 7(1)**, at para. 481; "***Directors and other officers of companies are by statute indictable for many criminal acts.***"

Directors, officers and members may be liable for the theft of the company property or for false accounting. Further, if the company itself has obtained property or a pecuniary advantage by deception, or has falsely accounted, and the offence is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer of the company, he, as well as the company, is guilty of the offence, and is liable to be proceeded against and punished accordingly.

56. We must also draw a distinction between a petitioner's right to sue for breach of her fundamental rights and freedoms and the issue of liability. At the point of suing, the petitioner will need to join to the suit as (a) respondent(s) a party against whom he or she alleges has infringed or threatens infringement of his or her rights. It then becomes the duty of the Court to make a determination as to whether or not such party is properly enjoined and more importantly, whether such party is liable for the alleged violations. As was observed in **Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi, Nairobi Petition No. 625 of 2009 [2011] eKLR** in reference to the then **section 84(1)** of the repealed Constitution;

“Needless to say, it is clear from the above provisions of the Constitution that a person who alleges (not “proves”) that his fundamental rights have been contravened has a Constitutional right to seek redress in the High Court. It would amount to grave injustice to lock out a petitioner from filing his claim purely because the respondent believes that the claim has no merit. The issue of merit is substantive while the filing of the claim is procedural...”

57. In the matter before us, the 2nd to 9th respondents' contention that they are wrongly joined to this suit is rejected. We find that they are properly before us as parties against whom claims are made regarding infringement of the petitioners' fundamental rights. It is also our finding that the KGU and the KLGU are properly joined to the suit as the bodies with the oversight role over the game of golf in the country and as parties against whom the petitioners have laid one claim or other regarding their suspension and expulsion.

Jurisdiction

58. The jurisdiction of this Court to determine the matters in dispute is challenged by the respondents on two fronts:

- a. That golf clubs are private entities governed by internal rules and the Court therefore ought not intervene;
- b. That there exists other alternative mechanisms to deal with the petitioners' grievances which have not been exhausted.

59. In the case of **Samuel Kamau Macharia v. Kenya Commercial Bank and Two others**, Civ. Appl. No. 2 of 2011, the Supreme Court of Kenya had the following to say with regard to jurisdiction:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Const. Appl. No. 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament

confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law.”

60. What is this Honourable Court’s jurisdiction under the Constitution? **Article 165(3)** grants jurisdiction to this Court in the following terms:-

“(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

61. **Article 23** of the Constitution also grants this Court authority to uphold and enforce the Bill of Rights in the following terms:

“23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

53. From the above constitutional provisions, it cannot be in dispute that this Court has jurisdiction, in the wider sense, to superintend over the matter at hand in as far as a breach of the Bill of Rights is alleged. What appears to be in contention is whether the Court has jurisdiction in the narrower sense, that is, power to enter into an inquiry into the dispute at hand, the question being whether affairs of private entities such as private members’ clubs ought to be brought under the purview of our Courts, and to this extent, whether constitutional provisions can and ought to be infused into management and affairs of such private entities.

54. The respondents, particularly the 1st respondent and excepting the Attorney General, have

contended that this Court lacks jurisdiction to entertain the petition; that the Club's rules are private affairs governed by private rules which this Honourable Court ought to steer away from. The petitioners and the Attorney General on their part contest this claim, their position being that the issues before the Court are amenable to this Court's jurisdiction.

55. **Article 2(1)** of the **Constitution** provides that '***This Constitution is the Supreme Law of the Republic and binds all persons and all state organs at both levels of the Government.***' Further, **Article 20(1)** states that, "***the Bill of Rights applies to all law and binds all state organs and all persons***". The definition of a state organ is found at **Article 260** which states that a State Organ is; "***a commission, office, agency or other body established under this Constitution***". Under the same provisions, the word "**person**" is defined to include "***a company, association or other body of persons whether incorporated or unincorporated***". Finally, **Article 21(1)** spells out the duty of all persons to protect the Bill of Rights in the following terms:

"It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights."

56. As a creature of the Constitution, the Court has a duty, like other State organs, to protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. In doing so, the Court must be guided by the principles set out in **Article 159** which include, among other things, protecting and promoting the purpose and principles of the Constitution. The purpose includes those values recognised by the preamble to the Constitution as the aspirations of all Kenyans for "***a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.***"

57. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies and must be protected and promoted for the purpose enunciated under **Article 19(2)** which is "***to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.***"

58. In line with **Article 20(4)**, the Courts must also seek to promote, as the Constitution demands, the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and the spirit, purport and objects of the Bill of Rights.

59. **Article 259(1)** provides for the manner in which the Constitution should be construed:

"259. (1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance."

60. Finally, it should also be borne in mind that the Court must be guided by the national values and principles of governance enunciated under **Article 10** which include "***human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.***"

61. **Article 22(1)** gives every person a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. **Article 258** further gives every person the right to institute court proceedings claiming that the Constitution has been contravened, or is threatened with contravention. The Court is enjoined by

the Constitution under **Article 20(3)**, in giving effect to the rights enshrined in the Bill of Rights, to develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Further, **Article 20(2)** provides that every person shall 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.

62. When confronted with a similar issue as to whether only public entities could be said to be in violation of fundamental rights, this Court recently in the case of **Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others, Petition No. 65 of 2010** [2013] eKLR observed as follows at para. 55;

“Looking at the provisions of Articles 2(1), 19(3) and 20(1), I am certain that the Bill of Rights can be enforced as against a private citizen, a public or a government entity such as the 1st and 2nd Respondents. I say so deliberately and with firmness because previous decisions of this Court on the subject have been completely misunderstood and misread by more persons than the misguided journalist masquerading as a scholar of Constitutional interpretation. The Bill of Rights is therefore not necessarily limited to a State Organ as argued by the 1st and 2nd Respondents.”

63. Similarly, in the case of **Isaac Ngugi v Nairobi Hospital & 3 Others, Nairobi Petition No. 407 of 2012** [2013] eKLR, the Court had this to say:

*“[19]. Counsel for the respondent argued that the case does not raise constitutional issues and should be determined as a contractual matter through the usual procedure for determining such matters. [20] The petitioner on the hand argued that he is on sound footing as the case is about breaches of the Bill of Rights and as such he is entitled to move the court under **Article 22** which provides that any party whose fundamental rights and freedoms are threatened or violated may move the court for appropriate relief. [21] The approach adopted in the **Kenya Bus Case (supra)** cannot survive the Constitution. The supremacy clause of our Constitution recognises that the Constitution is the supreme law and binds all persons and all State organs at both levels of government. **Article 3(1)** states that every person has an obligation to respect, uphold and defend the Constitution while **Article 19(1)** provides that, “**The Bill of Rights applies to all law and binds all State organs and all persons.**” The term ‘person’ includes a company, association or other body of persons whether incorporated or not such as the hospital, in accordance with **Article 260**. (See also **Sonia Kwamboka Rasugu v Sandalwood Hotel and Resort Limited and Others Nairobi Petition No. 156 of 2011** [2013] eKLR at Para. 30).*

64. The learned Judge therefore concluded in the above case as follows:

“[25] I take the positions that from the history of the country and the events leading up to the promulgation of the Constitution leave no doubt that it was intended to be a transformative document. I would be hesitant to adopt a hard and fast position that would prevent the principles and values of the Constitution being infused into the lives of ordinary Kenyans through application of the Bill of Rights to private relationships where necessary.”

65. In the case of **Richard Nduati Kariuki v Leonard Nduati Kariuki and Another** [2006] Misc App. No. 7 of 2006 [2006] eKLR Nyamu J., cites a quote by J. Balkan, **The Corporation: The Pathological Pursuit of Profit and Power** (New York, Free Press, 2004) as follows:

“The diffusion of political authority in the context of the global economy has led to concerns about the ability of constitutionalism to operate as a check on political power if it speaks only to the state. Moreover, there is growing awareness-perhaps fuelled by recent examples of corporate corruption and wrong doing-that private power as much as public power has the capacity to oppress.” [Emphasis ours]

66. The South African Constitutional Court in **Motala & Another v University of Natal (1995) 3 BCLR 374** remarked that;

“It goes without saying that many of the entrenched rights are, by their very nature, exclusively 'vertical' in their operation. But many of them are, in my view, not. For the purpose of furnishing these reasons I need only say that I consider that the rights entrenched in sections 8(1), 8(2) and 32, which are the only entrenched rights in issue before me, are enforceable not only against the state or its organs as defined, but also against individuals, natural or juristic, who may be disposed to threaten them or interfere with the exercise of them.”

67. It would be fair to observe that many a person's day to day activities and relations are largely transacted in the private spheres, be it commercial or social. As the Court (Gacheche J) remarked in **Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi (Supra)**,

“The rigid position that the human rights applies(sic) vertically is being overtaken by the emerging trends in the development of human rights law and litigation. We can no longer afford to bury our heads in the sand, for we must appreciate the reality, which is that private individuals and bodies such as clubs and companies wield great power over the individual citizenry, who should as of necessity be protected from such non-State bodies who may for instance discriminate unfairly, or cause other Constitutional breaches... I need not point out that this is the beginning of a new dawn for Kenya; one that should be embraced enthusiastically by all and it will not matter who the duty holder is, rather, what matters is who should enjoy the rights as enshrined in the Constitution. It must be clear by now that I find that the fundamental rights are applicable both vertically and horizontally, save that horizontal application would not apply as a rule but it would be an exception, which would obviously demand that the court do treat on a cases by case basis by examining the circumstances of each case before it is legitimized.”

68. It must be obvious by now that not only do we find that we have jurisdiction to entertain the dispute before us, but that we consider the fact that the 1st respondent is a private members club to be of limited relevance to the issues at hand. The respondents cannot be allowed to wave a private entity card to bar this Court, when properly moved, from assuming jurisdiction where there are allegations of breach of fundamental rights and freedoms by its members or any other person. It cannot be safe, in a progressive democratic society, to arrive at a finding that allows private entities to hide behind the cloak of 'privacy' to escape constitutional accountability. We think that it would be to accord a narrow, constricted interpretation to our Supreme Law, contrary to the canons of constitutional interpretation that have for ages infused our judicial system and which now find constitutional sanction under **Article 259** to accede to such a proposition.

69. To accede to the respondents' proposition that private entities are insulated from the constitutional duty to respect and uphold fundamental rights, to hold that private entities are completely shrouded by their private cloak from this Court's scrutiny is we believe, to reverse the intention of the framers of the Constitution. It is to strip individual Kenyans of the very constitutional protection that the Constitution of Kenya 2010 meant to jealously guard and leave them exposed and vulnerable in private dealings. This would effectively render the constitutional protections of little or no practical value to the very persons designed to enjoy its protections and would, in our view, amount to abdication of this Court's primary responsibility conferred upon it by the people

of Kenya.

70. In the *Satrose Ayuma case (supra)* the Court went on to conclusively state as follows;

58. I am also aware that under the provisions of Article 20(3) as read with Article 259 of the Constitution, this Court is obligated to develop the law to the extent that it gives effect to a right or fundamental freedom; and it must adopt an interpretation that favours the enforcement of a right or fundamental freedom, in order to promote the spirit and objects of the Bill of Rights. Clearly, to interpret the Constitution in a manner to even suggest that the 1st and 2nd Respondents do not have an obligation to promote and protect the Petitioners' rights and freedoms does not only fly right out of the window, but would also defeat the very essence and spirit of Article 20(3). It is thus clear to my mind that it would not have been the intention of the drafters of the Constitution and the Kenyan people who overwhelmingly passed the Constitution that the Bill of Rights would only bind State Organs. A purposive interpretation as can be seen above ... would imply that the Bill of Rights binds all State Organs and all persons, whether they are public bodies or juristic persons.

59. It also seems clear to me therefore that from a wide definition of the term "person" as contained in Article 260, the intention of the framers of the Constitution was to have both a vertical and a horizontal application of the Bill of Rights. I therefore find that the Petitioners are entitled to file a claim under Article 22 before this Court alleging a violation of the Petitioners rights by any of the Respondents, and the Court can properly grant an appropriate relief as envisaged by Article 23 of the Constitution. I hope this settles the issue once and for all in as far as the views of this Court are concerned. [Emphasis added]

71. We believe the sentiments expressed by the Court in *Satrose Ayuma* cited above, which we fully concur with, represent the correct position of the law on the issue.

72. A second level of inquiry with regard to the application of the Bill of Rights is to ask to what extent and in what circumstances such private affairs can be subjected to the Court process. In this regard, we must hasten to place a caveat that horizontal application of fundamental rights and freedoms is not an open cheque and whether and to what extent the Court will exercise jurisdiction will be informed by the circumstances of each individual case. For instance, if there are alternative civil or other remedies available to a party, then courts may decline to exercise jurisdiction. In the case of *Isaac Ngugi v Nairobi Hospital & 3 Others (supra)* the court held as follows regarding the application of the Constitution to private relationships;

[22] The issue whether the Bill of Rights applies horizontally or vertically is beyond peradventure. (See Satrose Ayuma and 11 Others v Registered Trustees of Kenya Railway Staff Retirement Benefits Scheme Nairobi Petition No. 65 of 2010 [2013]eKLR). The real issue is whether and to what extent the Bill of Rights is to apply to private relationships. The question as to whether it is to be applied horizontally or just vertically against the State depends on the nature of the right and fundamental freedom and the circumstances of the case....

[23] For instance, the court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in question. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the constitutional guarantee even though there exists private law regulating a matter within the scope of application of the constitutional right or fundamental freedoms. In such cases the court may proceed to apply the provisions of the Constitution directly. [Emphasis added]

73. This leads us to an examination of the second reason advanced by the respondents on why this Court has no jurisdiction to entertain the matter before us: that there are other avenues for the resolution of the dispute.

Alternative Dispute Resolution

74. The respondents claim that the Club has, within its structures, mechanisms of dispute resolution and that the petitioners ought to have pursued those rather than invoking this Court's jurisdiction; and that, the petitioners' grievances could effectively be resolved within the realm of the Club's constitution and rules. It was also submitted on behalf of the 5th and 6th respondents that the petitioners ought to have followed up their claims within the framework of the National Gender and Equality Commission established pursuant to **Article 59** of the Constitution; and that under **section 30** of the **National Gender and Equality Commission Act, 2011**, the Commission could not assume jurisdiction over matters pending before any court or tribunal. They therefore maintain that it is premature for this Court to step in while there is no evidence that such claim has been withdrawn or conclusively dealt with.

75. It is indeed true that the Constitution expressly recognizes the place and importance of alternative means of dispute resolution. One of the principles guiding the exercise of judicial authority under **Article 159(2)(c)** is that; ***“alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).”***

76. The question is whether, in the present case, there is an alternative process provided for the resolution of the dispute between the parties.

77. **Article 59** of the Constitution provides for the establishment of the Kenya National Human Rights and Equality Commission and vests upon it various functions including, ***“to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated.”***

78. Pursuant to **Article 59(4)**, Parliament enacted the National Gender and Equality Commission Act, which at **Section 3** establishes the National Gender and Equality Commission as one of the commissions emerging from the restructuring of the Kenya National Human Rights and Equality Commission established by **Article 59** of the Constitution.

79. **Section 8** of the **National Gender and Equality Commission Act, 2011** vests in the Commission various functions including the power to ***“investigate on its own initiative or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination and make recommendations for the improvement of the functioning of the institutions concerned.”*** The Commission is vested with the power to, among other things, ***“adjudicate on matters relating to equality and freedom from discrimination”*** under **Section 26(c)** of the National Gender and Equality Commission Act, 2011.

80. **Section 29** mandates the Commission on its own initiative or upon filing of a complaint to investigate any matter relating to equality and freedom from discrimination in relation to any person, a public office or a private institution or any other body or agency of the State. The section obligates the Commission to endeavour to resolve any matter brought before it by conciliation, mediation or negotiation. Subsection (3) of the section goes on to state that, ***“If the matter referred to under subsection (2) cannot be resolved by conciliation, mediation or negotiation and the Commission determines that there is discrimination carried out unjustly or unreasonably, the Commission shall make such recommendations as it deems fit.”***

81.

82. At **Section 30** of the Act, the jurisdiction of the Commission is limited in the following terms:

“The Commission shall not investigate-

- a. ***a matter pending before any court or judicial tribunal***
- b. ***a criminal offence***
- c. ***a matter relating to relations between the State and any foreign state or international organization recognized as such under any international law***
- d. ***anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to; or***
- e. ***any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.”***

83. In view of the foregoing, we find and hold that the lodging of the complaint before the Commission does not automatically oust this Court’s jurisdiction. Three reasons have informed this conclusion. First, it is clear that the matter before the Court is one in respect of which other modes of legal redress are not available. Second, with regard to the remedies available, it must be remembered that the Commission is not a court of law, hence is limited in both the manner of conducting its inquiry but also in the remedies that it can grant. In the course of its mandate, the Commission cannot, for instance, grant the orders that this Court is mandated to under Article 23. **Section 30** makes it clear that the Commission cannot exercise jurisdiction on matters that are pending before a court or tribunal. Thirdly, from the material before us, there is no evidence of any or any substantive progress having been made with regard to the petitioners’ complaint by the Commission. Our finding therefore is that the nature of the petitioners’ grievances may not be effectually dealt with by the Commission.

84. The jurisdiction of the Court is also challenged on the basis that there are in existence alternative dispute resolution mechanisms within the Club itself. The respondents aver that the petitioners ought to have invoked the Club’s internal mode of dispute resolution to resolve their grievances. It was submitted that they ought to have raised their grievances at the General Meeting or sponsored a Special resolution of a General Meeting of the company to address their cause. We were referred to Articles 34 and 58 of the Club’s Constitution. Article 34 is titled ‘**Expulsion of Members**’ and provides in part as follows;

“...In the event of the Directors passing any resolution under this Article, which is in any way detrimental to the Member concerned, he may appeal to a General Meeting (notice of appeal to be given to the Honorary Secretary within two(2) calendar months); and if such appeal is made the resolution of the Members present and voting at such General Meeting, be annulled as from the date of such General Meeting (but without prejudice to any action hereunder), meanwhile the opinion of the Directors as to whether or not any particular conduct is or might be injurious to the character or interests of the Company shall be subject to review by such General Meeting on appeal being made as aforesaid, but shall otherwise be final and binding on all the parties concerned.”

85. The proviso to Article 58 which deals with the power to make By-laws states that

“The Directors shall adopt such means as they deem sufficient to bring to the notice of Members of the Company all such By-Laws, amendments and repeals and all such By-Laws, so long as they shall be in force, shall be binding upon all Members of the Company provided nevertheless that no Bye-Law shall be inconsistent with or shall affect or repeal anything contained in the Memorandum or Articles of Association of the Company and that any By-Law may be set aside by a special resolution of a General Meeting of the company.”

86. As to whether the internal mode of dispute resolution provided by the Club is effective can only be determined from the unique facts of the case. From the material before us, we are unable to find

that such internal mechanism was adequate or even feasible for the petitioners in this case. It is an uncontested fact that the impugned by-law was made three days to the General Meeting and communication of the same was selectively done through email. In the circumstances, it would be to stretch credulity to suppose that the petitioners would have had room to raise objections. Further, during the General Meeting, the objections could not sail through reportedly due to the skewed manner in which the meeting was conducted.

87. In addition, mediation efforts by various bodies, including the Kenya Golf Union and the Commissioner of Sports on diverse dates failed to reach an amicable settlement. It is unrealistic in the circumstances to allege that there were available alternative modes of dispute settlement when it is clear that they were inadequate to address the petitioners' grievances. Furthermore, no evidence was tendered before the Court to show further steps taken in the adjudication of the petitioners' complaint within that forum. Our finding, therefore, is that we have jurisdiction to adjudicate over the issues presented in the petition before us.

Equality and Right to Non-discrimination

88. **Article 27** enshrines the right to equality and freedom from discrimination in the following terms;

“(1) Every person is equal before the Law and has the right to equal protection and equal benefit of the Law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in Clause (4)...

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under Clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

8. In addition to the measures contemplated in Clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”

89. The Supreme Court in its majority opinion in **Advisory Opinion No.2 of 2012** had this to say on gender representation at Para. 47:

“This Court is fully cognisant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power

relations between men and women in Kenyan society.... Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in Articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of “national values and principles of governance” [Article 10].”

90. Although the Court in this case spoke to discrimination in the public domain, especially with regard to elective positions, we take the view that the view of the Supreme Court represents the correct approach in other spheres, including the private domain, and is therefore apposite in the matter before us.

91. The Court in **Peter K. Waweru v Republic [2006]eKLR** defined discrimination as follows:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by...sex whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”

92. **Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW)** defines discrimination against women in the following terms:

"discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

93. In **Willis v The United Kingdom, No. 36042/97, ECHR 2002 – IV** and **Okpiz v Germany, No. 59140/00, 25th October 2005**, the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in relevantly similar situations.

94. The principle of equality and non-discrimination has its underpinnings in various International conventions which now form part of our laws by dint of **Article 2(5) and (2(6))**. The **United Nations Universal Declaration on Human Rights (UDHR)** provides at **Article 1** that *“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”* **Article 7** of the UDHR further states that, *“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”*

95. The preamble to the **Convention on Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW)** captures the effect of discriminatory practices against women in the following terms;

“[D]iscrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.”

96. Under **Article 2** of CEDAW, States parties bind themselves to condemn discrimination against women in all its forms, and to pursue by all appropriate means a policy of eliminating discrimination against women. To this end, they bind themselves to among other things; ***‘take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise’*** and to ***‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.’***

97. In **CEDAW General Recommendations Nos. 19 and 20**, adopted at the Eleventh Session, 1992 (contained in Document A/47/38) at No. 9;

“It is emphasized, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2 (e), 2 (f) and 5). For example, under article 2 (e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”

98. **Article 2** of the **African Charter on Human and Peoples’ Rights** stipulates that every individual is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, or sex. **Article 28** goes further to state that; ***“Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.”***

99. It is thus evident that both under the Constitution of Kenya and international and regional treaties to which Kenya is a party, the principle of equality of the sexes is recognized, and discrimination on any basis prohibited.

100. In this case, the respondents contend that it was within the mandate of the Board of the Club to make, alter and repeal all such by-laws as they may deem necessary, expedient or convenient for the proper conduct and management of the company. The power to make and amend by-laws by the Club’s Board of Directors is not in dispute. Article 58 of the Club’s Articles empowers the Directors to make, alter and repeal all such by laws. The relevant part of the Article reads as follows:

“58. The Directors of the Company shall, subject to the approval by the Company in General Meeting have power from time to time to make, alter and repeal all such By-Laws as they may deem necessary or expedient or convenient for the proper conduct and management of the Company...”

101. What is in contention is the nature and import of the impugned amendment to by-law No. 20. The by law, which deals with ‘THE GOLF COMMITTEES’ reads as follows;

“There shall be a Golf Committee comprising of the Golf Captain, the Golf Vice-Captain and not more than nine Committee Members of the Golf Section all of whom must be Full Members and must have paid the Games Supplement for the year. The Committee Members shall be elected annually at a General Meeting of Full Members interested in golf which meeting shall be held before the end of each calendar year. The notice of the meeting shall be published on the club Notice Board for twenty-one days prior to the meeting.

The immediate past Captain shall automatically qualify to sit in the Golf Committee as a member. The remaining eight seats will be filled by way of election during the general meeting of full members interested in golf.

There shall be Ladies Golf Committee comprising of the Lady Golf Captain, the Lady Golf vice-Captain and not more than eight Committee Members elected by full Lady Members interested in golf at an annual meeting to be held before the end of each calendar year.

Members of the Golf Committee and the Ladies Golf Committee should have held an official handicap for at least three years.

The Board of Directors shall appoint two persons to sit on the Golf Committee. One of the Appointees shall be a Director and the other shall be appointed from the general membership.

There shall be a Course Architectural Committee consisting of the Golf Captain, the Golf Vice-Captain and four other members one of who shall be Directors. The other three Members shall be elected at a general meeting of full members Committee and will serve for a three year term. The Captain and the Vice Captain will by virtue of their positions be members of the Court architectural.

The Golf Captain with the advice of the Course Architectural Committee shall be responsible for planning any alterations of the architecture of the golf Course. Any such alterations to the course must have the approval of the Course Architectural Committee and of the Golf Committee and the Board of Directors.”

102. The petitioners contend that since the making of this by-law, both male and female golfers have actively participated in the election of the Golf Captain, the Golf Vice-Captain and other members of the Committee.

103. What is clear from the above is that the Club contemplates three types of Committees, the Golf Committee, the Ladies golf Committee and the Course Architectural Committee. All seemed well until the Board’s resolution that amended the stated by-law by adding a clause that states that, **“The golf committee being a male only affair, only full male members with valid handicaps, and who are fully paid up, will be allowed to participate in the meeting and the lady golfers will attend the meeting as guests.”**

104. It cannot be in dispute that the wording of this amendment is patently discriminatory on the ground of gender by its reference to the committee being a **‘male only affair’** and by purporting to confine participation to the male gender. It also has a discriminatory effect as it serves to exclude the participation of female handicaps in the Club’s general meeting. This is clearly antithetical to the provisions of clauses (3) and (5) of **Article 27** which stipulate that follows:

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in Clause (4).

105. We therefore hold that the said by-law is discriminatory in nature and offends **Article 27** of the Constitution.

106. We also observe in closing on this issue that such an amendment is manifestly inconsistent with not only the wording of the by-law No. 20 of the Club as it stood prior to the amendment, but also to the Club’s own constitution. **Article 28(b)** of the Club’s Articles of Association states that;

“All joint or single full, country and social members shall be entitled to nominate candidates as directors or officers of the company and shall be entitled to vote at any general meeting of the company.”

107. **Article 36** of the Club's Articles also provides for voting by members and states that,

“Every Joint or Single Full Member should have one vote and no more on any issue put to the Company. The Directors may in their discretion disqualify from voting any Member in arrears with any payment due to the Company.” [Emphasis ours]

108. Further, **Article 58** stipulates that

“the Directors shall adopt such means as they deem fit to bring to the notice of the Members of the company all such by-laws, amendments and repeals and all such By-laws, so long as they shall be in force, shall be binding upon all members of the Company provided nevertheless that no bye-law shall be inconsistent with or shall affect or repeal anything contained in the Memorandum or Articles of Association of the Company and that any By-law may be set aside by a special resolution of a General meeting of the Company.” (Emphasis added)

109. Going by the above provisions of the Club's Articles of Association, it is clear to us that the impugned by-law goes against the Club's own Articles of Association, quite apart from being contrary to the Supreme Law of the land. Article 36 only gives discretion to the Board to disqualify a member from voting if ***such Member is in arrears with any payment due to the Company***. It is not disputed that the petitioners were fully paid up members and it cannot be said that they fell under that bracket. Thus, the board's passing of the discriminatory by-law is also *ultra vires* its own constitution.

Whether Discrimination is Permissible

110. The respondents seek to justify the impugned by-law on the basis that some other clubs have similar provisions in their constitution and club rules. In the Further Replying Affidavit dated 16th August 2013 sworn by Mr. Yassin Awale, the Chairman of the Club, the respondents have referred this Court to the constitutions of various other clubs which, according to the respondents, discriminate along similar lines.

111. The respondents were emphatic that this Court ought to take into account that private clubs, by their very nature, discriminate and therefore the members ought to play by the rules. To support their contention, the respondents referred to an Article by **Jennifer Jolly-Ryan** titled, ***“Teed off about Private Club Discrimination on the Tax Payer's Dime: Tax Exemptions and Other Government Privileges to Discriminatory Private Clubs”*** published in **William and Mary Journal of Women and the Law [Vol: 13:235]** in which the author notes as follows at page 236:

“A private club, by its very nature, discriminates. It is selective about who can and cannot be a member. Some private clubs may admit only members who meet certain income criteria. Some private clubs may admit only members with a certain pedigree. Other private clubs may admit only members from certain geographic areas. Still others outwardly discriminate on the basis of race, gender, and religion.” [footnote omitted]

112. The author goes on to note at page 243, ***“While the government has a compelling interest in eradicating discrimination, the courts must balance individual rights of association with discrimination laws, beginning with an analysis of the strength of the associational right implicated.”***

113. Our analysis of the situation before us, however, leads us to the conclusion that the authorities relied upon by the respondents to support their contentions with regard to discrimination in private clubs are distinguishable and inapplicable to the present scenario. While we agree that private members clubs are discriminatory by their very nature in terms of whom they may or may not admit, and that therefore courts ought not to micromanage their internal operations, that does not

absolve these entities from the constitutional burden of adherence to constitutional values and principles. Private clubs are bound by the Constitution in the same way as any other legal person.

114. While we accept the respondents' contention that the Club membership is expected to play by the rules of the game, the rules must meet constitutional muster—they must be fair and lawful in the first place and present an even playing ground.

115. We must emphasise that this is not a case where the petitioners allege that there was discrimination with regard to **membership** to the Club. Nor does the case raise the issue of discrimination in the **membership criteria** of private clubs. The situation before us is one in which an amendment to the Club's by-law was introduced long after the petitioners had become members whose effect was to disenfranchise female members from participation in certain Club activities hitherto open to them. We see no justification for such discrimination and find that the respondents have not given us valid grounds upon which we can deem such discrimination as 'permissible.' The Club's constitution did not provide for such discrimination and the move by the directors to introduce such distinction was not only contrary to the Supreme Law of the land, but was also *ultra vires* the Club's own constitution.

Freedom of Expression

116. The petitioners have alleged violation of their right to freedom of expression. They allege that the effect of the impugned amendment was to disallow participation by female members in General Meetings. Freedom of expression is one of the fundamental rights and freedoms protected by the Bill of Rights. **Article 33** provides for the right by stating that **“(1) Every person has the right to freedom of expression, which includes— (a) freedom to seek, receive or impart information or ideas.”**

117. The principles of freedom of expression has been firmly accepted as a necessary feature of modern democracy. **Article 19(2)** of the **International Covenant on Civil and Political Rights** (“ICCPR”) guarantees the right to freedom of expression as follows:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.”

118. The Supreme Court of Canada in the case of ***Edmonton Journal v Alberta (Attorney General)***, (1989) 2 SCR 1326 observed that

“It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized..... It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.”

119. Within our jurisdiction, the Court in **Hon. Chirau Ali Mwakwere v Robert Mabera & 4 Others, Nairobi Petition No. 6 of 2012** cited with approval the decision of the Supreme Court of Zimbabwe in **Mark Gova Chavunduka and Another v The Minister of Home Affairs Supreme Court Civil Appeal No. 156 of 1999** where it was noted that freedom of expression serves special objectives in a democracy. The Court captured the importance of the freedom as follows:

“Furthermore, what has been emphasised is that freedom of expression has four broad special objectives to serve: (i) it helps an individual attain self-fulfilment; (ii) it

assists in the discovery of truth and in promoting political and social participation; (iii) it strengthens the capacity of an individual to participate in decision making; and it provides a mechanism by which it would be possible to establish a reasonable balance between stability and change”

120. The respondents urged that even if the petitioners had participated and voted at the Club’s General Meeting, their candidate whom they claimed was ‘disfavoured’ by the Board and whom they supported would still have lost. This argument cannot hold water and on this we find apposite the words of John Stuart Mill in ‘*On Liberty and considerations on Representative Government* (Oxford 1946), at p. 14 cited in *RWDSU v Dolphin Delivery Ltd* [1986] 2 S.C.R. at page 583:

“If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.”

121. Restricting participation to the male members of the Club, with the female members being confined to mere ‘guests’ is not only discriminatory but also infringes on the freedom of expression protected under **Article 33**, and we so find.

Disciplinary Process

122. The petitioners also complain about the manner in which the disciplinary process against them was carried out. They submit that they were not accorded due process by the respondents in the disciplinary process culminating in their expulsion. It is their case that their rights to natural justice and fair hearing were infringed upon by the respondents, and that the Club’s Disciplinary Committee did not afford them any chance to either appear before it to defend themselves or to file any substantive response to the allegations against them.

123. In **Patel and Others vs Dhanji & others** [1975] EACA 301, it was observed that:

“...The courts will entertain suits by members claiming to have been irregularly or improperly expelled, and will interfere if the rules providing for expulsion have not been strictly observed, or if the principles of natural justice have been violated. The foundation for this jurisdiction is the right of property vested in the member, of which he is unjustly deprived by the unlawful expulsion, See Halsbury’s Laws of England, Vol. 6. Edn; para. 238...”

124. From the chronology of events in this matter, the genesis of the disciplinary process against the petitioners is clear: it arose from the unconstitutional by-law which led to protestations by the petitioners and their alleged ‘misconduct’ which triggered their suspension and expulsion. Having reached our finding above on the unconstitutionality of the by-law, we find it superfluous to delve into this issue further. As the by-law is rendered void, the resultant processes sprouting from the unconstitutional act, including the disciplinary process, were also unconstitutional and void, and the said process and the resultant expulsion is hereby quashed.

Conclusion and Disposition

125. Our findings on the three broad substantive issues we earlier set out for determination, can be summed up as follows:

a. ***Whether the court has jurisdiction to handle the dispute***

0. Our response to this issue is in the affirmative. The Court has the constitutional mandate to hear and determine disputes relating to allegations of violations of fundamental rights and freedoms under **Article 165** as read with **Article 23**.

0. **Article 22** entitles every person to move this Court claiming that a fundamental right has been

- infringed or is threatened with infringement.
0. The Bill of Rights binds all state organs and all persons, corporate or incorporate, by dint of **Article 2(1)**. Consequently, the 1st respondent, a corporate body, is bound to respect and observe the fundamental rights of its members and of all persons.
 0. The constitutional protections apply both vertically and horizontally. As to what extent they apply horizontally depends on the context and unique circumstances of individual cases including availability of alternative remedies.
 0. The alternative dispute resolution mechanisms provided under the Club's internal mechanisms were intended to address the petitioners' grievances. Attempts at mediation yielded no fruits. Avenues of alternative dispute resolution were pursued but were ineffectual.
 0. Consequently, the Court has jurisdiction and can intervene to exercise jurisdiction and inquire into the issues the subject of the present matter.

b. Whether the impugned By-law is Unconstitutional

0. Our response to this issue is also in the affirmative. The amendment to the by-law passed by the Board resolution of 18th December 2012 was not only discriminatory contrary to **Article 27** but is also in violation of the right to freedom of expression protected under Article 33 of the Constitution.
0. Whereas the membership of private clubs is generally, by its nature, discriminatory, restricting membership to particular groups, the discrimination that was perpetrated by the respondents through the unconstitutional by-law is not one that is permissible in a just and democratic society. The amendment to the by-law was also contrary to and in violation of the Club's own constitution.

c. On the Disciplinary Process

The chain of events leading up to suspension and expulsion of the petitioners' handicaps was as a result of contestation regarding the unconstitutional by-law. That being the case, the disciplinary process is consequently null and void and is so declared. The decision to expel the petitioners which emanated from an unlawful and unconstitutional action cannot be allowed to stand and is hereby quashed.

Reliefs

126. The next issue regards the appropriate reliefs to grant the petitioners in light of our findings set out above. **Article 23** mandates this Court to grant appropriate relief in redressing violations under Article 22. These reliefs include a declaration of rights, injunctions, conservatory orders, or an order of judicial review. In order for the ends of justice to be met, we consider the appropriate relief in the unique circumstances of this case is to quash the offending bylaw and restore the parties to the situation they were in prior to the passing of the offending by-law. Consequently, we now make the following orders;

- i. ***A declaration is hereby issued that the resolution passed by the Board members and subsequently approved at the General Meeting of the Club excluding the participation of female members in the Club General Meetings is contrary to Articles 27 and 33 of the Constitution, is therefore unconstitutional null and void and is hereby quashed.***
- ii. ***An order of Mandamus is hereby issued directed to the 1st respondent to reinstate the petitioners namely Ms Rose Mambo, and Ms Caroline Wangari Ngugi to full membership of the Club with all attendant benefits and privileges.***
- iii. ***The Kenya Ladies Golf Union is directed to ensure that orders (i) and (ii) above are implemented in so far as the same affect the membership or handicaps of Ms. Rose Mambo and Ms. Caroline Wangari Ngugi.***

Costs

127. Under **Rule 26** of the **Constitution of Kenya (Protection of Rights and Fundamental**

Freedoms) Practice and Procedure Rules, 2013, the award of costs is at the discretion of the Court (See also **John Harun Mwau and Other v Attorney General Nairobi Petition No. 65 of 2010 (Unreported) [2012] eKLR**). In the circumstances of this case, we take into account the fact that the 2nd - 9th respondents were acting in their official capacities as directors of the 1st respondent. They nevertheless individually and collectively as a Board flouted the 1st respondent's very constitution by passing the unconstitutional by-law despite legal opinions and other interventions advising otherwise. Indeed, this matter would not have taken the turn that it did had it not been for their recalcitrance in insisting on flouting not only the Club's constitution but also going against express provisions in the Constitutions of Kenya 2010. In the circumstances, we take the view that the 2nd to 9th respondents should shoulder the petitioners' costs without recourse to the Club's funds.

128. All the other parties shall each bear their own costs.

129. It is so ordered.

Dated and Signed at Nairobi this 7th day of March 2014

ISAAC LENAOLA MUMBI NGUGI D.S MAJANJA

JUDGE JUDGE JUDGE

Signed, Dated and delivered at Nairobi this 12th day of March 2014

MUMBI NGUGI

JUDGE