REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO. 216 OF 2019

BONIFACE AMBANI.....PETITIONER

VERSUS

AFC LEOPARDS SPORTS CLUB.....RESPONDENT

AND

BEN MUSUNDI.....INTERESTED PARTY

RULING

1. The Petitioner, Boniface Ambani, who is the Applicant in the notice of motion dated 4th June, 2019 seeks to stop the election of the office bearers of the Respondent, AFC Leopards Sports Club, slated for 23rd June, 2019.

2. The application is therefore an application for conservatory orders. The law applicable to the issuance of conservatory orders was pronounced by the Supreme Court in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** as follows:-

> **"[86]** ***Conservatory orders*****" bear a more decided** ***public-law*** **connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the** ***public interest.*** **Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the** ***inherent merit of a case*****, bearing in mind the** ***public interest, the constitutional values,*** **and** ***the proportionate magnitudes, and priority levels attributable to the relevant causes.***
>
> **[87] The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:**
>
> ***(i) the appeal or intended appeal is arguable and not frivolous; and that***
>
> ***(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.***
>
> **[88] These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:**
>
> **(iii) that it is** ***in the public interest*** **that the order of stay be granted."**

3. In considering an application for conservatory orders, the court is not required to undertake a deep analysis of the law and the facts. This was stated by Musinga, J (as he then was) in the case of **Centre for Rights and Awareness (CREAW) & 7 others v Attorney General, Nairobi High Court Petition No 16 of 2011** as follows:-

> **"It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner's application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only**

requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

4. The question therefore is whether the Applicant has met the conditions for the grant of the orders sought. Before deciding the said issue, I must, as required of me by the law, dispense with the challenge to the jurisdiction of this court by the Interested Party, Ben Musundi. The need to dispense with the question of jurisdiction was clearly explained by Nyarangi, JA in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** as follows:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

5. Before proceeding to deal with the Interested Party's objection to this court's jurisdiction, I must first acknowledge that this matter falls under the jurisdiction of the Sports Disputes Tribunal ("the Tribunal") established by Section 55 of the Sports Act, 2013. The advocates for the parties herein were, however, all in agreement that at the time this petition was filed the Tribunal had no members hence necessitating this court to exercise its jurisdiction as conferred by Article 165 of the Constitution.

6. I now turn to the Interested Party's claim that this court has no jurisdiction to deal with this matter. The claim is based on Clause 10.0 of the Respondent's Elections By-Laws which provides as follows:-

"10.0 <u>Complaints and Appeals</u>

10.1 All decisions on the application of these rules will be taken by the RO initially. Any complaints by candidates or prospective candidates should be put in writing to the RO immediately who will try to resolve them informally initially.

10.2 If the RO cannot resolve the complaint informally (usually within 3 days of receiving the complaint), the RO will issue a written response to the complaint.

10.3 If the candidate or prospective candidate remains dissatisfied with that response, he or she may appeal to the Election Management Group in writing setting out the grounds of the appeal and why the decision of the RO is considered to be wrong. The written appeal is to be addressed to the Election Management Group c/o the postal or internet address given above and a copy of the RO's response should be attached.

10.4 After making such enquiries as they think fit (provided that, in doing so, they act fairly between the appellant and the RO), the Group will determine the appeal and issue a written decision. The Group's decision will be final. The Group may meet to determine the appeal or may do so by telephone or e-mail. The Group will aim to determine the appeal within 7 days of having received it."

7. It is the Interested Party's case that this court has no jurisdiction to hear and determine the Petitioner's case for failure follow the internal mechanism for resolving disputes in the club.

8. The Petitioner's response to the issue is that the remedy availed by the Elections By-laws is inadequate for requiring him to complain to the Election Management Group ("the Group") whose actions he is challenging.

9. A perusal of the Elections By-Laws shows that rule 2.1 requires the National Executive Committee to appoint a Returning Officer (RO) who will be responsible for conducting an election along with the Group. There is no evidence that a Returning Officer had been appointed by the time the Petitioner's dispute arose. There was therefore no Returning Officer to whom the Petitioner could complain to.

10. According to the By-Laws, the next port of call was the Group. The Petitioner did indeed write to the Group as evidenced by the Group's letter dated 28th May, 2019 in response to the Petitioner's email dated 27th May, 2019. It appears that the Petitioner was not satisfied with the decision of the Group. He cannot therefore be blamed for escalating his issues to this court. He had done all that which could be done in the circumstances of the case and it cannot be said that he failed to follow the process availed by the Constitution of the club. For the reasons stated, I find the Interested Party's assertion that this court has no jurisdiction to be without merit. The objection is therefore dismissed.

11. Does the Petitioner have an arguable case? The Petitioner has not exhibited the email dated 27th May, 2019 which he allegedly wrote to the Group. A copy of the email was, however, annexed to the replying affidavit sworn by the Interested Party on 20th June, 2019. In the said email, the Petitioner was telling the Group that he was a member of the Respondent and was asking to be allowed to pick nomination papers.

12. In a response dated 28th May, 2019, the Group wrote to the Petitioner informing him that the time for raising any complaints had lapsed. Further, that their interpretation of Section 3(1) of the Respondent's Constitution was that a player was the only person who could become a member of the club without paying membership fee. A perusal of the exchanges between the Petitioner and the Respondent therefore confirm that the Petitioner may have an arguable case.

13. The next question is whether the Petitioner will suffer prejudice if the Respondent's elections are not stopped. Counsel for the

Respondent submitted that stopping the elections will occasion financial loss to the Respondent as money has already been expended in preparation for the elections. Counsel also submitted that the term of the Respondent's current office bearers comes to an end on 23rd June, 2019 and the Respondent will remain rudderless if elections are not held. Counsel therefore urged the court to follow the decision of the Court of Appeal in **Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR** where the Court which was faced with a similar situation allowed the holding of elections which the appellant wanted to stop.

14. In response, counsel for the Petitioner submitted that the evidence adduced by the Respondent shows the only money used is for the payment for the election venue and payment to the Independent Electoral & Boundaries Commission for supervision of the election. In his view, the election can be postponed and the money already paid can be applied to the elections at a later date. It was counsel's position that it would be more prejudicial to allow the elections to proceed without remedying the breach of the Petitioner's political rights.

15. In **Nelson Andayi Havi** (supra), the Court of Appeal in declining to stop the elections of the Law Society of Kenya held that:-

> **"Having carefully considered the rival contentions we are not persuaded, in the circumstances of this case, that the holding of the forthcoming elections will negate the applicant's intended appeal, if it ultimately succeeds. Those elections are not immutable; this Court can nullify them if it finds that they were conducted on the basis of an illegal and unconstitutional framework that among other things discriminated against or disenfranchised the applicant and other members of LSK. The applicant will then have an opportunity to contest if it is determined with finality that indeed he is eligible to run for the office of president of LSK. The determination of this Court after hearing the intended appeal will have two possible consequences. If the appeal is dismissed and we have in the meantime stopped the elections, it will mean losses that are not petty cash for a professional society that is financed primarily by members' subscriptions. It will also throw into confusion the prescribed statutory calendar and disrupt or undermine the discharge of critical statutory and national functions vested in LSK such as regulation of the legal profession, resolution of complaints against practitioners, and assisting in the administration of justice and the practice of law in the country. If on the other hand the appeal succeeds, the applicant will have an opportunity to contest in the ensuing bye-election. The primary prejudice that he will suffer is a delay in the realization of his ambition to lead the LSK, which we think can be mitigated or reduced substantially by fast-tracking the hearing and determination of his appeal. In our view that scenario is not synonymous with rendering the appeal nugatory. If he really wished, the applicant could be adequately compensated for any delay that is entailed, by award of damages."**

16. Taking into account the cited decision, I find that allowing the election to proceed will not prejudice the Petitioner as other viable remedies, including nullifying the elections results, will be available to him if his petition succeeds. Stopping the election, will on the other hand occasion financial loss to the Respondent and inconvenience the members who are already prepared to elect their representatives.

17. In the circumstances, I find the notice of motion dated 4th June, 2019 without merit. The application is therefore dismissed.

18. Considering that the application is aimed at supporting the enforcement of democratic ideals in the Respondent's operations, I direct each party to bear own costs.

Dated, Signed and Delivered at Nairobi this 21st day of June, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT