



IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 239 OF 2013

STEPHEN MBUGUA MWAGIRU.....PLAINTIFF

-VERSUS-

MUTHAIGA COUNTRY CLUB1ST DEFENDANT

MUTHAIGA COUNTRY CLUB HOLDINGS LTD.....2ND DEFENDANT

COLLIN CHURCH.....3RD DEFENDANT

GRAHAM NICHOLLS.....4TH DEFENDANT

RULING

1. The application before this Court is a Notice of Motion dated 26th June 2013 and filed on 26th June 2013. The same is brought under Order 40 Rules 1 to 10. Order 5 Rules 1 to 3 of the Civil Procedure Rules 2010 and section 1A, 1B, 1C and 3A of the Civil Procedure Act.
2. The applicant seeks the following orders;
 - i. That the honorable Court be pleased to restrain the defendants/respondents whether by themselves, their servants and agents or otherwise howsoever from suspending or expelling from or in any way whatsoever interfering with the plaintiff and this family's enjoyment of the Muthaiga Country Club facilities pending the hearing and determination of this suit.
 - ii. That costs of this application be provided for.
3. The motion was based on the grounds on the face of the application and the accompanying affidavit of Stephen Mbugua Mwagiru dated 26th June 2013. He depones; that he is a member of Muthaiga Country club following admission to the same by the 2nd defendant in 2004 and paying the entrance fee of Kshs.90,825/-; that the relationship between the 1st and 2nd defendant is contractual and terms are embodied by the memoranda and articles of association; that the same entitles the him and his family members to enjoy the restaurant and amenities of the Muthaiga country Golf Club for as long as the membership subsists; that the 1st and 2nd defendants have breached the implied term of contract embodied in articles of association requiring that the 1st defendant adheres to the rules of natural justice when disciplining him.; that on 22nd November, 2012 the defendant purported to suspend the plaintiff purportedly from a decision issued by the 1st defendant on 31st October, 2012; that following the purported suspension he and members of his family have been denied use of the defendant's facilities; that the purported suspension is ultra vires the defendant's Memorandum and Articles of association and is null and void; that unless the

injunction sought is issued he and members of his family stand to suffer irreparable injury; that he has 3 children who are registered junior members of the said Muthaiga Country Club; that the membership category he took entitles him to a full family membership; that the Club is a private members club with over 6,000 members; that the club comprises of two members Muthaiga Country Club (Holdings) Ltd. Limited by guarantee and Muthaiga Country Club limited by shares.

4. He averred that article 22 of the memorandum and articles of association which governs disciplining of members indicates it would adhere to rules of natural justice. The applicant referred to the case of *D'souza v Tanga Town County Council [1961] EA* and the court of appeal at Singapore decision in *Kay Swee Pin v Singapore Island county club [2008]2 SLR 802* which held that a body disciplining a person needs to act fairly, should not be biased or prejudiced in any way, to apply the principle that no man should be condemned unheard, be given a notice that fully sets out the alleged wrongs, be allowed to confront his accusers and call witnesses to refute the allegations, any prejudicial information or document received be disclosed to him and where the right of appeal is conferred the members must be heard by a body other than the twelve member committee.

It was averred that the plaintiff has been a member of good standing since he joined the club nine years back, that he and his family have enjoyed the facilities provided by the defendant until November, 2012 when he received the said letter; that since receipt of the said letter he and the members of his family have been denied the use of Muthaiga Country Club by the defendant; That on 4th November, 2012 he wrote to the defendant in response of their letter dated 22nd November, 2012; that he heard rumors he had been reported to the Club's Secretary for discipline by the committee for alleged misconduct in one of the restaurant called Pinks and denies that any such incident took place; that he followed up with the Operations manager who refused to disclose details of the same; that his endeavor to meet the Secretary were in vain and was never given the opportunity to meet the secretary or obtain the details of the said allegation; that the letter did not give any details on the said incidence at Pink's restaurant, that he has never been given any warning verbal or written from the club or any other formal setting; that the defendant reached a decision to expel him from the club without informing him of the allegation against him or giving him an opportunity to answer the allegation of misconduct; that Article 23 and 24 of the defendant's memorandum and articles of association require one to refer an appeal to the general Meeting, that on appeal the appellant should present a record of the decision with which has aggrieved him; that in December, 2012 he sought to obtain more information to enable him compile the said report but was informed by the Club chairman that the club was under no obligation to inform him of the alleged transgressions and was advised to do a letter of apology to express remorse which he did; that he waited for a response from the chairman in vain; that he met 3 members of the Committee on 8th, March and offered a blanket apology and asked to be informed his alleged transgression only to be taken through a process that confirmed the decision against him on 31st October, 2012.

The plaintiff avers that he is a victim of a well-orchestrated plan by some club members to have him expelled from the club; that he spends 95% of his time in bar and gym and no one had raised any complained about him; that the only event that transpired in October was that he wrote a letter objecting to an application by one 3 Fabian Phillipart and that is when his woes began; that his family is a shareholder of Tatu City Ltd and Mr. Fabian is an employee of Konifer Ltd.; that it is normal club practice to post potential new members so that anyone with reservations about them can inform the Committee; that in 29th May, 2012 he sent a demand letter to the 3rd defendant requesting that an independent panel be constituted to review his matter.

5. The application was opposed a replying affidavit sworn by Colin Edward Church was filed on 10th July, 2013. He deponed as follows; that he the Chairman of the said club elected on 9th December, 2010 to hold office for 3 years; that the suit is vexatious, fatally defective and seeks the same to be struck out; that prior to lawful expulsion from the said club the plaintiff was a member of Muthaiga Country Club and holds 1 preference share entitling him to invite or propose persons to join the club; that he appointed his family members; that he was expelled from the club for

conduct that the Committee held would be injurious to the character or interest of the club; that the plaintiff does not exonerate him from his gross contravention of the 1st defendant's articles of association and does not take into account the disciplinary procedure which he admitted by himself is bound to comply with and failed to adhere to said rules; that on 26th April 2012 the plaintiff visited Pink restaurant at 12.00am and ordered for food, when he was informed that the same was closed he hurled obscenities at an employee one Mr. Mwangi who lodged his complain vide his letter dated 25th April, 2012; that he urinated in the restaurant's corridor claiming that the toilets were too far; that the plaintiff became heavily intoxicated tore chits from the Christmas box and proceeded to abuse staff with obscenities, moved to the members bar and ordered that his bills be transferred there and upon being asked to verify his bills he refused and attempted to intimidate staff and hurling obscenities. It is averred further that the plaintiff's violent acts extended to others including Mr. Fabian Phillip Hart whom he hurled insults at and even broke his kitchen window; that the said incident was reported at Ruiru Police station as complaint no. OB21/18/02/2012 where upon the plaintiff was arrested and later released on a cash bail to appear in court on 23rd February, 2012 to be charged with the offence of causing malicious damage to property contrary to Section 339(1) and creating a disturbance; that it is clear that the plaintiff's character in and out of the club is injurious to the character and interests of the club; that following these events the committee met on 31st October, 2012 where it was resolved to prohibit him from using the club and invited him to resign from the clubs membership; that the plaintiff was suspended from the clubs membership under Article 25 and he was duly informed of the same; that on 4th December he sought to respond to the said letter via an email and was informed to collect a copy of the Club's Articles of association to assist him in compiling his appeal which he confirmed he received via his email dated 6th December, 2012; that even after being aware of the appeal procedure the plaintiff abandoned his appeal, abandoned his denial of what had transpired and proceeded to unequivocally admit his transgressions; that when the committee met on 8th March 2013 and notwithstanding that his appeal had been overtaken by events he was afforded audience and he indicated that he did not intend to dwell in the past and proceeded to give an equivocal apology to those who felt aggrieved by his behavior, that his claim that he was not given a chance to be heard are irrelevant and aimed to subvert the course of justice and as such the court should not allow him to approbate and reprobate as he seeks to do with this application and sought the application to be dismissed with costs.

6. There are two supplementary affidavits one sworn by Peter S. Kiggundu dated 12th August, 2013 where he deponed that on 25th April, 2012 he and the plaintiff had dinner at around 9.00pm and left at 2.00am to their respective homes; that at 1.00am while at the members bar the complainant Mr. Mwangi a patron from Pink's restaurant entered the members bar and started accosting the plaintiff and complaining why they had not left early. That he informed Mr. Mwangi that his conduct was unbecoming and indicated that he would lodge a complaint against him and he proceeded to reading room and wrote in the complaints book; that the barman on duty Mr. Alex pleaded with Mr. Mwangi to stop his unruly behavior but he refused and he called to the security guards on realization that the guards were on their way Mr. Mwangi left the premises; that Mr. Mwangi's allegations against Mr. Mwangiru were made to protect his job which was on the line because his complaint had been indicated in the comment book; that on 28th April, 2012 the Finance Manager on behalf of the former Secretary apologized for the employees misconduct and the operations manager later indicated to him that the employee had been reprimanded for his conduct towards the plaintiff; he denies that the plaintiff ever tore chits that on 8th November, 2012, Mr. Daniel Ngugi interrupted him and the plaintiff and when asked to return to the reception desk his duty station he refused to do so this prompted the plaintiff to make attempts to record the same on his phone as evidence; that again he collected the comments book from the reading room and made comment and referred again to his comment of 24/04/2012 he deponed that the two incidences are coincidences; that the defendant uses their staff members to secure their removal from the club; that he was later informed that he had misbehaved and was compelled to write an apology letter to the 4th defendant on 28th January, 2013 and also indicated what had transpired on 8th November, 2012 and later received a letter from the committee indicating that his apology had

been accepted by the Committee. The plaintiff further filed a supplementary affidavit dated 12th August, 2013 sworn by Stephen Mbugua Mwangiru which reiterates the contents of his supporting affidavit and that of Peter S. Kiggundu.

7. The applicant and respondent filed written submissions on 18th September, 2012 and 18th November, 2012 respectively. The plaintiff reiterated the contents of the supporting affidavit and the supplementary affidavits.
8. The plaintiff in his submissions reiterated the contents of the supporting and supplementary affidavits and submitted that joining a club is similar to entering into a contract. That his acceptance to the said contract was evidence by his payment of the consideration which was in terms of entrance fee and subscription fee for the year. That freedom of association is protected under Article 36 of the Constitution and that he has right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as provided under Article 47. He relied on the case of ***Jeremiah Gitau Kiereini –vs- Capital Market Authority and Another [2013] eKLR.***

He submitted that he is entitled to fair hearing as provided under article 50 of the Constitution and that the Court has jurisdiction to interfere with the decisions made by the respondents. He relied on the case of ***Patel and others –vs- Dhanji and others [1975] E., where the Court observed that the court can entertain suits by members of clubs or societies or clubs for improper expulsion or violation of principles of natural justice, based on the members’ right in property, but the to interfere in the running of club affairs, the remedy being in the hands of the members.***

He submitted that the Court should interfere with the committee’s decision since the same was not authorized by procedure and that in convicting a member they did not act on the principle of natural justice that the powers have not been bonified honest exercise of the powers given by the rules and the member has proprietary right for this he relied on the case of ***Daly –vs- Gallagher (1952)Q.S.R. 1.*** He submitted further that by paying the subscription fees and settling outstanding fees for goods and services he utilized he is entitled to an injunction sought.

9. The Respondent submitted that for the applicant to succeed he must satisfy the court on a balance of probability that his case warrants the grant of an injunction. He relied on the case of ***Giella –vs- Cassman Brown & company (1973) EA 358*** where it was held that; *the applicant must show he has a prima facie case with a probability of success; that unless he is granted an injunction he may otherwise suffer irreparable injury which would not be adequately compensated by an award of damages and lastly if the court is in doubt it would decide the application on a balance of probability.*

It was submitted that the submission made before the court did not show any infringement of any rights as claimed by the applicant and therefore he has not established a *prima facie* case. On the applicants argument that the respondents were in breach of rules of natural justice he referred to the case of ***D’souza Tanga Town Council (1961) EA 377*** where it was held that;

*‘The person accused must know nature of accusation and went on to cite ***Bryne –vs- Kinematograph Renters Society Ltd. (9), 2 ALL ER 529,*** a fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view, the tribunal should see the matter which has come into existence in the controversy and ones the tribunal commences any communication it receives must be made available to both sides’.*

It was further submitted that the plaintiff was notified of the said allegations subjected himself to the jurisdiction of the Committee and responded to the suspension via an e-mail. That on 5th December he was advised to obtain additional copy of the Club’s memorandum and articles of association to enable him lodge his appeal. That despite knowledge of the appeal process he failed to adhere to the same abandoned the appeal process and admitted to his transgressions. In support of this they referred to the plaintiff’s letter dated 13th December, 2013. That on 8th March 2013 the plaintiff was further afforded

audience. The respondent further submits that damages would be adequate remedy would if the applicant was to suffer any loss here it sought to rely on the case of **Barrack D Okul vs Esso (K) Ltd Nakuru High Court Civil case number 342 of 1988** where it was held that

“Where damages are adequate remedy, the breach of contract even if uncontroverted, it is not normally a ground for an injunction”.

Further submissions were that what the plaintiff seeks to establish a right that he was unjustifiably excluded from a voluntary association and cannot maintain an action on that basis. That the objects of the company specifically no. 4 provides that no portion thereof shall be paid or transferred directly or indirectly by way of bonus or otherwise howsoever by way of profit to the members of the company. That the applicant’s application seeks to restrain a spent action which can be set out in the main suit. That the applicant fell short of his obligations as required by the 1st respondent in its memorandum and Articles of Association by engaging in conduct injurious to the respondent’s character. He relied on the case of **Kenya Breweries Limited and another vs Washington O. Okeyo CA 332 of 2000 [200]** that it is trite law that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by other party by an award of damages. That the applicant has failed to meet the standards for issuance of temporary injunctions and therefore urged the court to dismiss the application.

10. The issue for determination is whether the applicant is entitled to temporary injunction sought? I have considered the facts as deponed by the applicant, the grounds of opposition filed, together with the submissions made by both counsels. The applicant seeks an injunction. The principles of granting an injunction are that the applicant has to establish a prima facie case with probability of success, the applicant has to show that he will suffer irreparable loss and if the court is in doubt it will decide the case on a balance of convenience (see **Geilla Vs. Cassman Brown Ltd Company E.A 1973 C.A 51 of 1972 at page 358**). The applicant has already been expelled from the club and as such an interlocutory order cannot be issued at this juncture. It is my view that the applicant has not proved how he stands to suffer irreparable loss noting that the said club is a social and leisure association. The issue on whether or not due process was followed in expelling him from the club is a matter to be determined at full hearing which can be compensated by way of damages. I find that this application lacks merit and the same is dismissed with costs to the respondent.

Orders accordingly.

Dated, signed and delivered this **6th** day of **March** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiff/Applicant

.....For the Defendant/ Respondent

.....Court Clerk