



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JR APPLICATION NO. 433 OF 2017

**IN THE MATTER OF LAW REFORM ACT SECTION 8 AND 9 CHAPTER 26 LAWS OF
KENYA**

AND

IN THE MATTER OF ARTICLE 22 & 50, OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF NOTICE TO CHARGE BY ANTI-DOPING AGENCY OF KENYA–
ADAK**

AND

IN THE MATTER OF INQUIRY NOTICE BY IAAF ETHICS BOARD

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

ANTI-DOPING AGENCY.....1ST RESPONDENT

SHARAD RAO.....2ND RESPONDENT

EX PARTE.....MICHAEL ROTICH

RULING

1. In these proceedings the applicant herein complains that until recently he was a member of the Athletics Kenya, North Rift Region and Team Manager at the 2016 concluded Rio Olympics in Brazil. However, half through the Olympics event he was recalled and deported back to Kenya, allegedly accused of aiding doping after a video clip was aired and reported by international media houses emerged.
2. The applicant disclosed that upon arrival at the Jomo Kenyatta International Airport JKIA on 9th

August 2016 he was arrested and detained at JKIA Police Station and later arraigned at Magistrate's Court in Milimani where the Court ordered the police to detain him for a period of 28 days at Gigiri Police Station. Upon his appeal against the said ruling, the lower court decision was set aside and he was released on a cash bail of Kshs 200,000/= which he paid.

3. It was averred that the said criminal case being case number 2622/2016 wherein he was charged with doping related offences contrary to the **Anti-Doping Act** and other related laws is ongoing and that he was also summoned severally at the Criminal Investigation Directorate (CID) headquarters where he recorded statements before the CID Anti-Narcotics Unit and also 1st Respondents officers.

4. According to the applicant, the 1st Respondent intends to charge him in the Sports Disputes Tribunal based on the similar facts as in the lower court case No. 2633/2016 yet the 1st Respondent worked closely with the CID Anti-Narcotics Unit during his detention, arrest and arraignment in court including also statement recording at the CID offices represented by one Eddied Nyoro. The applicant averred that the IAAF Ethics Board vide letter dated 8/4/2017 appointed the 2nd Respondent as their the lead investigator whom through a letter dated 25/4/2017 addressed to the applicant indicated his intention to commence speedy inquiry/investigation based on similar facts as the one for the 1st Respondent and the Lower Court.

5. It was the applicant's case that both investigations, charge and inquiry by the 1st and 2nd Respondents are based on the same video footage aired and published in Sunday Times on which the lower case No. 2622 of 2016 is similarly based.

6. It was the applicant's case that unless this honourable Court grants the orders sought his constitutional rights will be violated mainly because, he shall be subjected to various interrogations and or investigations based solely on a publication that he has already been questioned, interrogated and subsequently recorded statement with the CID in presence of the 1st Respondent. In his view, it will be against natural justice for him to be subjected to three parallel-running concurrently-judicial and quasi-judicial investigations.

7. Before the application could be heard, the Respondent raised the following preliminary objections which are the subject of this ruling.

8. The main issue for determination is whether this Court has jurisdiction to entertain these proceedings.

9. According to the Respondents, the applicant being a Sports Support Personnel and a member of Athletics Kenya is subject to the **Sports Act** and **Anti-doping Act**. It was submitted by **Mr Omariba** learned counsel for the 1st Respondent that under section 58 of the **Sports Act**, the right of appeal against decisions of national sports organisations is conferred upon the Sports Disputes Tribunal while section 31 of the **Antidoping Act** provides that all violations be heard and determined by the same Tribunal while appeals therefrom lie to the same Tribunal.

10. It was submitted that where jurisdiction is conferred upon specialised tribunals, such remedy ought to be exhausted first. It was submitted that in this case the applicant has indicated that he has been charged with a criminal case yet the alleged matter was just a miscellaneous application to enable investigations to be conducted.

11. According to learned counsel the charged filed before the Tribunal seeks to enforce ethical parts of the anti-doping and cannot forestall the criminal proceedings. The Court was therefore urged to refer the matter back to the Tribunal pursuant to Article 159 of the Constitution.

12. On his behalf **Mr Wachira**, learned counsel for the 2nd Respondent submitted that the 2nd Respondent was appointed as investigator by the IAAF to conduct investigations and the applicant was explained to his right to challenge the suspension but the applicant did not respond. It was contended that there is a procedure to be followed once a member is suspended hence the applicant should subject himself to the process.

13. In opposing the objections the applicant insisted that this Court has jurisdiction pursuant to Article 165 of the Constitution and that the Tribunal falls within the category of bodies under the supervision of the Court.

14. It was submitted that the matters the subject of these proceedings do not fall within the jurisdiction of the Tribunal as donated by section 58 of the *Sports Act* since the Tribunal is deprived of jurisdiction unless parties refer the same.

15. With respect to section 31 of the *Anti-doping Act*, it was submitted that the same in section 31.

16. I have considered the issues raised herein. Section 58 of the *Sports Act* provides 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.

17. It is clear that all decisions made by national sports organizations or umbrella national sports organizations are to be referred to the Sports Tribunal and the matter specifically mentioned under that section are just examples.

18. Similarly section 31(1) of the *Antidoping Act* provides that The

Tribunal shall have jurisdiction to hear and determine all cases on antidoping rule violations on the part of athletes and athlete support personnel and matters of compliance of sports organisations

19. As was held by Mohammed Ibrahim, JA in Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others [2014] eKLR:

“A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court”.

20. I have considered the issues raised herein and it is my view that the applicant’s complaints can be determined by the Sports Tribunal since it is clear that the criminal matter relied upon is merely a miscellaneous application.

21. Section 9(2), (3) and (4) of the *Fair Administrative Action Act*, No. 4 of 2015 provides:

(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.

22. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies.

23. Similarly in **International Centre for Policy and Conflict and 5 others-vs- The Hon. Attorney-General & 4 others [2013] eKLR** the Court recognized the need to let relevant statutory bodies deal with matter within their mandate fully before interfering in manner sought in these proceedings by holding that a Court of law:

“...must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act...Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted...”

24. In the premises I find that this Court ought not to entertain these proceedings which I hereby strike out with costs to the Respondents.

25. It is so ordered.

Dated at Nairobi this 4th day of August, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Sisule for Mr Omariba for the 1st Respondent

CA Mwangi