REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 355 OF 2019

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE SPORTS DISPUTES TRIBUNAL.....RESPONDENT

AND

ISMAEL CHEGE.....INTERESTED PARTY

EX PARTE APPLICANT:

KENYA VOLLEYBALL FEDERATION

JUDGMENT

Introduction

1. The Kenya Volleyball Federation, which is the *ex parte* Applicant herein, is aggrieved by the decision of the Sports Disputes Tribunal (the Respondent herein) rendered on 17th December 2019, in Sports Disputes Tribunal Cause No. 23 of 2019. The said Tribunal Case was filed by Ismael Chege, who is joined in this suit as an Interested Party, concerning his suspension as National Sports Organising Secretary of the *ex parte* Applicant Federation. The Respondent Tribunal in its decision nullified the Interested Party's suspension by the *ex parte* Applicant, and reinstated him.

2. The *ex parte* Applicant has now moved this Court through a Notice of Motion application dated 21st December 2020, in which it seeks the following substantive orders:

> **a) An order of Certiorari to bring into the Court and quash the Respondent's decision made on 17th December, 2019, nullifying the Interested Party's suspension and to reinstate him as the National Sports Organising Secretary of the Ex-parte Applicant Federation.**
>
> **b) An order of Prohibition to bring into the Court and restraining the Respondent from reinstating the Interested party as the National Sports Organising Secretary of the Ex-parte Applicant Federation.**
>
> **c) That the Respondent to be condemned to bear the costs of this application.**

3. The application is supported by the grounds on its face, and further grounds set out in a statutory statement dated 20th December 2019, and a verifying affidavit sworn on the same date by Charles Nyaberi**,** the Deputy President of the *ex-parte* Applicant's Federation. The Respondent did not respond to the said application. The Interested Party on his part filed a Replying Affidavit sworn on 23rd January, 2020. I will first proceed with a summary of the *ex parte* Applicant's and Interested Party's respective cases, before considering their legal arguments in the determination of the application.

The *ex parte* Applicant's Case

4. The *ex parte* Applicant elucidated that it called for an Annual General Meeting (AGM) to be held on 27th July, 2019, by way a notice

dated 28th June, 2019. That during the AGM, deliberations were held regarding the Interested Party's misconduct in his presence. However, that the issue of the said misconduct was eventually delegated to the *ex parte* Applicant's National Executive Committee for deliberations and further action. The ex parte Applicant explained that under its Constitution, supreme authority is vested in the General Meeting and the powers of executing the decisions of the General Meeting are vested upon the National Executive Committee.

5. Consequently, that the *ex parte* Applicant's National Executive Committee invited the Interested Party for a meeting that was to be held on 12th October, 2019 through a notice given on 4th October, 2019, and among the items for discussion was a review of the matters raised during the previous AGM of 27th July, 2019, under which the issue of the Interested Party's misconduct fell. The National Executive Committee subsequently engaged in deliberations regarding the Interested Party's misconduct during the meeting and laid bare the specific grievances against him, which touched on a wide array of issues, whereby he was given ample opportunity to defend himself and at the end of his defence, he apologized to the National Executive Committee for his wrongdoing.

6. It is contended that based on the Interested Party's admission and after considering his defence, the National Executive Committee elected to suspend the Interested Party through a letter dated 16th October, 2019. However, notwithstanding that the Interested Party was given a fair hearing before the National Executive Committee where he was a member, he went on to challenge his suspension at the Respondent's Tribunal on Petition No. 23 of 2019 on the grounds of fair process. However, the Respondent Tribunal in total disregard to the facts which the Interested Party had not contested went ahead to nullify the Interested Party's suspension on alleged "procedural impropriety" and reinstated him to his position through a decision rendered on 17th December, 2019.

7. The *ex parte* Applicant believes that the Respondent's decision warrants this court's intervention by way of judicial review, on account of unreasonableness, irrationality and bias, for failure to take into account all the relevant considerations it espoused. Specifically, the consideration that the Interested Party had admitted his wrong doing, and that going by the number and nature of accusations levelled against the Interested Party, reinstating him as the Organising Secretary would severely prejudice the operations of the *ex-parte* Applicant Federation and the volleyball sport as a whole.

The Interested Party's Case

8. The Interested Party on his part deponed that the current application is filed pursuant to a decision of one member of the *ex parte* Applicant's National Executive Committee, namely Mr. Charles Nyaberi, and in any event it has been filed outside the time provided under Order 53 Rule 3(1) of the Civil Procedure Rules, 2010. It was also his averment that he did not at any point admit to any wrongdoing, and the dispute before the Respondent was based on the irregular procedure used to hound him out of his position as the National Sports Organizing Secretary of the *ex parte* Applicant. He was also of the view that his reinstatement has not hampered the operations of the *ex parte* Applicant, as the decision by the Respondent was sound and reasonable, and all parties in Petition No. 23 of 2019 were accorded an opportunity to present their cases.

9. The Interested Party's version of events was as follows. That on 12th October, 2019, he attended the *ex parte* Applicant's National Executive Committee meeting, and that during the said meeting a decision was reached to suspend him from his position as the *ex parte* Applicant's National Sports Organizing Secretary. Further, that he challenged the said decision because the charges levelled against him had not been presented to him in advance, and a document containing the said allegations was only presented during the hearing at the Respondent Tribunal, in the *ex parte* Applicant's reply to his petition. he averred that the grievances against him were laid bare on 12th October, 2019 which demonstrates that he had no time to prepare to face the accusations.

10. It was the Interested Party's case that the decision to present charges to him on 12th October, 2019 was in breach of his constitutional rights to fair administrative action, as well as the mandatory provisions of the Fair Administrative Action Act. Further, in his view any disciplinary measures ought to have been taken by the Annual General Meeting, and there is no evidence in form of minutes demonstrating that the issue of his alleged misconduct was delegated to National Executive Committee and even if such delegation took place, his right to fair administrative action could not be extinguished. In addition, that the notice for the meeting of 12th October, 2019 listed the agenda items, and there was no indication whatsoever therein that he would be discussed, and the item on review of the matters of previous Annual General Meeting of 27th July, 2019 could not be termed as sufficient and unambiguous notice of the charges he faced.

11. He was further of the view that it was wrong for Mr. Charles Nyaberi to have sat and voted in a meeting in which the *ex parte* Applicant was suspended as he was one of the complainants. The Interested Party also stated that the *ex parte* Applicant does not give a breakdown of how the National Executive Committee members present voted, or how the allegations against him were proved, as some of the parties against whom he is alleged to have wronged did not attend the disciplinary hearing.

12. The Interested Party further deposed that he did not admit to any wrongdoing during the meeting of the National Executive Committee held on 12th October, 2019, and that in any event the purpose of judicial review proceedings is to look into the decision making process and not the merits of a decision. Similarly, he averred that his presence at the Annual General Meeting of 27th July 2019 or the meeting of 12th October, 2019 is not the issue *per se* but the process used at arriving at the decision to suspend him. The Interested Party further averred that the document setting out charges against him and the letter of suspension have very different accusations against him. In his view, the *ex parte* Applicant's National Executive Committee as constituted on 12th October, 2019 acted as the jury, judge and executioner, and any decision arrived at on that date could not have been fair due to members who were conflicted.

13. Lastly, the Interested Party averred that the document setting out charges against him and the letter of suspension have very different accusations against him. In his view, the *ex parte* Applicant's National Executive Committee as constituted on 12th October, 2019 acted as the jury, judge and executioner, and any decision arrived at on that date could not have been fair due to members who were conflicted.

The Determination

Preliminary Observations

14. The application was canvased by written submissions. Mr. Tollo appearing for the *ex parte* Applicant filed written submissions dated 21st February, 2020, while Mr. Kamwaro appearing for the Interested Party filed written submissions dated 13th March, 2020. A preliminary issue was raised by the Interested Party in its pleadings and submissions on the issue whether the intant Notice of Motion dated 21st January, 2020 should be considered by this Court, in light of the provisions of Order 53 Rule 3(1) of the Civil Procedure Rules, 2010.

15. The Interested Party submitted in this regard that the *ex parte* Applicant was granted leave to file the substantive application on 23rd December, 2019, and the substantive application ought to have been filed within 21 days from the said date. However, that the subject Notice of Motion was filed on 22nd January, 2020. Accordingly, that the said Notice of Motion should be struck out for having been filed outside the time set out under Order 53 Rule 3(1) of the Civil Procedure Rules, 2010, and as the *ex parte* Applicant did not seek leave to file the substantive motion out of time.

16. Order 53 Rule 3(1) provides as follows in this regard:

> **"(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing."**

17. This Court has jurisdiction to enlarge the time stipulated under Order 53 of the Civil Procedure Rules to file a substantive Notice of Motion, as noted by the Court of Appeal in the case of **Wilson Osolo v John Ojiambo Ochola & the Attorney General, CA No. 6 Nairobi of 1995** :

> **"As can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure Rules, the procedure cannot be availed of the extension of time limited by statute, in this case, the Law Reform Act….**
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> **It was a mandatory requirement of Order 53 Rule 3 (1) of the Civil Procedure Rules then (and it is now again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days on 15th February 1985 there was no proper application before the Superior court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules."**

18. Therefore, even if there is no specific provision for enlargement of time in Order 53 Rule 3 of the Civil Procedure Rules, what this court needs to satisfy itself is that there is no demonstrable prejudice caused to the adverse party because of a delay in filing the substantive Notice of Motion, and whether refusal to enlarge time would occasion hardship and result in an injustice to the applicant. This approach is compatible with the objective of this court's inherent jurisdiction to ensure that justice is done to parties, and also with the spirit of the provisions of Article 159(2) of the Constitution that substantive justice shall be administered without undue regard to procedural technicalities.

19. In the present application, leave was granted to the *ex parte* Applicant to commence judicial review proceedings on 23rd December 2019, and the 21 days for filing the substantive application lapsed on 16th January 2020. There was thus a delay of about 5 days in filing the instant Notice of Motion on 22nd January 2020. The Interested Party has however not shown any prejudice it has suffered by the said delay, and has also not made a formal application for striking out of the application on this ground. This Court therefore finds that in the absence of evidence of such prejudice, and given that the Court was also on its Christmas recess during the period of filing, the said delay is excusable. The ex *parte* Applicant's Notice of Motion dated 21st January 2020 is thus deemed to be properly before this Court.

20. At this juncture it is also necessary to point out at the outset that the decision that is under review is that of the Respondent tribunal, and not that of the *ex parte* Applicant. This clarification is being made by the Court for the reason that the parties in their submissions dwelt at great length on the legality of the *ex parte* Applicant's decision to suspend the Interested Party, and particularly the process that was followed. This issue was decided on by the Respondent Tribunal, and can only be re-opened on its merit on an appeal, and not on review.

21. The parameters of judicial review were explained in detail in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** at pages 303 to 304 thus:

> **"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
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> **Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..**
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> **Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority,**

addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."

22. In addition, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveal an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.**

23. This Court as a judicial review court cannot interrogate any of the issues raised as to the merits of the Respondent's decisions, in terms of whether they were the right or wrong decisions. In addition, judicial review does not entail a re-hearing of the merits of a particular case. In judicial review, a court reviews a decision to make sure that the decision-maker acted legally, and followed the correct legal procedures. It is not the function of the court to substitute its own decision for that of the administrator as happens in an appeal.

24. The merit review that can be undertaken by the Court is therefore limited to aspects of the lawfulness of the said decision, as delineated by the grounds set out in section 7(2) of the Fair Administrative Action Act which provides as follows:

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if

(a) the person who made the decision

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant; (f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.

(3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that(a) the administrator is under duty to act in relation to the matter in issue; (b) the action is required to be undertaken within a period specified under such law; (c) the administrator has refused, failed or neglected to take action within the prescribed period.

The Substantive Issues

25. With the above-stated delineation in mind, two substantive issues have been discerned by the Court from the parties' pleadings and arguments as regards the legality of the Respondent's decision. The first is whether the Respondent acted beyond its powers in taking into account requirements of natural justice in its decision. The second is whether the Respondent failed to consider relevant factors raised by the *ex parte* Applicant when making its decision.

On whether the Respondent acted beyond its powers

26. On the first issue, the ex *parte* Applicant argued that in its response before the tribunal, it pleaded that the Interested Party had made an irrevocable admission of misconduct before the National Executive Committee. Further, that the said admission of wrongdoing is what informed the National Executive Committee of the *ex parte* Applicant to suspend the Interested Party for a period of two years. Therefore, that there having been an unequivocal admission of wrongdoing by the Interested Party, the rules of natural justice would therefore not have come to the aid of the Interested Party and the Respondent herein went too far to invoke the same and fault the procedure adopted whilst it was not refuted that the Interested Party had admitted the charges levelled against him.

27. The *ex parte* Applicant therefore submitted that the Respondent went beyond its powers in allowing the Interested Party's petition while disregarding his admission. To buttress his argument, counsel cited the case of **Kenya Revenue Authority v Menginya Salim Murgani Civil Appeal No. 108 of 2009,** where the Court of Appeal held that there is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures, provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed. In counsel's view, that the Respondent went too far by applying the strict procedures whilst disregarding the issue of fairness taking into account the Interested Party's own admission of wrongdoing and offering an apology.

28. Accordingly, it was submitted that the National Executive Committee of the *ex-parte* Applicant has its own rules that govern its processes and it should not be expected that its rules should conform to the procedures that are set down by statutes. Reliance was also placed on the case of **Peris Mbogo v. Kenyatta University [2014] eKLR** where the court held that the *audi alteram partem rule* should not be interpreted to mean a full adversarial hearing.

29. The Interested Party's submissions on the issue were that the fact that *ex parte* Applicant's procedures are not laid down by statute does not remove it from the purview of Article 47 of the Constitution or rules of natural justice. To buttress his argument, the Interested Party cited the decision by the Court of Appeal at Kisumu in **County Assembly of Kisumu & Others vs Kisumu County Assembly Service Board & Others**, **Civil Appeal Nos. 17 & 18 of 2015,** where the court dealt with the issue of due process and held that the right to a fair hearing encapsulated in the *audi alteram partem* rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them, but a constitutional imperative.

30. In determining whether or not the Respondent acted illegally or in error of law, regard is made to the description of illegality by Lord Diplock in **Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410** as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law. In addition, this Court is also guided by the expose on when errors of law will arise in decisions made by a public body, as expounded in **Halsbury's Laws of England, 4th Edition** at paragraph 77 as follows:

"A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power."

31. It is therefore necessary when deciding whether a statutory power or duty has been lawfully exercised or performed, to identify the scope of that power and duty, and which involves construing the legislation that confers the power and duty. In the present application, the powers of the Respondent to hear appeals are found in sections 58 and 59 of the Sports Act which provides for its jurisdiction and powers as follows:

"58. The Tribunal shall determine—

(a) appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including —

(i) appeals against disciplinary decisions;

(ii) appeals against not being selected for a Kenyan team or squad;

(b) other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear; and

(c) appeals from decisions of the Registrar under this Act.

59. The Tribunal may, in determining disputes apply alternative dispute resolution methods for sports disputes and provide expertise and assistance regarding alternative dispute resolution to the parties to a dispute."

32. A reading of the decision by the Respondent shows that in hearing the Interested Party's appeal, it considered the issue of whether the suspension of the Interested party by the *ex parte* Applicant's National Executive Committee was unfair and unlawful. After analysing the processes employed in the said suspension, and applying the provisions of Article 47 of the Constitution and the principles on fair administrative action and natural justice, the Respondent found the suspension to have been tainted with procedural improprieties and therefore irregular and illegal.

33. Although no specific provisions of the Sports Act provides for the manner of hearing appeals by the Respondent Tribunal, the applicable procedure is expressly provided in Article 47 of the Constitution and the Fair Administrative Action Act. It is now a core requirement under Article 47 of the Constitution that every person who is to be affected by a decision must be accorded fair administrative action, and the procedures to be follows are provided by the Fair Administrative Action Act of 2015.

34. Section 2 of the Fair Administrative Action Act, which was enacted to implement Article 47, in this regard defines an administrative action to include—

a) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

b) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

In addition, under section 3, the said Act applies to all state and non-state agencies.

35. Therefore, the provisions of the Act as regards fair action bind not only the Respondent as a quasi-judicial body, but also the sports organisations whose decisions are the subject of appeals before it. The Respondent is therefore required and obliged to ensure that the said provisions are observed by administrative bodies it supervises in exercise of its appellate jurisdiction. In addition, where a statutory provision expressly confers a power or a duty upon a public body, and is silent whether the public body has the power to take associated steps which are necessary for, or incidental to the discharge of its functions, this fact does not mean that the body has no power to take the associated or incidental steps or powers.

36. This is for the reason that it is an established principle of statutory interpretation that where no statutory incidental power is provided for, a public body will usually have an implicit power to do things that may reasonably and fairly be consequential upon, or incidental to its express statutory function, provided that they are necessary to the exercise of the primary function. See in this regard the text by F. Bennion: **Bennion on Statutory Interpretation, 4th Edition**, at section 174. In the case of the Respondent, there is thus an implied power to apply the law that applies to decision making by administrative bodies, when hearing the Interested Party's appeal.

37. It is thus the finding of this Court that the Respondent did not act illegally or outside its powers in applying the requirements of Article 47 of the Constitution and of natural justice in its decision, as it is expressly and implied empowered to do so. Conversely, the Respondent would indeed have erred in law if it did not consider and apply these requirements of the Constitution and the law.

On whether the Respondent failed to consider relevant factors

38. On the second issue as to whether the Respondent failed to take into account relevant considerations, the *ex parte* Applicant submitted that the Respondent did not take into account the relevant matters that informed the decision of the *ex-parte* Applicant to suspend the Interested Party. To this end, it was submitted that the Respondent did not exhibit fairness to the *ex-parte* Applicant by disregarding the issue of admission of wrongdoing by the Interested Party, and only basing its decision on the procedure adopted by invoking rules of natural justice. Further, that procedural fairness is a flexi-principle and there are no rigid or universal rules as to what is needed in order to be procedurally fair, but the content of the duty depends on the particular function and circumstances of the individual case.

39. On its part, the Interested Party submitted that no evidence of his purported admission and apology alluded to by the *ex parte* Applicant has been availed. Furthermore, that the *ex parte* Applicant has not produced the minutes of the meeting held on 12th October, 2019 which would have laid bare what exactly transpired during the impugned meeting.

40. The general rule on this issue as stated in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation (1948) 1 KB 223,** is that a public body when making a decision, must take into account all the factors which the legislation conferring the relevant function expressly or implicitly requires it to have regard. The considerations that are relevant to a public authority's decision are therefore of two

kinds: the mandatory relevant considerations that the statute empowering the authority expressly or impliedly identifies as those that must be taken into account; and the discretionary relevant considerations which the authority may take into account if it regards them as appropriate. The discretionary considerations to be taken into account will also depend on the circumstances of each case.

41. Once a decision-maker determines that a particular consideration is relevant to its decision, the extent to which it will inquire into that factor, and the weight to be attached to the factor, are matters to be decided by the decision-maker, and the courts will not interfere with the decision unless the decision-maker has acted unreasonably. This is consistent with the principle that the courts are generally only concerned with the legality of decisions and not their merits.

42. In the present application, it has already been pointed out by the Court that the Sports Act has no specific requirements as to what factors the Respondent needs to take into account when making its decisions, save for the requirements set out by the Constitution and Fair Administrative Action Act as regards fair administrative action. As regards taking into account relevant considerations, the Fair Administrative Action Act does require a decision to be rational, to the extent that it is connected with the information presented to the decision maker.

43. The *ex parte* Applicant in this respect argues that it did present information that the Interested Party had admitted his wrong doing which was not taken into account by the Respondent. There are two aspects of the *ex parte* Applicant's claim that it needed to prove to succeed. The first is that the evidence of the Interested Party's admission of wrong doing was presented before the Respondent. An admission is defined in the **Black's Law Dictionary, Ninth Edition** at page 53 as "any statement or assertion made by a party to a case, and offered against that party; an acknowledgment that facts are true.

44. The *ex parte* Applicant has not provided any evidence of such a statement or acknowledgment made by the Interested Party as regards the wrongdoing he has done, nor of its presentation to the Respondent. To this extent the *ex parte* Applicant has not discharged it burden of proof as regards the presentation of evidence of such an admission to the Respondent.

45. The second aspect of the *ex parte* Applicant's claim that needs to be proved, is that in the event that evidence of such admission was indeed presented to the Respondent, it has to be shown that the admission was relevant to the issues under consideration by the Respondent. In this respect, the main issue before the Respondent, and on which its decision turned on, was the processes undertaken by the *ex parte* Applicant in suspending the Interested Party. An admission of guilt would only have been relevant in this respect when considering whether the decision to suspend the Interested Party was right or proportionate, in the event that the processes were found to be lawful and fair.

46. The Respondent did specifically find in its decision at paragraph 57 thereof, as follows in this regard :

"Whether the Tribunal should intervene and lower the sentences meted against the Petitioner?

In view of the above finding by this Tribunal, we find that this issue is no longer important and therefore shall not delve into much analysis about it"

47. In effect, the Respondent did make a finding that the culpability of the Interested Party and consequences thereof were not relevant, in light of its findings that the processes undertaken by the *ex parte* Applicant were procedurally unfair and irregular. The *ex parte* Applicant has not disputed the findings of the Respondents as regards the processes that were employed in the Interested Party's suspension, and it is thus my view that the Respondent's decision was a reasonable as it was supported by the evidence before it. This Court will therefore not interfere with the findings by the Respondent.

48. In the premises and arising from the foregoing findings and reasons, the *ex parte* Applicant's Notice of Motion application dated 21st January 2020 is found not to be merited, and is accordingly dismissed.

49. The *ex parte* Applicant shall meet the Interested Party's costs of the said application.

50. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF AUGUST 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's, Respondent's and Interested Party's Advocates on record.

P. NYAMWEYA

JUDGE