



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 499 OF 2016

IN THE MATTER OF ARTICLES 3, 10, 20, 21, 22, 23, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF INTERPRETATION OF THE CONSTITUTION AND ALLEGED

CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER

ARTICLES 27, 28, 35, 36, 47 AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF THE SPORTS ACT 2013 AND MAKING OF A NEW CONSTITUTION

FOR AND REGISTRATION OF ATHLETICS KENYA UNDER SECTIONS 46 AND 49 THEREOF

BETWEEN

MOSES TANUI.....1ST PETITIONER

JULIUS KORIR.....2ND PETITIONER

JULIUS KARIUKI.....3RD PETITIONER

CHRISTOPHER KOSGEL.....4TH PETITIONER

WILSON BOIT.....5TH PETITIONER

SUSAN SIRMA.....6TH PETITIONER

LEAH MALOT.....7TH PETITIONER

NIXON KIPROTICH.....8TH PETITIONER

HOSEA KOGO.....9TH PETITIONER

MARY CHEMWENO.....10TH PETITIONER

AND

ATHLETICS KENYA.....1ST RESPONDENT

Sued as an organization and through its officials

LT. GEN. (RTD) J. K. TUWEI

PAUL MUTWII

MT. DAVID MIANO

CABINET SECRETARY, MINISTRY OF SPORTS,

CULTURE & ARTS.....2ND RESPONDENT

REGISTRAR OF SPORTS.....3RD RESPONDENT

REGISTRAR OF SOCIETIES.....4TH RESPONDENT

HON. ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. Through the amended petition filed on 17th October 2017, the Petitioners herein, who describe themselves as sports people and athletes, and residents of various counties in the Republic of Kenya sued the respondents herein, the governing body for the sport of [athletics \(track and field\)](#) in [Kenya](#), Ministry of Sports, Culture and Arts, Registrar of Sports, Registrar of Societies and the Honourable Attorney General seeking the following orders:

- a) ***THAT a declaration be issued to declare that by dint of Article 36 of the Constitution as read with Section 46 of the Sports Act all athletes including the Petitioners are entitled to be members of the First Respondent in their individual capacity.***
- b) ***THAT a declaration be issued to declare that the constitution of Athletics Kenya – the Athletics Kenya – envisaged by Section 46 of the Sports Act is subject to Article 6 of the Constitution in terms of regional representation/branches.***
- c) ***THAT a declaration be issued to declare that the constitution of Athletics Kenya registered under the Societies Act lapsed on 1st August, 2014 upon the expiry of the one year period prescribed by Section 49(1) of the Sports Act, 2013.***
- d) ***THAT a declaration be issued to declare that by dint of Articles 36 and 81 of the Constitution read with Section 46 of the Sports Act and the Second Schedule thereof the First Respondent is enjoined to consult all the stakeholders in drawing its constitution and have the same adopted and/or ratified through the direct voting of all members.***
- e) ***THAT a declaration be issued to declare that by dint of Articles 36 and 81 of the Constitution read with Sections 46 and 49 of the Sports Act and the Second Schedule thereof the current officials and Executive Committee of the First Respondent are not lawfully in office.***
- f) ***THAT a declaration be issued to declare that by dint of Articles 36 and 81 of the Constitution read with Section 46 and 49 of the Sports Act and the Second Schedule thereof a constitution of the First Respondent made, adopted and/or ratified pursuant to the directive referred to in the First Respondent's advocates' letter dated May 13, 2016 on 27th April, 2016 is illegal, null and void ab initio.***
- g) ***THAT an order of certiorari be issued to bring into this Honourable Court and quash the constitution of the First Respondent amended by members of its Annual General Meeting on 27th April, 2016 purportedly to bring it in harmony with the Sports Act, 2013.***
- h) ***THAT an order of permanent injunction be issued to restrain the First Respondent by its officials, Executive Committee and Annual General Meeting (AGM) from making, adopting ratifying and presenting to the Second Respondent for purposes of registration a new constitution pursuant to the Constitutional Review process referred to in the First Respondent's Advocates' letter dated Friday May 13, 2016.***
- i) ***THAT an order of permanent injunction be issued to restrain the Second Respondent from registering and issuing a registration certificate to the First Respondent on the basis of the Amended Constitution adopted/approved during the Annual General meeting held on 27th April, 2016.***
- j) ***THAT an order of mandatory injunction be issued to compel the officials and Executive Committee Members of the First Respondent to relinquish or otherwise vacate their respective offices by dint of Sections 46 and 49 of the Sports Act, read with Articles 36 and 81 of the Constitution..***
- k) ***THAT an order of mandamus be issued to compel the Second Respondent – Cabinet Secretary, Ministry of Sports, Culture & Arts – to organize election of an interim Executive Committee by all willing athletes and stakeholders in the sports of athletics to***

preside over the recruitment of individual members of Athletics Kenya, making of a new constitution and registration of the organization under Section 46 of the Sports Act.

l) THAT an order of mandatory injunction be issued to compel the First Respondent to make a new constitution to be ratified by direct vote of all members that comply with the Second Schedule of the Sports Act, 2013.

m) THAT a declaration be issued to declare that the constitutional review process undertaken by the First Respondent pursuant to the directive referred to in the First Respondent's advocates' letter dated Friday May 13, 2016 has violated the Petitioners' rights and freedom under Articles 27, 36 and 81 of the Constitution.

n) THAT the Petitioner be paid damages for compensation for violation of their rights under Articles 27, 28, 35, 36, 47 and 50 of the Constitution.

o) THAT the costs of this Petition be borne jointly and severally by the Respondents.

2. The petitioners' case is that following the promulgation of the new Constitution in 2010, Parliament enacted The Sports Act, 2013 (hereinafter "**the Act**") whose main objective is to harness sports for development and that Section 46 of the Act stipulates that a body shall not operate as a sports organization unless it is registered under its provisions and further that Section 46(4) of the said Act provides, *inter-alia*, that a national sport organization shall submit an application for registration accompanied by a certified copy of its constitution which shall contain, as a basic minimum, the provisions set out in the Second Schedule of the Act.

3. The petitioners state that in November 2015, the 1st Respondent began the process of reviewing its constitution in order to comply with the Act which process resulted in an amendment of the said constitution at an AGM held on 27th April, 2016 after which the 3rd Respondent issued the 1st respondent with a Certificate of Registration.

4. The Petitioners challenge the process that was followed in amending the 1st Respondent's Constitution in a meeting that was held on 27th April, 2016 and state that the said process was fundamentally flawed and contravened the Constitution of Kenya and the Act. The Petitioners contend that the flawed process of amending the 1st respondent's violated their fundamental rights and freedoms enshrined in Articles 10, 21, 27, 28, 35, 36, 47 and 50 of the Constitution.

5. Through a Notice of Preliminary Objection dated 17th October 2018, the 1st respondent raised an objection to the petitioners' re-amended petition and listed the following grounds of objection.

1. The re-amended petition related to a dispute founded on the provisions of Sections 46 and 49 of the Sports Act, 2013 relating to the registration of Sports Organization and the transition in exiting Sports Organizations respectively following the enactment of the Sports Act, 2013.

2. The 3rd respondent, the Sports Registrar already certified the 1st respondent Organization as having properly transited as a Sports Organization under Section 49 of the Act. Further, she has also issued the 1st respondent with a certificate of Registration under Section 47 of the Act upon compliance with the provisions of Section 46 of the Act. The said certificate of Registration was based on the amended constitution arising from the 1st respondent's Annual General Meeting held on 27th April, 2016.

3. Questions relating to the constitution of a Sports Organization, its compliance or non-compliance with the Sports Act, its validity for the purposes of registration such as are contained in the present re-amended petition are matters which are governed by the Sports Act under the superintendence of the Sports Registrar.

4. The challenge in the re-amended petition upon the decision and the exercise of the functions of the Registrar of Sports, the 3rd respondent as contained under Section 45 of the Sports Act and Regulation 5 of the Sports Registrar Regulations, 2016, constitutes an appeal against her decision. Such an appeal should, in the first instance, be lodged before the Sports Disputes Tribunal in accordance with the provisions of Section 58(c) of the Sports Act.

5. The matters relating to the challenge on the validity of the 1st respondent Sports Organization's office bearers to hold such office are provided for under Regulation 10 of the Sports Registrar Regulations, 2016 and any person dissatisfied with a decision of the Registrar Sports taken in this regard then appeals against the said decision provided for under Section 58(c) of the Act.

6. By dint of these provisions, therefore, the dispute herein should, in the first instance, be heard before the Sports Disputes Tribunal as it is a challenge to the decision of the Sports Registrar allowing the 1st respondent to transit as a Sports Organization under Section 49 of the Act and also issuing it with a certificate of registration under Section 47 of the Act upon the 1st respondent's compliance with the provisions of Section 46 of the said Act.

7. Further, there are elaborate procedural Rules giving effect to the exercise by the Registrar of Sports of the powers conferred by the Act and the challenge thereto in the Sports Registrar Regulations, 2016 now in force.

8. This court therefore lacks the requisite jurisdiction under the Sports Act, to handle the present dispute in the first instance.

6. The 2nd, 3rd and 5th respondents also filed a Notice of Preliminary Objection to the petition, dated 26th October 2018, in which they listed

the following grounds:

- 1. That the re-amended petition before this Honourable court is a dispute arising from the actions of the 3rd respondent (the Registrar of Sports)**
- 2. That by dint of Section 58 of the Sports Act this Honourable Court lacks the requisite jurisdiction to hear this dispute at first instance as the Sports Act provides that the Sports Disputes Tribunal shall hear appeals from decisions of the Registrar.**
- 3. That by dint of Article 159 of the Constitution of Kenya, this Honourable court has an obligation to promote alternative forms of dispute resolution in the exercise of its judicial authority.**
- 4. That his Honourable court has already pronounced itself that in disputes where there is an alternative dispute resolution mechanism prescribed by statute, the Honourable court ought to suspend its jurisdiction to allow parties exhaust the various dispute resolution mechanisms provided in the relevant statutes.**
- 5. That this Honourable court ought to suspend jurisdiction to determine the dispute raised in the petition, amended petition and re-amended petition and order that parties attend the Sports Disputes Tribunal in line with the provisions of Section 58 and 59 of the Sports Act.**
- 6. That this Honourable Court ought to decline to hear this petition for want of jurisdiction as per the operation of the provisions of the Constitution of Kenya (2010) and Sports Act.**
- 7. That this petition be struck out with costs to the respondents.**

7. This ruling is therefore in respect to the two notices of preliminary objection. At the hearing of the preliminary objection, Mr. Masika, learned counsel for the 1st respondent submitted that considering the uncontested fact that the petitioners main challenge is the legality of the 1st respondent office holders following the amendment of the constitution at the Annual General meeting of 27th April 2016 and the decision by the 3rd respondent to issue a transitional certificate of registration to the 1st respondent, this court lacks jurisdiction to entertain the matter.

8. According to the 1st respondent, the jurisdiction to entertain a petition challenging the decision of the Sports registrar is under Section 58 of the Act vested in the Sports Disputes Tribunal.

9. On her part, Miss Omuom, learned counsel for the 2nd, 3rd and 5th respondents similarly argued that disputes emanating from the decisions of the 3rd respondent under Section 58 of the Act may be arbitrated upon by the Sports Disputes Tribunal.

10. For this argument, counsel cited the decision in the case of **Republic vs NEMA [2011] eKLR** wherein the court held that where there is a statutory remedy, the court should suspend its jurisdiction. Reference was also made to the case of **Narok County Council vs Transmara County Council Civil Appeal No. 25 of 2000** wherein it was observed that the jurisdiction of the High Court can be ousted by an Act of parliament.

11. Mr. Kibe, learned counsel for the petitioners submitted that the process of amending the 1st respondent's constitution did not accord with the provisions of the Constitution of Kenya 2010 and that the petitioners rights under the constitution were violated. Counsel maintained that the dispute contained in the amended petition is a purely constitutional petition.

12. Counsel further submitted that the instant petition is double pronged and that under Article 165(3) of the Constitution, this court has jurisdiction to hear and determine a petition where a party alleges violation of rights as jurisdiction of the Sports Tribunal does not extend to determining questions of violation of constitutional rights.

Determination

13. I have considered the respondent' preliminary objection, the petitioner' response and the submissions presented by the parties' counsel together with the authorities that they cited. The main issue for determination is whether this court is clothed with the jurisdiction to hear and determine the petition herein.

14. It is trite that jurisdiction of a court or a tribunal is derived from the constitution, statute, or by principle laid out in judicial precedent. In **Re the matter of the Independent Electoral and Boundaries Commission** the Supreme Court held

“[29] Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution, by statute and by principle laid out in judicial precedent.”

15. The same position was held in the case of Samuel **Kamau Macharia vs Kenya Commercial Bank & 2 Others [2012] eKLR** where the Supreme Court stated thus:

“[68] A court's jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law...”

16. In the instant case, the respondents contended that under Section 58 of the Act this dispute falls within jurisdiction of the Sports Tribunal while the petitioners maintained that under Article 165(3) of the Constitution the matter falls within the purview of this court. Section 58 of the Sports Act stipulates as follows;

“Jurisdiction of the Tribunal

The tribunal shall determine-

a) Appeals against decisions made by national sports organization or umbrella national sports organizations, whose rules specifically allow for appeal to be made to the Tribunal in relation to that issue including.

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

i. Appeals against disciplinary decisions;

ii. Appeals against not being selected for a Kenyan team or squad;

c) Appeals from decisions of the Registrar under this Act.

17. Article 165(3) (b) and (d) (ii) of the Constitution on the other hand stipulates as follows.

(3) Subject to Clause (5), the High Court shall have-

(b) Jurisdiction to determine the questions whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(d) jurisdiction to hear any question respecting the interpretation of this constitution including the determination of –

(ii) the question whether anything said to be done under the authority of this constitution or of any law is inconsistent with, or in contravention of, this Constitution;

18. A perusal of the amended petition reveals that the petitioners mainly challenge the process that was undertaken in amending the 1st respondent’s constitution and the 3rd respondent’s subsequent decision to issue the 1st respondent with the certificate of registration. Besides the challenge on the process of amendment of the 1st respondent’s constitution, the petitioners also allege that there was violation of the principles and values of the Constitution including the violation of their fundamental rights under Articles 10, 21, 27, 28, 35, 36, 47 and 50 of the Constitution.

19. To my mind therefore, the instant petition is double pronged in the sense that there is a part of it that relates to the challenge of the 3rd respondent’s decision that falls under the purview of the Sports Tribunal and another part that falls under the jurisdiction of this court by dint of the provisions of Article 165(3) (b) and (d) (ii).

20. For the above reasons, one cannot say that this court is completely bereft of the jurisdiction to hear and determine the petition the issue of violation of constitutional rights. I find that whether or not the petitioners will prove that their rights were violated is a matter for the court to determine at the hearing of the petition. I therefore find that the preliminary objection raised on the jurisdiction of this court is unmerited and I therefore dismiss it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 30th day of April 2019.

W. A. OKWANY

JUDGE

In the presence of:

Joba for Kibe for the petitioner

Miss Omuom for Masika for 1st respondent

Miss Omuom for 2nd -4th respondent

Court Assistant - Ali