

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E455 OF 2024

DONALD B. KIPKORIR
PETITIONER

VERSUS

MUTHAIGA COUNTRY CLUB PLC.....1ST

RESPONDENT

KUSH BHARAT BHARDWAJ.....2ND

RESPONDENT

CAROLINE WANGARI MURIUKI.....3RD

RESPONDENT

JONATHAN STEWART PHILIP COULSON.....4TH

RESPONDENT

MICHAEL TURNER ALAN.....5TH

RESPONDENT

KIUNA NGUGI KIUNA.....6TH

RESPONDENT

DAVID WILLIAM STODGALE.....7TH

RESPONDENT

ANTHONY MCEWEN CLEGG BUTT.....8TH

RESPONDENT

LISA TRACEU WANJIRU KARANJA.....9TH

RESPONDENT

GORDON WESTON SINCLAIRE.....10TH

RESPONDENT

MATTHEW RUDD JOHN BEVIL.....11TH

RESPONDENT

JOHN NGUMI.....12TH

RESPONDENT

VIJAY VASHDEV GIDOOMAL.....13TH

RESPONDENT

ROGER BEBBINGTON.....14TH

RESPONDENT

JESSICA GAIL PAUL.....15TH

RESPONDENT

MICHAEL TURNER ALAN.....16TH

RESPONDENT

GEORGE THEOBALD CARMICHAEL.....17TH

RESPONDENT

RESPONDENT

JUDGMENT

Petition

1. The petitioner is an Advocate of the High Court of Kenya. In the course of his duties, the petitioner is often invited to meet clients outside his law Chambers and take instructions. Muthaiga Country Club (the Club) is one such places.
2. On 9th August 2024. the petitioner was invited by a client and a member of the club, to meet at the club and take instructions in a matter the client wanted the petitioner to act on. The petitioner went to the club but was denied entry without being given reasons. The petitioner felt the club had not only

mistreated him but also blacklisted him as one of the persons not permitted to enter the club though invited. The incident followed another that had occurred in October 2022 when the petitioner was first denied entry but was later allowed after he complained.

3. The petitioner states that prior to this debacle, he had on the invitation of members of the club, attended meetings at the club for more than 20 years without incident although he is not a member of the club and does not wish to be a member. He should not however be denied access to the club to meet clients who are members of the club and on invitation.

4. The petitioner asserts that he has relatives who are members of the club but now cannot attend family functions even on invitation and he cannot drop or pick his children when attending family functions with their cousins and friends. The petitioner states that he has been invited to the club between October 2022 and August 2024 by several clients and esteemed members of the club but he cannot be allowed into the club. The refusal to grant him entry to the club portrays him badly as a public nuisance in the eyes of clients and other members of the club.

5. The petitioner asserts that the make-up of the Board of Trustees and or management of the club comprises of persons of European descent who are

the majority and the denial of entry could be associated with his colour or origin.

6. The petitioner argues that the club cannot implement administrative rules that hinder law abiding Kenyans from accessing the club when invited by members otherwise this is a form of discrimination which is prohibited under article 27(5) of the Constitution.

7. The petitioner maintains that the decision by the Club to deny him entry impeded his work as an advocate and violated article 10 of the Constitution. The action further violated his right to human dignity and freedom of movement guaranteed under articles 28 and 39 (1) of the Constitution. The

petitioner shas sought declarations on violations and an order for compensation.

Response

8.The respondents have opposed the petition through grounds of opposition and a replying affidavit.

Grounds of opposition

9.In the grounds of opposition, the respondents contend that the petitioner has not disclosed material facts to the court that he is aware of the reasons why he was not allowed into the club as required by the law.

10. The respondents assert that the petition seeks orders against a private member's club which has a

right to determine who to admit and if the orders sought are granted, they would amount to interfering with the right of a private members club. They cite the decision in *Arun Kumar Jain & another v Board of Trustees Nairobi Gymkhana* [2020] eKLR.

11. It is the respondents' position that the petition does not meet the threshold of a constitutional petition set out in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR. The petitioner is also guilty of delay having first raised his complaint by a letter dated 9th October 2023 which was answered comprehensively in the 1st respondent's advocates' letter of 14th December 2023.

12. The respondents argue that the petition is an attempt to give the petitioner access to a private members' club when he is not a member thus, the petition is an abuse of the court process.

Replying affidavit

13. The respondents state through the replying affidavit, that the club is for private members and access is limited to members, their invited guests and members of reciprocating clubs. According to the respondents, under clauses 9 (a) and (b) of the club's bylaws, the club declined to admit the petitioner because of derogatory remarks he had made about the club in the social media on 25th February 2015. The petitioner has failed to disclose to the court that he is aware of the reasons why he

has been denied entry to the club which was communicated to members who invited the petitioner and to his lawyer by emails of 15th December 2022 and 14th December 2023, respectively.

14. The respondents admit that the petitioner was invited to the club on 9th August 2024 by [name withheld] a member of the club as a guest at 9.45 am. [name withheld] was however informed at 10.25 am on the same day that the petitioner is not allowed in the club as a guest. The respondents have no record that the petitioner visited the club on that day but was turned away.

15. The respondent deny that the petitioner was treated as alleged and assert that membership or

leadership of the club is not restricted to a particular race, ethnicity or any other distinguishing factor such as religion, gender or belief. Admission of guests is not restricted by any factors, including those alleged by the petitioner as the basis for discrimination.

16. The respondents maintain that the club has over 6500 members of different ethnicities and nationalities, including those the petitioner indicates have previously invited him to the club. Members are also free to invite guests of any races, nationalities and ethnicities.

17. The respondents maintain that the petitioner's allegations that he is perceived as a criminal, terrorist, drunkard and public nuisance are

unfounded; the respondents have never described the petitioner as such and that the 2nd to 4th, 9th, 12th to 14th and 17th respondents are directors of the 1st respondent while the 5th, 7th, 8th, 10th, 11th and 15th and 16th respondents are former directors. The 6th respondent is a shareholder while the 18th respondent is the company Secretary. Any actions taken or may have been taken by the 2nd to 18th respondents in the past were taken on behalf of the 1st respondent.

18. The respondents assert that no allegations have been made against the 2nd to 18th respondents hence they are improperly joined in the petition and their names should be struck out. The club was established to offer members and their guests a venue for social gatherings and accommodation and

damaging posts by persons, including the petitioner are detrimental to the club's brand and image. The club considered the harm caused by the petitioner's social media post in taking the impugned action.

19. The respondents maintain that the petition has been filed with an ulterior motive because by a letter dated 11th September 2024, the petitioner wrote to the Director General, State Department of Immigration requesting information on the immigration status of some of the respondents and in doing so, the petitioner has only referred to the named parties who are of Caucasian or Asian background and not Africans.

20. The respondents state that from the petitioner's social media posts and his lawyer published on X on

9th September 2024, the petitioner is seeking to create an impression that the 1st respondent is racist in its operations which is not the case. Out of the fifteen directors, only two are not Kenyan citizens.

21. The respondents assert that there was no legal basis for the letter dated 11th September 2024 which was, in any case, responded to on 12th September 2024. According to the respondents, the petitioner is fond of attacking the hospitality industry and is a habitual abuser of court process to advance personal agendas.

Submissions

22. The petition was disposed of through written submissions with oral highlights

Petitioner's submissions

23. Mr. Peter Wanyama, learned counsel for the petitioner, submitted highlighting their written submissions, that the petition raises claims on violation of articles 10, 27(5), 28 and 39(1) of the Constitution attributed to all the respondents. Learned counsel argued that article 22 of the Constitution allows applications for claims on breach of fundamental rights and freedoms which are enforceable against private persons. This informs the reason why the 2nd to 18th respondents were joined into the proceedings.

24. Learned counsel asserts that while the respondents make reference to a social post of 25th February 2015, the alleged post has not been produced together with the certificate required

under section 106B of the Evidence Act. If the post existed, it became time barred in February 2018 by virtue of section 4(2) of the Limitations of Actions Act. In any case, counsel argues, criticism for bad service is protected under articles 32, 33, 34 and 36 of the Constitution.

25. Mr. Wanyama submits that the allegation that the petitioner is a habitual abuser of the court process is unfounded since the respondents have admitted denying the petitioner entry to the club and therefore violated his legitimate expectation and the right to fair administrative action. The letter to the Director General, State Department of Immigration was seeking information regarding the citizenship status of the respondents because of the silent discrimination in the club.

26. Learned counsel maintains that denying the petitioner entry to the club is discriminatory and violates the right to dignity and freedom of movement. Counsel relies on the decisions in *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* [2014] eKLR and *Nyarangi & 3 others v Attorney General* [2008] KLR 688.

27. Learned counsel again relies on the decisions in *John Harun Mwau v Independent Electoral and Boundaries Commission & another* [2013] eKLR to submit that the 1st respondent deliberately and in a preferential manner allows some people to the club while denying others entry, including the petitioner without cogent reasons a violation of the petitioner's rights. Learned counsel cites the decision in *Law*

Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested party) [2020] eKLR for the position that every member of the public, individually or collectively is enjoined to respect, uphold and defend the Constitution and any alleged violation of the Constitution by any individual is a serious matter; an affront to constitutionalism and sets a dangerous precedent in the violation of the Constitution, which can, if not checked result in serious harm to the country and its citizens. It is therefore proper and prudent for the court to act in public interest and consider granting the appropriate reliefs in the circumstances where such orders are deserved.

28. Mr. Wanyama goes on to submit that by obstructing the petitioner's entry and opportunity to

represent clients, the respondents undermined professional autonomy required of an advocate under article 10 of the Constitution and infringed on the right of the petitioner's clients to legal representation. Such actions contradict the principles of accountability and good governance in article 10 as they frustrate the administration of justice and erode public confidence in the legal process.

29. Learned counsel maintains that the petitioner's right to human dignity was violated in the manner he was asked to leave the premises. Reliance is placed on the decisions in *JWI v Standard Group Limited & Another* [2013] eKLR and *Ann v Attorney General* [2013] KEHC 6004 (KLR).

30. Mr. Wanyama again cites the decision in *University Academic Staff Union (UASU) v Attorney General & Chief of Staff & another* [2018] eKLR for the argument that the unexplained denial of entry to the club violated the petitioner's right to freedom of movement since rights guaranteed under articles 28 and 39 of the Constitution are foundational to the bill of Rights. Limiting these rights without justification undermines the principles of equality, freedom and justice which create a precedent that erodes the Bill of Rights that is integral in safeguarding democracy, the rule of law and freedom of the individual.

31. Learned counsel relies on *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others* [2021] KECA 328 (KLR) and *Gitobu Imanyara & 2*

others v Attorney General [2016] eKLR and prays for general damages of Kshs. 10,000,000. He further urges the court to consider the potential mental and psychological impact that the respondents' humiliating conduct caused the petitioner and allow the petition with costs.

Respondents' submissions

32. Mr. Kimani Kiragu, SC, learned counsel for the respondents submits also highlighting the respondents' written submissions and has urged the court to dismiss the petition and set aside the conservatory orders issued on 9th September 2024. Learned senior counsel argues that the orders were obtained through concealment of a material fact that the petitioner was aware of the reason why he

was denied access to the club and the decision was communicated to him. Senior counsel relies on the decision in *Brink's Mat Ltd v Elcombe* [1988] 3 All ER 188.

33. Mr. Kimani Kiragu, SC, submits that the orders amount to an improper interference with the discretion of a private members' club to admit people into its premises. The court should only interfere in the club' affairs where it is demonstrated that the club acted in breach of the Constitution. Reliance is placed on the decision in *Arun Kumar Jain & another v Board of Trustees Nairobi Gymkhana* (supra).

34. Learned senior counsel argues that the petition has not disclosed a cause of action against the 2nd to

18th respondents. Senior counsel relies on Halsbury's Laws of England 5th Edition Volume 13, paragraph 207 and the decisions in *Mungania Tea Factory Company Ltd & 50 others v Attorney General* [2021] eKLR; *Garden Square Ltd v Kogo and another* [2003] eKLR and *Muchanga Investments Limited v Safari unlimited (Africa) Limited & 2 others* [2009] eKLR.

35. Mr. Kiragu Kimani, SC, again argues that the petition does not meet the threshold of a constitutional petition and the claim for discrimination has not been proved. Reliance is placed on the decisions in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR; *Harksen v Lane NO.* 1998 (1) SA 300 (CC) and *Prinsloo v Van*

der Linde and Another 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

36. Learned senior counsel asserts that it was wrong for the petitioner to file this petition long after what he considers violation of his rights. The delay of two years since he was aggrieved by the club's actions is inordinate and has not been explained. The petition is therefore an abuse of the court process. Learned senior counsel relies on the decision in *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR.

37. According to learned senior counsel, the decision to deny the petitioner entry into the club does not fall within the scope of article 10(1) of the Constitution. There is no question of applying or interpreting the Constitution; enacting or

interpreting any law or formulating public policy decisions. Although the petitioner alleges a violation of article 10 of the Constitution and the rule of law, the petition did not particularise the allegation and how the respondents violated his rights. The petition thus, offends the threshold set in *Anarita Karimi Njeru v Republic* [1979] eKLR.

38. It is learned senior counsel's argument that the 1st respondent is a private members club which does not discharge any public functions and its decision to deny the petitioner entry to the premises cannot be construed to amount to application or interpretation of the Constitution or the law; enactment of law or making or implementing public policy decisions. The decision was justified and was in accordance with by-laws of the club.

39. Mr. Kimani Kiragu, SC, submits that the argument on violation of article 48 of the Constitution cannot stand because the article imposes an obligation on the state to ensure access to justice but the state has nothing to do with the club. There is also no reason to believe that there is anything special about a meeting between the petitioner and his clients at the club. They can meet at any other location and nothing suggests that they would not be able to achieve the same outcome for reason only of meeting at a different location since it is not the client who is complaining.

40. Learned senior counsel maintains that while the petitioner may argue that he is entitled to advance this petition pursuant to articles 22 and 258 of the Constitution, those provisions would not be available

when it is accepted that a meeting can take place at any other location. One of the indicators of whether a matter is of public interest litigation is whether or not there is a claim for damages. reliance is placed on *Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others* [2020] eKLR.

41. Mr. Kimani Kiragu, SC asserts that the petitioner has not demonstrated violation of article 27(5) of the Constitution and that the petitioner attempted to enter the club on 9th August 2024 but was turned away. The emails attached to the petitioner's affidavit do not constitute evidence of his physical attempt to enter the club. Senior counsel relies on the decision in *Mohamed and another v Haidara* (1972) EA 166.

42. Learned senior counsel again argues that the petitioner has not proved violation of his rights. He relies on Black's Law Dictionary, 8th Edition (page 1407); Constitutional Law, Doctrines and the Litigation of Fundamental Rights and Freedoms, Isaac Lenaola SCJ and Arnold Ochieng Oginga and the decision in *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another* [2011] eKLR.

43. It is senior counsel's position the club is for private members and certain privileges are accorded to members of the club only. Since the petitioner is not a member, he cannot claim that he had not been accorded the privileges enjoyed by members such as the right to unrestricted access to the club without invitation. The petitioner has not

demonstrated that other non-members of the club were been accorded preferential treatment than him. The petitioner has also not discharged the burden of proof required under sections 107(1), 108 and 109 of the Evidence Act. He has not demonstrated the allegations of discrimination on the prohibited grounds in article 27(4) of the Constitution. Reliance is placed on the decisions in *Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] KESC 66 (KLR) and *Githunguri Dairy Framers Co-operative Society Ltd v Attorney General & 2 others* [2016] eKLR.

44. Mr. Kimani Kiragu, SC, goes on to argue that article 39 cannot be construed as allowing free access to private property. The club has the right to restrict entry and the petitioner has not

demonstrated that the decision to deny him entry was unreasonable so as to amount to a violation of the Constitution. Learned senior counsel relies on *Gitobu Imanyara & 2 others v Attorney General* [2016] KECA 557 (KLR); *Ngethe wa Murimi alias Ngethe Kuria Murimi v Attorney General* [2017] eKLR; *Njuguna Githiru v Attorney General* [2016] KEHC 5714 (KLR) and *Masibo v Nation Media Group Limited* [2023] KEHC 20569 (KLR) to propose that the most appropriate award if any, would be Kshs. 500,000.

45. He urges the court to dismiss the petition with costs.

Determination

46. I have considered the pleadings, arguments by parties and the decisions relied. Even though parties addressed different aspects in this petition, the core issue for determination is whether the respondents' action violated the petitioner's rights to fair administrative action; human dignity and non-discrimination.

47. The facts of this petition are fairly straight forward. The 1st respondent is a private members' club and entry is reserved for members, their invited guests and members of reciprocating clubs.

48. On 9th August 2024, the petitioner, not being a member of the club, was invited by a member to the club to take instructions on a matter the member wanted the petitioner, an advocate, to handle on her

behalf. The petitioner went to the club but was denied entry for what he says were unexplained reasons. The petitioner felt aggrieved and has instituted this petition arguing that his right to fair administration action; human dignity and freedom of movement and non-discrimination were violated.

49. The respondents argue that that the club reserves the right of entry; the petitioner not being a member, had no right to enter the club without permission and invitation; reasons for denying the petitioner entry were given and there was no violation of rights and fundamental freedoms. The respondents further argue that there is no evidence that the petitioner went to the club on the material day but was denied entry.

50. The petitioner and the respondents are in agreement that although the petitioner is not a member of the club, he can still be allowed into the club on invitation by a member. It was on this basis that the petitioner went to the club on 9th August 2024 on the invitation by [name withheld], a member of the club, but was denied entry.

51. Article 22 of the Constitution confers on every person the right to approach the court on a claim that a right and fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23(1) read with article 165(3) of the Constitution then confers on the court jurisdiction to determine such an application. Article 23(3) further gives the court authority to grant an appropriate relief to redress denial, violation or

infringement of, or threat to, a right or fundamental freedom. The essence of appropriate relief should be to ensure that rights enshrined in the Constitution and the Bill of Rights are protected and enforced. (*Fose v Minister of safety and Security* (CCT 14/1996) [1997] ZACC 6.)

52. The petitioner went to the club on invitation by a member but was turned away without any reason. This, he argues, was in violation of his rights, including the right to fair administrative action guaranteed under article 47 of the Constitution; the right to human dignity; freedom of movement and non-discrimination. The respondents maintain that the club as a private entity, reserves the right of entry.

53. The respondents' argument that it reserves the right of entry is correct in principle. However, the respondents like everybody else, are bound by constitutional principles to respect uphold and defend the Constitution, including human rights guaranteed in the Bill of Rights. Article 19(2) of the Constitution makes it clear that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. Article 19 (3) further states that rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state and are subject only to the limitations contemplated in the Constitution.

54. Article 20(1) states even more succinctly, that the Bill of Rights applies to all law and binds all State organs and all persons and that (2) every person should enjoy the rights and freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedoms. The Constitution is clear that the Bill of Rights binds not only state organs, but every person.

55. Article 20 (3) requires courts when applying a provision of the Bill of Rights, to develop the law to the extent that it does not give effect to a right or fundamental freedom. The court should also adopt an interpretation that most favours the enforcement of a right or fundamental freedom. Sub article (4) provides that in interpreting the Bill of Rights, a court, tribunal or other authority should promote-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. In that respect, therefore, provisions in the Bill of Rights have to be construed in a manner that secures for individuals, the full measure of protection of their rights and fundamental freedoms.

56. From the constitutional text, every person must enjoy all the rights and fundamental freedoms guaranteed in the Bill of Rights because the Bill of Rights binds the state; state agencies and every other person, including private entities given that our Constitution applies both horizontally and vertically.

Fair administrative action

57. The petitioner went to the club on invitation by a member but was turned away without being told why. This, he argues, was in violation of the right to fair administrative action guaranteed under article 47 of the Constitution. The respondents maintain that the club as a private entity, reserves the right of entry and did not violate the petitioner's rights. They also argue that there is no evidence that the petitioner went to the club on the material day but was turned away.

58. Article 47(1) guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The petitioner does not suggest that the respondents'

action was not expeditious or efficient. The petitioner seems to argue that the action was not lawful, reasonable and procedurally fair.

59. Regarding lawfulness, the club reserves the right of entry but this right is qualified because a person can go to the club on invitation by a member. On invitation, the invited guest enters the club as a guest of the member inviting him and denial of entry should be for lawful reasons. In this petition, apart from arguing that the club reserves the right of admission, the respondents have not demonstrated a lawful reason why the petitioner was denied entry despite the invitation. The action must also be reasonable so that an independent observer applying the reasonable test would agree with the respondents' action. The action and therefore the

reason(s) must not be based on extraneous matters or vendetta.

60. Article 47(1) further requires that the action be procedurally fair. Procedural fairness is based on the common law rule of natural justice and the right to fair hearing which demands that a person be given a hearing before an action is taken against him or her.

61. The petitioner's case is that he was denied entry and turned away without being given a reason for the action. The respondents maintain that the club reserves the right of entry and that there is no evidence that the petition went to the club but was turned away. The respondents however admit that the petitioner was invited to go to the club on 9th August 2024 at 9.45 am as a guest of [name

withheld] who is member of the club. However, on the same day at 10.45 am, [name withheld] was informed that the petitioner is not allowed into the club as a guest. That in itself is an admission that the petitioner was not excluded from the club at the time of invitation. It also means the petitioner must have been turned away by the time [name withheld] was being informed that the petitioner was not allowed into the club which again demonstrates that [name withheld] was not aware that the petitioner would not be allowed into the club.

62. The respondents' admission negates their argument that there is no evidence that the petitioner went to the club on the material day but was turned away. If at all [name withheld] was aware when inviting the petitioner that the

petitioner would not be allowed into the club there would have been no reason to invite him in the first place.

63. It is true that a private club has the right of admission. It is also a fact from the respondents' own admission, that members of the club have a right to invite guests to the club. It was on this basis that the petitioner was invited and went to the club in response to the invitation and therefore, the respondents cannot approbate and reprobate at the same time.

64. The respondents have not shown when the decision to exclude the petitioner was made; whether it was made prior to the invitation or after; that petitioner was aware of the decision and that

[name withheld] was aware of the decision to exclude the petitioner. The respondents have not also demonstrated that there was procedural fairness in the manner the petitioner was treated.

65. Article 47(2) provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action. The petitioner argues that the respondents did not give any reasons why he was denied entry into the club despite being invited by a member. The respondents argue that the petitioner's advocate's letter was responded to and reasons were given.

66. The inclusion of article 47 in the Bill of Rights was not in vain. It was intended to bring discipline in administrative actions so that values and principles of the Constitution are infused in matters of public administration. (See *Judicial Service Commission v Mbalu Mutava Musyimi* [2015] eKLR).

67. The respondents' position that the petitioner was given reasons why he was not allowed into the club though invited only confirms that the petitioner was not informed why he had been turned away since the petitioner left the club without understanding why he was not allowed in and was instead turned away since the issue here is on the action complained of. I therefore agree with the petitioner that the respondents' action violated the petitioner's right to fair administrative action.

Human dignity

68. The petitioner again argues that the respondents' action violated his right to human dignity guaranteed under article 28 of the Constitution a claim the respondents deny. Article 28 provides that every person has inherent dignity and the right to have that dignity respected and protected.

69. Christopher McCrudden opines that human dignity as a constitutional right, represents the idea that "every human being possesses an intrinsic worth" that precludes their subjection to certain forms of degrading treatment. ("Human Dignity and Judicial Interpretation of Human Rights" (2008) 19:4 The European Journal of International Law 655 at 679).

Dignity is that state in a human being that makes a person worth of honour and respect.

70. It has been held that the right to human dignity is the foundation of many of the other rights in the Bill of Rights. The Constitutional Court of South Africa observed in *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3, that *“The rights to life and dignity are the most important of all human rights, and the source of all other personal rights....By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.”*

71. The Constitution guarantees the right to human dignity and this right can only be limited by legislation which must pass the stringent article 24

limitation test. The limitation must also be justifiable in an open and democratic society based on freedom and equality; must be both reasonable and necessary and must not negate the essential content of the right. Violation of one's dignity is intrusive to personal worth and once personal dignity is pierced; it cannot be restored. This right and, the Constitution so commands, must be respected and protected.

72. The petitioner went to the club not on volition or a frolic of his own but following invitation by a member who had exercised the right to invite a guest to the club. The host member did not know that the petitioner would not be allowed to the club neither did the know. As already alluded to, it is also not clear when the decision not to allow the

petitioner to the club was made since the host was only informed that the petitioner would not be allowed way past the time the petitioner was expected to have arrived and had as well been turned away by then.

73. That the petitioner responded to the invite and took trouble to go to the club hoping to meet the client only to be turned away for unexplained reasons is not denied. The petitioner had to turn and drive away in indignation not knowing what was happening. The respondents' action failed to respect the petitioner's right to human dignity but humiliated him piercing his human dignity thereby violating the core of this right.

74. Even though the petitioner went to the club, a private entity, he was invited by a member which is allowed by the rules governing the club. The respondents could not act in the manner they did once the petitioner had been invited and was within the precincts without justifiable reason which reason must not be based on extraneous matters or vendetta.

75. The respondents' action was obviously surprising and humiliating to say the least since it was not the petitioner's mistake to go to the club. The humiliation, coupled with lack of justifiable reasons, injured the petitioner's right to human dignity in violation of article 28 of the Constitution.

Discrimination

76. The petitioner again argues that the respondents' action was discriminatory and violated article 27 of the Constitution. The respondents however deny that there was discrimination.

77. In *peter K Waweru v attorney General* [2006] eKLR, the court defined discrimination to mean:

[A]ffording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are

not accorded to persons of another such description.

78. In *Jacqueline Okeyo Manani & 5 others v Attorney General & another* [2018] eKLR, the court added that:

[28]. [D]iscrimination...is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based on such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups.

(See also *James Nyasora Nyarangi & 3 others v Attorney General* [2008] eKLR)

79. Article 27 of the Constitution confers on every person the right to equality before the law and equal protection and equal benefit of the law. Equality includes full and equal enjoyment of all rights and fundamental freedoms in the Bill of Rights regardless social or other considerations. Article 27(4) prohibits the State and its agencies from directly or indirectly discriminating 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. Sub article 27(5) prohibits any person from directly or indirectly discriminating against another person on any of the prohibited grounds in article 27 (4).

80. It is clear that the Constitution abhors in absolute terms all forms of discrimination so that one's social standing, origin, colour, religious belief or any other ground cannot be reason for subjecting the person to differential treatment. That is, the Constitution prohibits both direct and indirect discrimination on any grounds.

81. The Constitutional text in article 27 is plain that all persons are equal before the law and enjoy equal protection and benefit before the law. That is; every person must enjoy all the rights and fundamental freedoms in the Bill of Rights since the Constitution prohibits both direct and indirect discrimination by either the state; state agencies or any other person

thus, the Constitution applies both horizontally and vertically.

82. A claim for discrimination being a claim on violation of rights and fundamental freedoms, has to be demonstrated to the satisfaction of the court. The petitioner argues that he was treated in a discriminatory manner based on his origin and ethnicity. The petitioner did not however show that the treatment he was subjected to was actually based on these prohibited grounds.

83. The petitioner did not demonstrate that no other people from his ethnicity are allowed into the club to show that his ethnicity was the basis for denying him entry into the club. From the petitioner's own assertions, some people from his ethnicity are members of the club and occasionally invite his

children to the club. The petitioner has therefore not shown that he was targeted on grounds of his origin and ethnicity. I therefore find no discrimination.

Appropriate relief to grant

84. The court has found that the respondents violated the petitioner's right to fair administrative action and human dignity but that there is no proof of discrimination. The issue therefore is what relief should the court grant.

85. Article 23(3) of the Constitution provides that in any proceedings brought under article 22, a court may grant appropriate relief- including declaration of rights and an order for compensation. The essence of an appropriate relief is to enforce the constitution and ensure that rights enshrined in the Bill of Rights

are protected and enforced-*(Fose v Minister of safety and Security (CCT 14/1996) [1997] ZACC 6.)*

86. In *Tinyefuze v Attorney General of Uganda*, (Constitutional Petition No. 1 of 1996) [1997] UGCC 3, the Constitutional Court of Uganda held that “*if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of constitutional jurisdiction as a matter of course.*”

87. In *Attorney General of Trinidad and Tobago v Siewchand Ramanoop* Appeal No. 13 of 2004 [2005] UKPC 15, Lord Nicholls of Birkenhead writing for the Privy Council stated that “*When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which*

has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation.

88. Applying the above principles to this case and the court having found violation, an award of compensation is the appropriate relief in the circumstances.

89. Regarding quantum, the court has been urged to award Kshs. 10,000,000 considering the mental and psychological impact the respondents' action had on the petitioner. The petitioner has relied on the decisions in *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others* [2021] KECA

328 (KLR) and *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.

90. The respondents propose an award of Kshs. 500,000 should the court find in favour of the petitioner. Reliance is placed on the decisions in *Gitobu Imanyara & 2 others v Attorney General* [2016] KECA 557 (KLR); *Ngethe wa Murimi alias Ngethe Kuria Murimi v Attorney General* [2017] eKLR; *Njuguna Githiru v Attorney General* [2016] KEHC 5714 (KLR) and *Masibo v Nation Media Group Limited* [2023] KEHC 20569 (KLR).

91. Taking into account the parties' proposals *visa vis* the nature of the violation, the court is of the view that compensation of Kshs. 1,000,000 is fair and reasonable.

92. Consequently, and based on the above reasons, the petition succeeds and the court make the following declaration and orders it considers appropriate.

1. A declaration is hereby issued that the decision by Muthaiga Country Club to deny the petitioner entry to the club on 9th August 2024 violated the petitioner's rights to fair administrative action and human dignity guaranteed under articles 47 and 28 of the Constitution.

2. The Petitioner is hereby awarded compensation of Kenya Shillings one million (Kshs.1,000,000) for the violation of his rights in 1 above, to be paid by the 1st respondent.

3. The 1st respondent will also pay interest and costs of the petition.

**Dated and delivered at Nairobi this 7th Day of
November 2025**

**E C MWITA
JUDGE**

ORIGINAL