



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CONSTITUTIONAL PETITION NO. 3 OF 2021

IN THE MATTER OF: Articles 22,(1), 23, 24, 165 (6) & 258 of The Constitution of Kenya 2010

IN THE MATTER OF: A violation of Articles 10 (1) & 10 (2) (a & d) of The Constitution of Kenya 2010

which bind all persons to promote the national values among them the rule of law

whenever they interpret or apply the law.

IN THE MATTER OF: A violation of the right to social and economic

rights guaranteed at Article 43 of the Constitution of Kenya 2010.

IN THE MATTER OF: A violation of the right to Fair Administrative Action that is expeditious,

efficient and lawful as guaranteed under Article 47 of the Constitution.

IN THE MATTER OF: A violation of the rights of the Youth to associate,

be represented and participate in social, economic and other spheres of life as

decreed under Article 55 of the Constitution of Kenya 2010.

IN THE MATTER OF: The Constitution of Kenya (Protection of Rights

and Fundamental Freedoms) Practice and Procedure Rules, 2013.

IN THE MATTER OF: The Companies Act No. 17 of 2015.

IN THE MATTER OF: The Sports Act No. 25 of 2013

IN THE MATTER OF: Fair Administration Act.

BETWEEN

OPIYO TAIWO LEO ATIENO AWUONDA (Suing on his behalf and on behalf of the larger

public/community that is a beneficiary of effective sports activities and management).....PETITIONER

AND

THE REGISTRAR OF COMPANIES.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND PETITIONER

JUDGMENT

This matter was commenced by way of a Petition dated 15/4/2021. The petitioner seeks the following reliefs and declarations:

A declaration be and is hereby issued that the First Respondent is enjoined by the Constitution to adopt the path that most fosters enjoyment of fundamental freedoms and rights when applying the law;

A declaration be and is hereby issued that the First Respondent acted contrary to Articles 10, 24 and 47 of the Constitution in construing the law as to be limiting use of the word "Club" in absence of any provision to that effect;

A declaration be and is hereby issued that the First Respondent went beyond the criterion prescribed under Regulations 11 and 12 of the Companies (General) Regulations 2015 in declining the word 'Club' in 'Migori United Football Club Limited';

A declaration that the First Respondent violated the Petitioner's right to economic and social rights guaranteed in Article 43 without any lawful justification;

A declaration be and is hereby issued that the First Respondent violated the Petitioner's right to administrative action that is fair, lawful, reasonable and expeditious;

A declaration be issued that the First Respondent violated the legitimate interests of the Petitioner for the incorporation of a company upon meeting all requirements in law;

An order of Certiorari be issued removing into this Court for the purposes of quashing the decision of the First Respondent of 24/2/2021 not to register the proposed company 'Migori United Football Club Limited';

An order of Mandamus be issued directing the Respondent to register the company under the name of 'Migori United Football Club Limited';

An order be issued directing the Respondent to register the proposed company being 'Migori United Football Club Limited';

Costs be awarded on a full indemnity basis to the petitioner on account of the First Respondent's conduct in this matter i.e. approbating and reprobating on the registration of the company for a long time despite the petitioner's various appeals;

Such other orders as this court shall deem just.

In support of his petition, **Opiyo Taiwo Leo Atieno Awuonda (the petitioner)** swore an affidavit dated 15/4/2021. The petitioner describes himself as a holder of Kenyan and British dual citizenship, an international professional footballer now turned commercial director with his own investment companies in the UK, USA and Kenya. The petitioner also states that he has an interest in sports development in Kenya and the East Africa region.

The petitioner's case is that he conceived the idea of incorporating a company which would carry out professional football and youth development in Kenya, stadia infrastructure and management, hotel accommodation, hospitality, conference and events facilities, fitness training facilities, commercial facilities and related sports amenities and undertake integrated sports development in Migori County and Kenya as a whole; that the idea of incorporating a company is not new as it is the best vehicle to secure among others, equity, share certificates and for the purposes of developing the much needed sports infrastructures among other facilities as provided for under Section 2 of the Companies Act.

It is on this background that the petitioner contends on 22/8/2019, he initiated the process of the registration of a company name 'Migori United Football Club Limited.'; that the 1st respondent on 27/8/2019, rejected the proposed company name for the reason that the word 'club' is allegedly not allowed in registration of a company and the petitioner was advised to go and register with the Sports Registrar.

The petitioner further contends that he then instructed his counsel on record who wrote a letter dated 2/2/2021 to the Registrar to clarify on their position which letter did not elucidate any response; that on 17/2/2021 the petitioner received a notification that that the proposed company name had been approved; that on 18/2/2021 the petitioner lodged the relevant documents required to facilitate the registration of the proposed company; that on 19/2/2021 the petitioner received a notification instructing him to obtain a letter of no objection from the Registrar of Sports.

The petitioner states that on 24/2/2021 he received an email from one Mr. Hiram Gachugi explaining further why the proposed name is a prohibited name and that it contravenes Sections 49, 50 and the regulations of the Companies Act; that the petitioner did follow up with emails to appeal against the said decision which have been ignored.

The petitioner further states that he has been advised by his Counsel that the 1st respondent's decision whether or not to register a company name cannot be arbitrary and must be interpreted under the exhaustive criterion prescribed at Regulations 11 and 12 of the Companies (General) Regulations 2015; that there is no regulation in the aforementioned ones that prohibits the use of the word 'club' in a company name; that Article 24 of the Constitution of Kenya, 2010 states that a right shall not be limited and no provision in any legislation shall be construed as to be limiting a right, unless the said provision is clear and express to the extent of the said limitation; that Section 46 of the Sports Act does not give powers to the Sports Registrar to incorporate a company, all that it states is that it can register an 'organization' as a sports club, county sports association or national sports association.

The petitioner laments that the actions of the 1st respondent are discriminatory and a violation of his constitutional right of equal treatment before the law as it has previously registered a football sports organization as a limited liability company namely Kenya Premier League Limited; that the proposed company was geared towards promoting sporting activities in the County of Migori for the benefit of everyone interested in sports development and even be used as a tool of promoting peace and harmony among the youth and the community. The petitioner contended that the orders sought for are in the best of public interest.

I have carefully considered the entire Petition, its Supporting Affidavit, the respective annexures and the submissions of the petitioner. On that account, it is this court's considered opinion that the issues for determination which arise therefrom are:-

i. Whether the Petition dated 15/4/2021 is merited.

ii. Whether the orders sought should be granted.

The petitioner's case is hinged on the failure of the 1st respondent to register 'Migori United Football Club Limited.' (**proposed name**) as a Limited Liability Company as envisaged under the Companies' Act. By an application dated 22/8/2019, the petitioner applied for reservation of the proposed name but on 27/8/2019 the 1st respondent rejected it for the reason that the word 'club' is allegedly not allowed in registration of a company.

The petitioner stated that he made several appeals resting with a formal letter from his Counsel on record addressed to the 1st respondent dated 2/2/2021 which sought certain clarifications. The letter went unanswered but on 17/2/2021, the petitioner received a notification that the proposed name was allowed. On that basis, the petitioner lodged the necessary documents for registration of the company but he was faced with another hinderance on 19/2/2021 when the 1st respondent instructed him to obtain a letter of no objection from the Registrar of Sports. The 1st respondent advised the petitioner that the proposed name is one which is prohibited and undesirable and offended to Sections 49 and 50 and the regulations of the Companies Act.

Sections 49 and 50 of the Companies Act and its regulations provide as follows:-

49 (1) The Registrar may not register a company by a particular name if:-

The use of the name would constitute an offence;

the name consists of abbreviations or initials not authorised by or under this Act; or

the Registrar is, after taking into account the 40 relevant criteria of the opinion that the name is offensive or undesirable.

(2) For the purposes of subsection (1)(c), the relevant criteria are

the criteria (if any) prescribed by the regulations.

50. The approval of the Registrar is required for a company to be

registered under this Act by a name that would be likely to give

the impression that the company is connected with –

(a) a State organ;

(b) a county government; or

(c) any public authority prescribed by the regulations.

Regulations 11 of the Companies (General) Regulations 2015 provides:-

The Registrar is required to apply the following criteria in determining whether a particular name is offensive or undesirable or contrary to the public interest:

(a) the name includes "co-operative", "society" or "trade union" or any variant or synonym of those words;

(b) the name suggests an association with, or the patronage of, the State or any of its agencies, unless there are circumstances that justify its use;

(c) the name suggests an association with, or the patronage of, a foreign government or an embassy, high commission or consulate representing such a government in Kenya;

(d) the name suggests an association with, or the patronage of, a county government;

(e) the name comprises an acronym that will render its use vague or uncertain;

(f) the name includes the name of a registered trade mark unless a document signed by the owner of the trade mark and indicating consent to its use is provided;

(g) the name is such that the Registrar believes on reasonable grounds that there is reasonable possibility that it could offend members of a particular community or ethnic or racial group.

Regulation 12 provides:-

Consent to registration of a name which is the same as another in the Registrar's index of company names. (1) In this regulation—

“existing corporation” means a body corporate whose name already appears in the Registrar's index of company names.

(2) For purposes of section 57(2) of the Act, a company (the applicant company) may be registered Act by a proposed name that is the same as, or similar to—

(a) the name of an existing company; or

(b) a name already reserved for a proposed company that is proposed to be registered, if the conditions specified in paragraph (3) are satisfied.

(3) The conditions are as follows:

(a) the existing company consents, or the promoters of the proposed company, consent, to the proposed name being the name of the applicant company;

(b) the applicant company forms, or is to form, part of the same group as the existing company or the proposed company;

(c) the applicant company provides the Registrar with a copy of a statement made by that corporation specifying—

(i) the consent of the existing company or the promoters of the proposed company as referred to in subparagraph (a); and 16

(ii) that the applicant company forms, or is to form, part of the same group as the existing company.

(4) The Registrar may accept the statement referred to in paragraph (3)(c) as sufficient evidence that the conditions referred to in paragraph (3)(a) and (b) have been satisfied.

(5) If the consent referred to in paragraph (3)(a) is given by the existing company or by the promoters of a proposed company, a subsequent withdrawal of the consent does not affect the registration of the applicant company by the proposed same name.

The petitioner strenuously submitted that there is no bar to use the word ‘Club’ in the Companies Act and also under the Companies (General) Regulations 11 and 12; that Section 70 of the Sports Act, only prohibits the use of the name “Sports Kenya”, “Academy of Sports” or “Kenya Academy of Sports” whereof one would need approval of the sports institutions. Further, the petitioner submitted that Section 46 of the Sports Act provides that a body shall not operate as a ‘sports organization’ unless registered under the Act either as a sports club, county sports association or a national sports association but the word ‘body’ is not defined.

The contentious issue is in the use of the word ‘Club’ in the registration of the proposed name. I have taken time to consider the documents presented by the petitioner to the offices of the 1st respondent to register the proposed name. “Annexure TA-2” being the name search and reservation document indicates the description of the proposed name as:-

“Migori United Football Club is a professional football club serving Migori County...”

In the email dated 24/2/2021, (Annexure - TA-7) the 1st respondent through one Hiram Gachugi addressed the issue of the name ‘Sports Club’. He noted that the name contravened Sections 49, 50 and the Regulations therein of the Companies Act. He further noted that the petitioner in his application, had proposed that their primary business activity would be a ‘Sports Club’. It was again noted that the petitioner in his application submitted that:-

“I have plans to invest private equity capital into developing professional football here in Kenya i.e. Kenyan Premier League...the company will not be competing with any organisation (sic) and the company will not be seeking any funding whatsoever from the Sports Ministry or Kenyan Government or Migori County Government.”

Mr. Hiram Gachugi noted that the intended business being a sports club falls within the sole mandate of the Sports Registrar under Section 46 (2) of the Sports Act, 2013. Mr. Hiram advised the petitioner that for purposes of registering the company, they should propose a

business activity registerable under the Companies Act.

Sections 49 and 50 as read together with Regulations 11 and 12 of the Companies Act set out the criteria which the Registrar of Companies should use before registration of a company. Section 49 (1) (c) provides that the Registrar of Companies may not register a particular name if after taking into consideration the relevant criteria, is of the opinion that the name is undesirable or offensive. The criteria is outlined under Regulation 11 (b) of the Companies Act. For the purposes of this petition, the relevant criteria under the criteria would be:-

“(b) the name suggests an association with, or the patronage of, the State or any of its agencies, unless there are circumstances that justify its use;”

The Sports Act No. 25 of 2013 is an Act of Parliament that was established to **“harness sports for development, encourage and promote drug-free sports and recreation; to provide for the establishment of sports institutions, facilities, administration and management of sports in the country, and for connected purposes.”**

Section 45 establishes the office of the Sports Registrar who is mandated with the task of among others to keep and maintain a register of the registered sports organizations.

Section 46 (1) and (2) of the Sports Act provides for registration of sports organizations as follows: -

A body shall not operate as a sports organization unless it is registered under this Act.

The Registrar shall register sports organization as either-

a sports club;

a county sports association; or

a national sports organization.

The petitioner submitted that in as much as Section 46 of the Sports Act empowers the Sports Registrar to register a sports organization or body, in its regulations, there is no prescribed definition of what form a ‘body’ needs to be prior to its registration as a sports club, national or county sports organization. The petitioner has also submitted that it was erroneous for the 1st respondent to require them to obtain a Letter of No Objection from the Registrar of Sports despite the fact that they were not seeking to register a sports club.

According to the petitioner, the activities of the proposed company would not be limited to operations of sporting activities but includes other diverse activities such as stadium development, hospitality, youth fitness, construction of training and business facilities.

There is no doubt that the petitioner is a passionate international football player having graced the fields both in the national and international arena. His passion led him to the idea of forming a company with the proposed name of ‘Migori United Football Club’ to promote not only sporting activities but also venture into other income generating activities for the benefit of sports. In my view, the proposed name of the body taking up the word ‘Football Club’ changed the trajectory of the company to be incorporated.

The proposed company would have been an entity to undertake sporting activities and at the same time income generating activities. This in my opinion raises queries. For instance, a company which seeks to run hospitality, recreational facilities would have a different tax regime as one which would be tasked with solely promoting sporting activities in the country. In addition, if at all the petitioner was to open hospitality facilities and at the same time seek to conduct some sporting activities in the county, the legal regime of those activities are separate and distinct. It would be a fallacy to expect one business entity to be a **‘one fit all’** body for the different economic activities. Especially in the instant case where there is a particular statute which regulates sporting activities in the country.

Admittedly, the words ‘Football Club’ do not appear in the Sports Act but the prominent name is ‘Sports Club’ which I do not see any difference in their names as they would still serve the same purpose. The Sports Regulation 2016 defines a **‘sports club’** as **“a body registered for the purposes of developing sports and which is affiliated to one or several national or county sports organizations, or a private sports club and includes sports training camps, sport academies and gyms;”** while a **‘sports organization’** is defined as **“a body registered for purposes of promoting sports by whatever name;”**

The definition of a Sports Club is one which is affiliated to one or several sports organizations at the national or county sports organizations or a private sports club. A sports organization is a body registered for purposes of promoting sports by whatever name. The distinction of the two different sports entities under the Act is clear. The petitioner’s application to the 1st respondent was an intention to incorporate a sports club in a private capacity. Section 46 of the Sports Act is clear that the mandate to register a Sports Club lies with the Registrar of Sports. Even if the petitioner wishes to carry out activities outside the ambit of sporting using the vehicle of a limited liability company, it would be mandatory for him to obtain a letter of no objection from the Registrar of Sports to carry out this activities in the name of a Sports Club as he plans to eventually register himself with the Registrar of Sports.

Regulation 11 (b) of the Companies Act states that an undesirable name is one which **“the name suggests an association with, or the patronage of, the State or any of its agencies, unless there are circumstances that justify its use;”** Certainly, the words ‘football club’ under the wordings of Section 46 of the Sports Act are associated with the office of the Sports Registrar which is a state office within the Public Service. I do not fault the 1st respondent in requiring that the petitioner do seek a letter of no objection from the relevant body before registration of its proposed name.

On whether the 1st respondent breached the petitioner's legitimate expectation, the expectation of the petitioner after the proposed name was reserved, after its first rejection, was to be registered as a limited liability company, however they were asked to provide a letter of no objection from the Registrar of Sports. For the reasons I have stated, although the expectation was for the 1st respondent to register the proposed name of the petitioner, there was a duty expected to be conducted on the part of the petitioner to enable the 1st petitioner to complete the registration of the proposed name.

On whether the petitioner's right to fair administrative action was infringed, I have noted the difference in the responses given by the 1st petitioner on 19/2/2021, in which it required that the petitioner avail a letter of no objection for the registration of the proposed company. On the other hand, in its email of 24/4/2021, the 1st respondent's response was a summary rejection of the registration of the petitioner's proposed company name altogether. By making the latter decision, the 1st respondent did not answer the queries made by the petitioner on the production of the letter of no objection as earlier advised. The unilateral decision of rejecting registration of the petitioner's proposed company without giving him audience and an opportunity to be heard, was an infringement of his right to fair administrative action.

Kenya Human Rights Commission & another v Non-Governmental Organizations Co-Ordination Board & another [2018] eKLR it was held that: -

“This Court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.”

Having made the foregoing findings that although the petitioner had a right to register the proposed name as a private entity, he was also under duty to obtain a letter of no objection from the Registrar of Sports who is mandated to regulate sporting activities in the country. On the orders sought, I find that the petition partially succeeds and the petitioner is entitled to the following orders: -

- i. A declaration that the 1st Respondent violated the Petitioner's right to administrative action that is fair, lawful, reasonable and expeditious.**
- ii. A declaration be and is hereby made that the 1st Respondent violated the legitimate interests of the Petitioner for the incorporation of a company upon meeting all requirements in law subject to production of a letter of no objection;**
- iii. An Order of Certiorari be and is hereby issued removing into this court for the purposes of quashing the decision of the 1st Respondent of 24/2/2021 declining to register the proposed company 'Migori United Football Club Limited;**
- iv. An Order of Mandamus be and is hereby issued directing the 1st Respondent to register the proposed company under the name of 'Migori United Football Club Limited' reserved on or about 17/2/2021 subject to the Petitioner obtaining a letter of no objection from the Registrar of Sports within forty five (45) days hereof;**
- v. An Order be and is hereby issued directing the 1st Respondent to register the proposed company being 'Migori United Football Club Limited' as a private limited company subject to the Petitioner obtaining a letter of no objection from the Registrar of Sports;**
- vi. Costs of the petitioner awarded to the Petitioner.**

DATED, SIGNED AND DELIVERED AT MIGORI THIS 31ST DAY OF MARCH, 2022

R. WENDOH

JUDGE

Ruling delivered in the presence of:

Mr. Odero holding brief for Kimaru for the Petitioner.

No appearance for the 1st Respondent.

No appearance for the 2nd Respondent.

Nyauke Court Assistant