REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 372 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS

BETWEEN

JAMES MWEU MAINGI...APPLICANT

VERSUS

SPORTS REGISTRAR...RESPONDENT

AND

RICHARD OLAKHI...1st INTERESTED PARTY

SEIFUDIN PATWA..2ND INTERESTED PARTY

NATIONAL OLYMPIC COMMITTEE

OF KENYA..3RD INTERESTED PARTY

DR. OCTAVIUS NJUE.....................................4TH INTERESTED PARTY

RULING

The Application

1. The Applicant, James Mweu Maingi states that he is the duly elected Secretary General of the Kenya Rowing and Canoe Association, which is registered under the Socieities Act. He has sued the Sports Registrar, which is a statutory office created under the Sports Act, as the Respondent herein, and also joined several interested parties in this suit. The Applicant, in his Chamber Summons application dated 5th September 2018, is seeking the following orders:

> **(a) The Applicant herein be granted leave to apply for:**
>
> **(i) An order of Certiorari bringing before the Court for purposes of its being quashed, the decision of Respondent signified in his letter to the Applicant dated 27th July 2018.**
>
> **(ii) An order of Prohibition directed at the 1st and 2nd Interested Parties prohibiting them from taking office as the chairman and Secretary Geneal of the Kenya Rowing and Canoe Association respectively.**
>
> **(iii) An order of Prohibition directed to the 3rd Interested Party prohibiting him from recognizing the 1st and 2nd Interested Parties as officials of Kenya Rowing and Canoe Association.**
>
> **(b) Costs.**

2. The application was supported by a statutory statement dated 5th September 2018, a verifying affidavit sworn by the Applicant on the same date, and a supplementary affidavit he swore on 15th January 2019. In summary, the grounds for the application are that on the 7th January 2015 Kenya Rowing and Canoe Association (hereinafter "the Association") held a Special General Meeting where an interim

committee was selected mandated to oversee the activities of Association as per the Constitution, to amend the Association's constitution to be in line with the Sports Act of 2013, and to prepare for an all-inclusive elections within a period of 60 days.

3. That on the 2nd March 2015, the Association held its Annual General Meeting, during which it adopted a new constitution and elected new officials, with the Applicant being elected as the Secretary General, and the returns were duly filed with the Respondent by the Kenya National Sports Council. Further, that on the 29th April 2015, the Respondent wrote to the Applicant informing him that she was in the process of analysing their application.

4. However, that another faction led by the 1st Intersted Party as the Chairman of the Association sought registration with the Respondent, and a legal battle ensued on who e the *bona fide* officials of the Association are. That the Applicant then moved the Sports Disputes Tribunal in SDT Case No. 12 of 2017, and that the Respondent was ordered by the Tribunal to fast track and expedite the registration of the Association, whereupon the Respondent called for an Arbitration Conciliation meeting on 24th January 2018 with a view of merging the two factions of the Association, a move that was opposed by the Applicant.

5. The Applicant contends that on 27th July 2018, the Respondent made a decision to appoint the 1st Interested Party as the Chairman and the 2nd Interested Party as the Secretary General of the Kenya Rowing and Canoe Association, ignoring the fact that none of them was elected during the elections conducted on on 2nd March 2015. Therefore, that unless the orders sought are granted, the 1st and 2nd Interested Party's will illegally take over office to the detriment of the Applicant and members of the Association. The Applicant in his supplementary affidavit averred that an appeal against the Respondent's decision could not be presented to the Sports Disputes Tribunal as it lacks the capacity to quash and or vary the decision, since the jurisdiction to quash the decision of the Sports Registrar is vested with the High Court by way of judicial review

The Response

6. The Respondent filed a replying affidavit sworn on 7th November 2018 by Rose M.N. Wasike, who is the Sports Registrar. The Respondent averred that disputes relating to registration of sports organizations are supposed to be arbitrated upon by the Sports Registrar under section 45(2) (d) of the Sports Act, and that it is pursuant to this power that the Respondent decided to arbitrate between the two factions that submitted two registration applications for the Association, with the intention of merging the two into one organization. Further, that a party that is not satisfied with the Registrar's decision can appeal to the Sports Disputes Tribunal as provided for under sections 59(c) and 58 of the Sports Act, therefore that this appeal should have been filed in the Sports Disputes Tribunal and not the High Court of Kenya.

7. According to the Respondent, the Kenya Rowing and Canoe Federation failed to transit under section 50(1) of the Sports Act, which obliges all sports organizations that were previously registered by the /registrar of Societies under the Societies Act, to make application to the Sports Registrar within one year after commencement of the Sports Act of the purpose of transition and operating legally, and that the transition period lapsed on 1st August 2014. Further, that a body cannot operate as a sports organization unless it registered as such under the Sports Act.

8. The Respondent stated that the Kenya Rowing and Canoe Association embarked on the process of registration as a new organization, and the two factions picked registration forms from its offices. She gave the details of the two factions, and stated that on 29th April, 2015, she wrote to both factions informing them that they did not have *locus standi* since they had submitted two applications, and severally urged them to merge into one organization; a request they failed to adhere to .

9. The Respondent detailed her efforts to arbitrate between the two factions, which culminated in a meeting which the Applicant did not attend. That following disagreement in the said meeting and lack of quorum, the Respondent stated that she exercised the power bestowed upon her under section 45 of the Sports Act to arbitrate between the two factions, and that on 27th July 2018 after perusing the file and hearing the interim officials present, she prepared a conciliatory report that she send to both factions, in which she merged the officials from both factions. Further, that the reasons why she did not put the Applicant among the three officials was because most of his officials had disowned him in writing, and as he was a perpetual complainant hence disrupting the activities of the organisation. The Respondent annexed a copy of the report dated 27th July 2018, and details on the previous court cases by the Applicant.

10. Lastly, the Respondent averred that it is a requirement under the Sports Registrar Regulations 2016 that all new sports organizations carry out elections within three months after registration, and that this implies that once the Rowing and Canoe Federation is registered, all the interim official from the two factions will have a chance to vie for elections and have a chance to be elected by their members, including the Applicant.

The Determination

11. This Court directed that the application for leave be heard and determined *inter partes*, and parties were directed to file their submissions in this regard. The advocates on record for the Applicant, Kisini Mutisya & Co Advocates, filed submissions dated 3rd April 2019; while the Attorney General filed submissions dated 28th February 2019 for the Respondent.

12. The Applicant submitted that section 46 of the Sports Act which provides for the duties and functions of the Respondent does not allow her to handpick officials on behalf of a sports organization, and that the arbitration provided for under section 45(2)(d) of the Act should have been conducted between legitimately elected officials. On rule 25 of the Sports Registrar Regulations of 2016 that provides for appeals from decisions of the Registrar, the Applicant submitted that the Tribunal referred to in the Rules has not been described in the preamble to the Regulations, and should not be implied to refer to the Sports Tribunal. Therefore, that due to this ambiguity, the Applicant is exempted under Section 9(4) of the Fair Administrative Action, as the only remedy available to him is to move the High Court to quash the Respondent's decision.

13. The Respondent on its part submitted that section 58 of the Sports Act states that the Tribunal shall determine inter alia appeals from decisions of the Registrar under the Act, and the Applicant should have filed his appeal with the Sports Tribunal, which he did not. The Respondent relied on the section 9(2) and (3) of the Fair Administrative Action Act and the decisions in **International Centre for Policy and Conflict and 5 others vs the Hon. AG & 4 others, (2013) eKLR** and **Speaker of National Assembly vs Njenga Karume 92008)** 1 **KLR 425**, that the jurisdiction of Courts should not be invoked until the statutory mechanisms for dealing with a dispute have been exhausted. The Respondent also submitted that it properly exercised its arbitration powers under the Act.

14. I have considered the arguments made by the parties on the issue of leave. The applicable law on leave to commence judicial review proceedings is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

> **"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".**

15. The criteria for granting leave which is multifarious. The relevant factors to be considered in the grant of leave can be summarized as the capacity and interests of the applicant, the nature of the applicant's claim, the merit or otherwise of the applicant's claim, and the propriety of judicial review proceedings to resolve the claim. In the present application, the factor that comes to play is whether this Court is the proper forum to hear the Applicant's claim, in light of the provisions of section 58 of the Sports Act which provides as follows for the jurisdiction of the Sports Disputes Tribunal as follows:

> **"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."**

16. In addition, Regulation 25 of the Sports Registrar Regulations provides that a person aggrieved by the decision of the Registrar under the Regulations may appeal to the Tribunal within thirty days from the date of the decision of the Registrar. Therefore, Sections 9(2) (3) and (4) of the Fair Administrative Action Act are applicable to this application. The said provisions state as follows:

> **"(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**
>
> **(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).**
>
> **(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."**

17. Exhaustion of alternative remedies is also now a constitutional imperative under Article 159 (2)(c) of the Constitution, and is exemplified by emerging jurisdiction on the subject, which was initially stated in **Speaker of National Assembly vs Karume (1992) KLR 21** in the following words:

> **"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

18. The doctrine of exhaustion of alternative remedies was further explained by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2**

Others vs Samuel Munga Henry & 1756 Others (2015) eKLR as follows:

> "**It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews….. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."**

19. It is acknowledged that the Courts may, in exceptional circumstances, find that the exhaustion of alternative remedies requirement would not serve the values enshrined in the Constitution or law, and permit the suit to proceed before it, particularly, where dispute resolution mechanism established under an Act is not competent to resolve the issues raised in an application, or where it is not available or accessible to the parties for various demonstrated reasons. This discretion is exercised pursuant to the provisions of section 9(4) of the Fair Administrative Action Act.

20. The approach to be taken by the Courts in this regard was suggested by the Court of Appeal in **R vs National Environmental Management Authority (2011) eKLR** as follows*:*

> **".. in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it…."**

21. On the Applicant's argument that he is so exempted because the Tribunal stated in the Sports Registrar Regulations 2016 is not specified, firstly it is notable that the Regulations are made pursuant to powers provided in this regard under the Sports Act, and the provisions and duties therein can only be interpreted with reference to the Act. Secondly, the said Act defines the Tribunal to means the Sports Disputes Tribunal established under section 55 of the Act, which is the Sports Disputes Tribunal. Lastly, the impugned decision made by the Respondent on 27th July 2018 was made pursuant to powers granted to the Registrar under section 45 of the Act and not under the Sports Registrar Regulations 2016, therefore section 58 of the Act is applicable. In any event, section 58 of the Sports Act does not limit which decisions of the Respondent shall be subjected to appeal, and provides that appeals shall lies from all decisions made by the Respondent under the Act, which includes the regulations made thereunder.

22. The remedy of an appeal to the Sports Disputes Tribunal was therefore available and accessible to the Applicant under section 58 of the Sports Act, and he has not demonstrated any exceptional circumstances that would have exempted him from filing an appeal with the Tribunal. To the extent that this statutory remedy has not been exhausted by the Applicant, the instant application is incompetent and is not properly filed before this Court. In the premises, the Applicant's Chamber Summons application dated 5th September 2018 is accordingly struck out with no order as to costs.

23. Orders accordingly**.**

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF JULY 2019

P. NYAMWEYA

JUDGE