REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL, HUMAN RIGHTS AND JUDICIAL REVIEW DIVISION
APPLICATION NO. E030 OF 2024

REPUBLIC…….....APPLICANT
-VERSUS-
BOARD OF MANAGEMENT NYALI GOLF & COUNTRY CLUB LTD &
MANAGEMENT COMMITTEE, LADIES SECTION……...RESPONDENT
ex parte;
MARY WAMBUI MWAI

JUDGMENT

1. The motion before court is dated 16 October 2024. It is expressed to be brought under sections 8 and 9 of the Law Reform Act, cap. 26; sections 4,7,8,9, 10 & 11 of the Fair Administrative Action Act, cap. 7L and Order 53 rules 1,3 and 4 of the Civil Procedure Rules. The prayer sought and which is pertinent to this determination has been couched as follows:

> ***"b)That this Honourable court be pleased to issue an order of certiorari removing the decision made on 16/9/2024 and upheld on 26/9/2024 for quashing , an order of Mandamus to compel the respondents to reinstate the Exparte applicant as the captain of the ladies section of the Nyali Golf and Country Club Ltd and an order of prohibition prohibiting the respondents from implementing the impugned decision and/or affecting the exparte applicant's position until the end of her term and/or until the***

proper process of declaring a vacancy in her position and right procedure is followed."

The applicant has also sought costs of the suit.

2. The application is based on a statutory statement dated 4 October 2024 and an affidavit sworn by the applicant verifying the facts relied upon. In the affidavit, the applicant has sworn and described herself as "*the current Ladies Captain of the Nyali Golf and Country Club Ltd*."(I will henceforth refer to the company as "the Golf Club"*).*

3. According to the applicant, she was duly elected as the Ladies Captain during the annual general meeting held on 23 January 2023 and, since then, she had been diligently serving in that capacity until a special general meeting was convened on 16 September 2024 with the specific agenda of removing her from office.

4. It is her contention that the meeting was convened contrary to the articles of association of the Golf Club. In particular, the meeting did not comply with clause 27.1 of the articles which requires signatures of at least 25 voting members for such a meeting to hold. There was also no quorum as a special general meeting requires a quorum of 100 voting members yet only 32 members attended the meeting. The applicant also alleges that no notice was served upon her and neither was she given reasons for her removal. Accordingly, she was condemned unheard contrary to clause 39.1 of the articles of association of the Golf Club.

5. The removal of the applicant from her position was communicated through a letter signed by one Teresia Odoo, apparently acting on behalf of the Kenya Ladies Golf Union. The letter was, however, said to have been countermanded by the Kenya Ladies Golf Union.
6. The applicant's efforts to resolve the dispute through the internal dispute resolution and appellate mechanisms was rebuffed by the respondent. The applicant's vice-captain is said to have been installed as the captain contrary to clause 23.1 of the articles of association of the Golf Club.
7. Ms. Zaituni Mohamed swore a replying affidavit opposing the applicant's application. She has introduced herself as honorary secretary of the ladies section committee of the Golf Club.
8. According to Ms. Mohammed, the ladies' section of the Golf Club holds annual general meetings pursuant to the provisions of Article 34.1 of the Club's memorandum and articles of association and that part of the agenda for the annual general meeting is the election of officials of the ladies' section, which includes a Lady Captain.
9. The ladies' section of the Club held an annual general meeting on or about 23 January 2023 where the applicant was elected as the Lady Captain to serve for a term of two years. The quorum in the annual general meeting of 23 January 2023, was only 27 members out of 109 members of the Ladies' Section.

10. On 22 August 2024, a petition for a special general meeting of the Ladies' Section of the Golf Club to consider passing a motion for the removal of the applicant as Lady Captain was presented to Ms. Mohamed's office. The motion for removal was on the grounds of gross misconduct; sabotaging a Golf of the Year Event (GOTY);negligence of duties; failure to follow laid down policies; and breach of confidentiality.
11. It is against this background that the Honorary Secretary scheduled a Special General Meeting on 16 September 2024 from 5:30pm; the notice of this meeting was published on the Golf Club's notice board.
12. The petition dated 22 August 2024 was served on the applicant who was certainly aware of the date of the special general meeting because on 05 September 2024, she wrote to the Honorary Secretary of the Golf Club seeking the Golf Club board's intervention in the matter. In her letter, the applicant made reference to the petition and the special general meeting together with the notice of the meeting.
13. The Honorary Secretary of the Club responded to the applicant on 13 September 2024 addressing the issues raised by the applicant in her letter dated 05 September 2024 and advising her to attend the special general meeting to present her case and convince the members of the Ladies' Section to vote against her impeachment.
14. On 16 September 2024, the special general meeting of the Ladies' Section of the Club was held and the motion was discussed in the absence

of the applicant who opted not to attend despite being present within the Club's precincts. The motion was passed by a vote of 49 to 2. On the same day, the Ladies' Section of the Golf Club resolved that the Vice Lady Captain assumes the office of the Lady Captain for the remainder of the term.

15. According to Ms. Mohamed, the requisition for the Special General Meeting of 16 September 2024 was made by more than 25 members of the Ladies' Section, which would have been enough to even call for a special general meeting of the entire Golf Club pursuant to article 24.3. of the articles of association of the Golf Club. The applicant's right to fair administrative action was not infringed as alleged; rather, the applicant is said to have deliberately refused to attend the special general meeting despite having notice of the meeting.

16. It is further sworn on behalf of the respondent that the annual general meeting of the Ladies' Section was scheduled for Monday 17 February 2025, officially marking the end of the term of the officials of the Ladies Section who were elected on 23 January 2023. Thus, the applicant's application has been overtaken by events.

17. After considering the applicant's application, the response thereto and the submissions filed in support of and in opposition to the application, one issue that stands out is whether the primary prayer sought in the

application is still viable considering that, her impeachment aside, the applicant's term of office expired way back in February 2025.

18. The prayer is itself couched in rather intriguing terms. I reproduced it earlier in this judgment but for the sake of emphasising my point here, it is necessary I quote again; it reads as follows:

> ***"b)That this Honourable court be pleased to issue an order of certiorari removing the decision made on 16/9/2024 and upheld on 26/9/2024 for quashing , an order of Mandamus to compel the respondents to reinstate the Exparte applicant as the captain of the ladies section of the Nyali Golf and Country Club Ltd and an order of prohibition prohibiting the respondents from implementing the impugned decision and/or affecting the exparte applicant's position until the end of her term and/or until the proper process of declaring a vacancy in her position and right procedure is followed."***

19. Ordinarily, judicial review reliefs of certiorari, mandamus and prohibition would be sought as distinct and separate prayers, independent of each other and thus making it a rather straight forward case for the court to grant any particular relief where an applicant satisfies it that he merits any or some of the prayers sought. In the applicant's case, she has sought all the three reliefs in one prayer. Nonetheless, nothing much turns on this as I take it to be more of a question of drafting or form than of substance.

Nonetheless, the fundamental question remains whether the quashing of the impugned letter of 16 September 2024 would serve any useful purpose if the goal is to compel the respondent to reinstate the applicant to office pending "*her proper removal*" from office or until her term in office ends.

20. It is agreed that the applicant's term in office has since expired and, therefore, even if the applicant was to persuade the court to exercise its discretion in her favour, granting the prayer, particularly in the form or in terms in which it has been sought, would be an exercise in futility.

21. It is trite that judicial review reliefs are discretionary and of the several factors the court will consider in exercising its discretion whether or not to grant a judicial review remedy, the futility of the grant of the order sought stands out prominently as a major factor. This was so held in **R v Secretary of State for Social Services, *ex parte* Association of Metropolitan Authorities (1986) 1 All ER 164.**

22. In that case the Association of Metropolitan Authorities applied to quash the Housing Benefits Amendment (No 4) Regulations 1984, S1 1984/1965, made by the Secretary of State for Social Services under the Social Security and Housing Benefits Act 1982, on the ground that the Secretary of State failed to consult the applicant association properly or at all with regard to the making of the regulations before making them. Alternatively, the association applied for a declaration that the Secretary

of State failed to comply with the duty of consultation imposed on him by s 36(1) of that Act.

23. Section 36(1) of the 1982 Act provided that before making regulations, including the regulations in question in the case, "*the Secretary of State shall consult with organisations appearing to him to be representative of the authorities concerned"*. It was not in dispute that the Association of Metropolitan Authorities was an organisation appearing to the Secretary of State to be representative of authorities concerned.

24. The court established that regulations were made on 17 December 1984. They were laid before Parliament on 18 December and they came into operation on 19 December without the requisite consultation. Webster, J. held that the Secretary of State had not complied with section 36(1) and, accordingly, was emphatic that:

> ***"I am satisfied that the Secretary of State failed to fulfil his obligation to consult before making the regulations."***

25. Nevertheless, in declining to grant the relief of certiorari, the learned judge held as follows:

> ***"Having decided that the provisions of s 36(1) are mandatory and that they were not complied with before the regulations were made, I now have to consider the relief which I should give to the applicant association. They ask me to quash the regulations. I do not think that I should do so.***

I acknowledge, with respect, that in the ordinary case a decision (I emphasise the word 'decision') made ultra vires is likely to be set aside in accordance with the dictum of Lord Diplock in Grunwick Processing Laboratories Ltd v Advisory Conciliation and Arbitration Service [1978] 1 All ER 338 at 364, [1978] AC 655 at 695 where he said:

'My Lords, where a statutory authority has acted ultra vires any person who would be affected by its act if it were valid is normally entitled ex debito justiciae to have it set aside, if he has proceeded by way of certiorari, or to have it declared void, if he has proceeded by way of an action for a declaration. The court may exercise its discretion to refuse the remedy on grounds of laches or of acquiescence or maybe, though there appears to be no reported case of this, where the ultra vires act of the authority was induced by the unlawful acts of the complainant himself.'

26. The learned judge held, *inter alia*, that the regulations have been in force for about six months and, that if they were to be revoked, all applicants who had been refused benefit because of the new regulations would be entitled to make fresh claims, and all authorities would be required to consider each such claim.

27. For this reason, amongst other reasons, the learned judge refused, to exercise his discretion, to revoke the Housing Benefits Amendment (No

4) Regulations 1984. He however made a declaration, which the applicants sought, that the Secretary of State had failed to comply with section 36(1) of the Act.

28. The rationale is, where the judicial review relief sought may otherwise be merited, it will not be granted if it would be rendered futile.

29. The second reason why the applicant's application ought to fail is that no grounds were given in the statement filed alongside the chamber summons seeking leave to file the substantive motion for judicial review.Without the grounds on which judicial review reliefs are sought, an application for judicial review would be fatally defective. I say so because, the point of entry for a judicial review court to intervene and check the powers of subordinate courts or tribunals or such other bodies whose powers are subject to judicial review is the grounds upon which the application is made.

30. Order 53 Rule 1(2) states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:

> (***2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant,***

the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).

31. And Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

32. The grounds to which reference has been made in these provisions of the law have not been left to speculation. They were enunciated in the English case of **Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lor**d Diplock set out the three heads which he described as "***the grounds upon which administrative action is subject to control by judicial review***". These grounds are illegality, irrationality and procedural impropriety.

33. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under

three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its

defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not

involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

34. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and may grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed.

35. Back home, these grounds have, more or less, been codified in section 7 of the Fair Administrative Action Act because any of those grounds stipulated in this provision can argued conveniently under any of the heads of the traditional grounds for judicial review.

36. Since they form the foundation upon which the application for judicial review is based, these grounds must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave.

37. While reiterating the importance of stating grounds for judicial review in concise and precise terms, **Michael Fordham** in his book, **Judicial Review Handbook,** at Paragraph 34.1 states as follows:

> ***"The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."***

38. The 'new order' referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in *pari materia* with our own Order 53 of the Civil Procedure Rules, 2010. The point is, however, clear that courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity. It follows that where the grounds are not

stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built. On this ground alone, the applicant's application would fail.

39. For the reasons given, I hold the applicant's application to be fatally defective and incompetent. It is hereby struck out with costs to the respondent.

Signed, dated and circulated on the CTS on 20 February 2026

Ngaah Jairus
JUDGE