REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HC. CIVIL MISC. APPL. NO. 637 OF 2016

XXCEL AFRICA LIMITED T/A MATHARE UNITED FOOTBALL CLUB (MUFC)....APPLICANT

VERSUS

KENYAN PREMIER LEAGUE LIMITED (KPL).....1ST RESPONDENT

PEVANS EAST AFRICA LIMITED T/A SPORTPESA.....2ND RESPONDENT

RULING

1 The Amended Chamber Summons dated 17th January, 2017 is brought under Articles 23,27,50,159 (2) (c) of the Constitution of Kenya; Section 1A & 1B of the Civil Procedure Act, Chapter 21 of the laws of Kenya; Section 58(b) of the Sports Act, 2013 Laws of Kenya, Section 4 of the Fair Administrative Action Act, Section 12 of the Arbitration Act, Order 46 Rule 20 of the Civil Procedure Rules, Section 13(5)(h) of the Arbitration Act; the inherent powers of the honorable Court and all other enabling provisions of law.

> **"1. That the application herein be certified urgent and heard** *exparte* **in the first instance.**
>
> **2. That the court do issue an order referring the dispute between the parties herein to the Sports Tribunal for determination.**
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> **3. That in the alternative this Honourable Court grant an order referring the dispute to arbitration and authorizing the Chairman of the Chartered Institute of Arbitrators, Kenya to appoint an Arbitrator without delay.**
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> > **3A.That in the interim this Honourable court do issue an order restraining the 1st Respondent from interfering with the shirt sponsorship rights, and the Perimeter Pitch Branding rights of the Applicant to put up billboards of any Sponsor in its capacity as either a Home Team and/or a visiting team during matches organized by the 1st Respondent pending the hearing and determination of this Application.**
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> > **3B.That in the interim this Honourable court do issue an order restraining the 1st Respondent from interfering with the shirt Sponsorship rights and the Perimeter Pitch Branding rights of the Applicant to put up billboards of any Sponsor in its capacity as either a Home Team and/or a Visiting team during matches organized by the 1st Respondent, pending the hearing and determination of the Complaint herein by Arbitration or by the Sports Tribunal**

4. That the costs of this application be awarded to the Applicant as against the Respondents."

2. The application is premised on the grounds stated in it's body and is supported by the supporting affidavit and supplementary affidavit sworn by Robert Munro, the Applicant's Managing Director and Founder/Executive Chairman. It is stated that the Applicant is a registered sports club under the 1st Respondent and is one of the shareholders of the 1st Respondent. That both the Applicant and the 1st Respondent are bound by FIFA rules which obliges all members to resolve disputes out of court and encourages members to explore out of court settlement of disputes through alternative dispute resolution mechanisms.

3. That as a member of the 1st Respondent the Applicant has been entering into individual team sportship agreements with various companies and organizations to enable it run effectively and cater for sports events and uniforms. The Applicant's complaint is in respect of a sponsorship agreement signed on 17th July, 2015 between the 1st and 2nd Respondents concerning the title sponsorship of Kenya Premier League. It is stated that the said agreement gives exclusive sponsorship rights to the 2nd Respondent and its brand, "Sportpesa". It is contended that the said rights belong exclusively to the individual clubs and the same include shirt sponsorship rights, uniform rights and billboard rights. That the rights of the 1st Respondent include sponsorship rights, radio contracts and commercial contracts which contracts should not hinder clubs individual sponsorship rights.

4. It is further stated that in the month of September 2016, the Applicant entered into a sponsorship contract with Ms Betway Ltd for advertising, broadcasting, branding, shirt sponsorship and billboard services. However, when the Applicant erected billboards which included Ms Betway Billboards on the eve of an opening home match slated for 25th September, 2016 at Nyayo Stadium between the Applicant and Posta Rangers, the said billboards were removed by the 1st Respondent's members of staff on allegations that the 2nd Respondent was the only betting partner for the 1st Respondent and that no other betting company was to engage in competition with the 2nd Respondent during the said sporting events. According to the Applicant, the move by the 1st Respondent is unconstitutional and in breach of the competition Act.

5. It is stated that the aggrieved Applicant attempted to have it's complaint heard by the Independent Disciplinary and Complaints Committee of the 1st Respondent. However, the said Committee declined to determine the complaint on grounds that it did not have jurisdiction over the dispute. The Applicant's further attempts to have the Respondents consent to have the complaint lodged with the Sports Tribunal also failed. It is stated that there is no arbitration clause in the Kenya Premier League Constitution and therefore the parties cannot go for arbitration unless the court orders so.

6. The Applicant has further deponed it stands to lose it's team sponsorship contract with Ms. Betway Ltd to the detriment of the club. That due to the pending dispute the 2nd Respondent has since withdrawn its financial support to the 1st Respondent.

7. The application is opposed. The 1st Respondent filed a replying affidavit sworn by Jack Oguda, it's Chief Executive Officer. The 1st Respondent is opposed to the dispute being referred to the Sports Tribunal for adjudication. It is stated that the conditions provided by the law for such a reference have not arisen. It is further stated that the 1st Respondent is also opposed to the dispute being referred to arbitration as the application herein does not disclose any cause of action in that the Applicant has not been candid and withheld fundamental information from the court.

8. It is further stated that the Applicant is one of the shareholders of the 1st Respondent and the managing director and founder/executive chairman of the Applicant, Bob Munro is also a director of the 1st Respondent. That all members of the 1st Respondent are enjoined by it's constitution to facilitate the 1st Respondent to fulfill it's commercial contracts pertaining to broadcasting and title sponsorship and not to infringe on the exclusives rights between the 1st Respondent and the title sponsor. That the clubs are

allowed to have shirt sponsorship contracts with a 3rd party but without interfering with the rights of the title sponsorship contract.

9. It is stated that the 1st Respondent has a title sponsorship contract with the 2nd Respondent. That under the category of sports betting of the said agreement the 2nd Respondent is granted exclusive rights and therefore the 1st Respondent is barred from associating with any of the 2nd Respondent's competitors. That Ms. Betway Ltd is a competitor of the 2nd Respondent. That the contract between Ms. Betway Ltd and the Applicant was not approved by the 1st Respondent as per the policies of the 1st Respondent. That the Applicant's attempts to put up the billboards in question without the approval of the 1st Respondent or 2nd Respondent was a violation of the 1st Respondent's policies. That in any event where conflicts of interest arise between the title sponsors and team sponsors, the same are resolved by the governing council of the 1st Respondent. It is further averred that the sponsorship agreement between Ms. Betway Ltd and the Applicant has not been produced for the 1st Respondent to interrogate it's meaning and purport.

10. The 1st Respondent filed a preliminary objection on the grounds that the entire suit as stated in the application discloses no cause of action.

11. The 2nd Respondent also filed a preliminary objection to the application on the following grounds.

> **"1.That the Honourable court lacks jurisdiction to hear and determine this application as the prayers sought are not capable of being granted.**
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> **2. That this application is incompetent and unmeritorious by virtue of the provisions of the Law of Contracts Act, The Arbitration Act and the sports Act.**
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> **3. That there is neither a contract nor a "sports related" dispute between the Applicant and the 2nd Respondent to warrant a reference to the Sports Tribunal.**
>
> **4.That there is no arbitration agreement between the Applicant and the 2nd Respondent to warrant reference to arbitration.**
>
> **5. The complaint does not raise any question meriting a hearing by the Honourable court and ought to be struck out with costs."**

12. The 2nd Respondent also filed a replying affidavit sworn by it's Chief Executive Officer, Captain Ronald Karauri. It is stated that the suit against the 2nd Respondent amounts to a misjoinder as the alleged cause of action arose out of a contractual relationship between the Applicant and the 1st Respondent. That the 2nd Respondent was not involved in the purported removal of the Applicants billboards. That the sponsorship agreement dated 17th July, 2015 was executed with the consent of the 1st Respondent's Governing Council which comprises of the Applicant and other football clubs participating in the Kenya Premier League. It is further stated that the Applicant never objected to the provisions of the said agreement and continued participating in the league and consistently received money from the 1st Respondent further to the agreement in question until September, 2016.

13. The 2nd Respondent's contention is that neither the Sports Tribunal nor the Independent Disciplinary and Complaints Committee have the jurisdiction to determine the dispute herein. It is further stated that the dispute cannot be referred to Arbitration as the formal requirements for such a referral have not been met. According to the 2nd Respondent, the 1st Respondent being members of Football Kenya Federation (FKF), the dispute can be lodged with the Arbitration Tribunal created under Article 66(1) of the Football Kenya Federation Constitution.

14. It is the 2nd Respondent's further contention that the sponsorship agreement complained of does not hider competition in the sports market as the 1st Respondent has the power to grant exclusive title sponsorship rights in exchange for sponsorship by the 2nd Respondent.

15. The application was argued by way of written submissions which were also highlighted before me. I am grateful to the counsels for the respective parties herein for the erudite submissions and the authorities relied on.

16. I will first deal with the preliminary objections raised. As stated by the Court of Appeal in the case of **Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited [1989] KLR 1**:

> **"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."**

17. The Applicant complains about the exclusivity clause between the 1st and 2nd Respondent which he states violates it's rights under the constitution of the 1st Respondent. This is a valid complaint which calls for examination of evidence. As stated by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) Ea 696**. At page 700:

> "…**a 'preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."**

18. What is before the court is a miscellaneous application that seeks to have the dispute between the parties referred to the Sports Tribunal or to Arbitration. The forum that will determine the dispute will therefore determine whether the Applicant has a cause of action or not. This court is not at this stage looking at the merits or otherwise of the complaint.

19. On whether the dispute between the parties herein should be referred to the Sports Tribunal for determination, both parties in their arguments have referred to Section 58 of the Sports Act. The said Section 58 provides for the jurisdiction of the Sports Tribunal as follows:

> **"The Tribunal shall determine**
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> **(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-**
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> **(i) appeals against disciplinary decisions;**
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> **(i) 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."**

20. It is common ground that the 1st and 2nd Respondents have not consented to have this matter referred to the Sports Tribunal. Consequently, the dispute does not fall within the ambit of Section 58 of the Sports Act. This court cannot confer jurisdiction on the Sports Tribunal. In this regard my position is fortified by the decision of the Supreme Court in the case of **Samuel Kamau Macharia & another v**

Kenya Commercial Bank & 2 others [2012] eKLR:

> **"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 to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

In the case at hand, the legislature through the Sports Act has provided for the jurisdiction of the Sports Tribunal.

21. It has been argued by the Respondents' side that the dispute herein is not sports related. Section 2 of the Sports Act defines a Sport as follows:

> **"Sport" includes all forms of physical or mental activity which, through casual or organized participation, or through training activities, aims at expressing or improving physical and mental well-being, forming social relationships or obtaining results in competition at all levels, and includes any other activity as the Cabinet Secretary may, from time to time and after consultation with the technical department responsible for sports, prescribe."**

22. The dispute herein revolves around the sponsorship agreement between the 1st and 2nd Respondents which seems to confer some exclusive rights on the 2nd Respondent. According to the Applicant, the said agreement violates the 1st Respondent's Constitution and bars the Applicant from enjoying the benefits of it's team sponsorship agreement with Ms. Betway Ltd, a competitor of the 2nd Respondent. From the material before this court, it is evident that the teams rely on sponsorships to fund their events and to purchase the uniforms. *Prima facie*, the dispute is sports related as it directly impacts on the actual sporting activities

23. Turning to the question whether the court can refer the dispute to Arbitration, it is apparent that the parties have not agreed to refer the matter to arbitration. Section 6(1) of the Arbitration Act provides as follows:

> **"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when the party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds**
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> **(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or**
>
> **(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."**

24. The dispute must therefore be the subject of an arbitration agreement or the parties consent to arbitration. In this regard I am persuaded by the case of **Kenya Pipeline Company Limited v**

Kenolkobil Limited [2013] eKLR where Justice J. Kamau stated as follows:

> **"31. I must point out that a plain reading of Article 159 of the Constitution of Kenya, 2010 requires the court to promote settlement of disputes by way of alternative dispute resolution. That may be so but such referral must be by the consent of the parties because of the very nature of the resolution methods. It is for that reason that the Constitution uses the words "promote" and not "shall refer to" alternative dispute resolution.**
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> **32. Under Order 46 Rule 1 of the Civil Procedure Rules, 2010 which deals with arbitration under an order of the court and other alternative dispute resolution, duty is bestowed upon the parties in a suit pending in court for determination to apply to have the matter referred to arbitration. The said Order stipulates as follows:-**
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> **"Where is any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference."**
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> **33. Order 46 Rule 20 (1) of the said Rules provides that:-**

"Nothing under this order may be construed as precluding the court from adopting and implementing, of its or at the request of the parties, any other appropriate means of dispute resolution (including mediation)...."

34. It is clear that it is only where other methods of alternative dispute resolution are concerned that the court can on its own motion, refer a matter under such methods. On the other hand, referral of a matter to arbitration that is in court must be by the consent of the parties. If the court had the power to refer matters pending in court for arbitration *suo moto,* nothing would have been easier than for the drafters of the legislation to have explicitly stated so.

35 For the simple reason that arbitration is a consensual process, it therefore obtains that unless the parties in this matter consent to proceed for arbitration under Order 46 of the Civil Procedure Rules, 2010, they have no option but to submit themselves to the jurisdiction of this court until the very end of the proceedings."

25. In the case of **Martin Otieno Okwach & Charles Ongondo Were T/a Victoria Clearing Services v Kenya Post Office Savings Bank [2014] eKLR** the court held as follows:

> **"26. Unless, parties consent to have the matter referred to arbitration under Order 46 Rule (1) of the Civil Procedure Rules, 2010, they are firmly stuck in the court system. Indeed, while Article 165 of the Constitution of Kenya, 2010 gives the High Court supervisory jurisdiction over any person, body or authority exercising a judicial and quasi-judicial function to ensure the administration of justice, such authority can only be exercised within the parameters of Section 10 of the Arbitration Act which provides as follows:-**
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> **"Except as provided in this Act, no court shall intervene in matters governed by this Act."**

26. Prayer No 3A of the application seeks interim orders pending the hearing and determination of the application. This prayer has been overtaken by events. The said prayer was not granted when the application was heard *exparte* in the first instance. This court also ruled when the case come up tor hearing inter-partes on 18th February, 2017 that now that the matter was already being heard *inter-partes*, the best the court could do was to expedite the hearing of the application and deliver its ruling.

27.On whether interim orders can issue pending the hearing and determination of the dispute by the Sports Tribunal or through Arbitration, this court has already expressed it's views herein above in respect of the jurisdiction of the said two forums.

28. I will now consider the merits of the prayers for the injunctive orders sought. The principles applicable were well settled in the case of **Giella v Cassman Brown & Co. (1973) Ea.** To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss would be suffered and if in doubt, the court will decide on a balance of convenience.

29. *Prima facie*, as per the holding of this court hereinabove, the Applicant seems to have a valid complaint concerning the interpretation of the constitution of the 1st Respondent and the rights of the Applicant vis-à-vis the rights of the 1st Respondent under the said constitution.

As stated by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**:

> **".....a prima facie case" I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

30. The Applicant's complaint revolves around the sponsorship rights. In the circumstances of this case I understand the said rights to mean advertisement rights during the football matches organized by the 1st Respondent. Specifically the restraining orders sought relate to the removal of the billboards and banners of Ms. Betway Ltd during the football matches in question. It is noteworthy that Ms. Betway Ltd has not been demonstrated to be the Applicant's only sponsor. It has also not been shown that the Applicant's activities would come to a standstill if Ms. Betway Ltd does not advertise during the Applicant's matches. In other words, there is no damage that will be occasioned to the Applicant that cannot be compensated in monetary terms.

31. The Applicant, Ms. Betway Ltd and the 1st Respondent and "Sportpesa" are competing for the same advertising rights during the matches organized by the 1st Respondent. The Applicant's have not exhibited a copy of the agreement with Ms. Betway Ltd. At this stage of the dispute, the balance of convenience does not favour the Applicant. The billboards/posters of Ms. Betway Ltd have already been pulled down. Any order made at this stage regarding the erecting of the said billboards/posters again would amount to orders of mandatory injunction. In any event it is not clear at this point of the case as to which party is entitled to the said advertising rights.

32. The Applicant has come to the High Court because of what seems to be a lacuna in the Sports Act in respect of sports disputes where the parties in the dispute fail to agree to refer the dispute to the Sports Tribunal. There is also no agreement for the dispute to be referred to arbitration. The Applicant has also exhibited herein a letter from the Independent Disciplinary and Complaints Committee which shows the Committee declined to hear the dispute on the grounds that it had no jurisdiction. Other forums alluded to by the Respondents as capable of determining the dispute include the Football Kenya Federation Arbitration Tribunal established under the Football Kenya Federation constitution. The view of this court is that if indeed there is no body with the jurisdiction to hear the dispute and the parties to the dispute herein cannot agree to have the dispute determined by any of the other forums, there is no Lacuna in the law. The dispute can be instituted in the High Court. As stated in the case of **Portia Mutema Robinson v Senior Resident Magistrate Children's Court Nairobi [2007] eKLR** wherein it was stated:

> **"...Parties cannot be locked out of the seat of justice just because of such lacuna in the law. The court has an inherent jurisdiction to do justice in situations that call for it where the law is silent....."**

33. This court is also in agreement with the decision in **Football Kenya Federation v Kenyan Premier League Limited & 4 others [2015] eKLR**:

> **"Clearly, there is no express provision ousting the jurisdiction of the High Court from entertaining the dispute herein.... that jurisdiction of this court is conferred by the**

Constitution and enacted statutes and therefore only the Constitution or statute can limit such jurisdiction, not by parties to a suit or bodies' constitutions....that the High Court has supervisory jurisdiction over the subordinate courts and over any person or body or authority exercising a judicial or quasi-judicial function and such supervisory jurisdiction extend to calling for records of those subordinate courts, bodies or authorities and making any order or giving any direction it considers appropriate to ensure the fair administration of justice....What that means is that subordinate courts, bodies, tribunals or authorities cannot limit the jurisdiction of the High Court and neither can they clothe it with jurisdiction which the Constitution or statute has limited."

34. With the foregoing, the upshot is that the application is dismissed with costs.

Date, signed and delivered at Nairobi this 24th day of March, 2017

B. THURANIRA JADEN

JUDGE