



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 59 OF 2017

In the matter of the Constitution of the Republic of Kenya

In the matter of Articles 10, 22, 23, 43, 47, 48, 50, 55, 159, 161, 165 and 259 of the Constitution of the Republic of Kenya

In the matter of Rules 10, 11, 23 and 24 of the constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules

In the matter of the Sports Tribunal

BETWEEN

SAM NYAMWEYA.....PETITIONER

AND

SPORTS DISPUTES TRIBUNAL.....1ST RESPONDENT

NICK MWENDWA & ROBERT MUTHOMI BEING SUED AS

REPRESENTATIVES OF FOOTBALL KENYA FEDERATION.....2ND RESPONDENT

KENYA PREMIER LEAGUE.....3RD RESPONDENT

JUDGEMENT

The Petitioners case

1. The petitioner accuses the second Respondent of passing club licensing regulations without the participation of members and stakeholders in breach of the principles of natural justice and violating FIFA and confederation of African Football (CAF) club licensing guidelines.

2. He avers that such unilateral actions will bring chaos and disunity to the Kenya Football and degrade the extensive strides that have been accomplished and may cause a total ban on Kenya Football by FIFA to the detriment of the whole country, which may cause Kenya to miss out hosting the Continental African Nations Championships (CHAN) 2018 competition to the detriment of millions of fans around

the country and the national team unless the issues are resolved.

3. The petitioner further states that:- **(a)** the Football Kenya Federation and the Kenyan Premier League mutually agreed upon a 16 team league beginning 2006/2007 season in line with the recommendations of FIFA; **(b)** that the Football Kenya Federation and the Kenyan Premier League agreed on an MOU that was approved by FIFA which recommended that the top tier Kenyan Premier League should maintain the size of 16 teams; **(c)** that the second and third Respondents executed the FKL-KPL Agreement on September 24, 2015; **(d)** that the Sports Dispute Tribunal on 10th January 2017 declared the said agreement as binding.

4. The petitioner avers contrary to the said agreement, the second Respondent unilaterally expanded the Kenya League to 18 teams starting 2017, which may lead to wrangles and cause Kenya to be banned from international football by FIFA contrary public interest.

5. Also, the petitioner further avers that on 14th October 2016, the first Respondent granted interim orders in petition number **41** of 2016 restraining the second Respondent from interfering with the third Respondent's affairs and discussing expansion of the league and further that on 15th October 2016, the second Respondent's annual General meeting discussed and approved club licensing regulations which bordered on expansion of the league in clear contempt of the said Orders.

6. The petitioner maintains that the club licensing regulations are against Article 3 of the Confederation of African Football (CAF) club licensing guidelines and FIFA club licensing guidelines and more so the FIFA principle of promotion and relegation under sporting integrity which provides that a club entitlement to take part in a domestic league shall depend principally on sporting merit.

Respondents' Responses

7. The first Respondent states inter alia that the petition discloses no constitutional issues, that it is an attack on the first Respondents decision rendered on 10th January 2017 in which the petitioner was not a party, and that section 59 of the Sports Act allows the first Respondent to apply alternative dispute resolution methods and that the disputes relating to the Club Licensing Regulations are already before the first Respondent being the forum selected by the aggrieved parties and that the petitioner has not demonstrated how he is personally affected by the regulations in question.

8. Robert Muthomi in his Replying Affidavit filed on 31st March 2017 avers that the above agreement ought not to concern the petitioner, that the Annual General Meeting is the supreme decision making body of FKF and in a meeting held on 15th October 2016, it unanimously voted for adoption of the Regulation of intermediaries, Club Licensing Regulations, hence stake holders in the football fraternity were involved in the formulation and adoption of the Club Licensing Regulations.

9. He also avers that the agenda touching on the dispute pending before the tribunal was not discussed, that that the FKF was mandated to conduct 2017 Club Licensing prior to start of 2017 football season and that all the KPL and NSL teams submitted their application to FKF Club Licensing Committee by the set deadline and that all the clubs listed in paragraph 25 of the affidavit qualified save for the three listed in paragraph 27 thereof. Aggrieved by the said decisions, the said clubs preferred appeals to the FKF Committee and a re-evaluation was done and all scored below 50%, hence they did not qualify, but two clubs, namely, SOFAPAKA FC and MUHORONI Youth FC successfully appealed against the said decision. Thus, the matter is now res judicata having been determined by a competent judicial body.

10. Nick Mwendwa, in his Replying affidavit on 9th June 2017 avers inter alia that owing to the turbulent history of the Kenyan Football, the second Respondent and the third Respondent entered into a memorandum of understanding on 24th September 2015 which agreement was approved by FIFA, that the agreement was entered into voluntarily the terms of which were inter alia each party undertook to perform certain duties and obligations, and that the said agreement still remains valid and binding, hence enforceable between the parties. He avers that the first Respondents decision is illegal and violates the

constitution and supported the reliefs sought in the petition.

11. In a supplementary affidavit filed on 14th May 2017, the petitioner avers inter alia that on 10th January 2017 the tribunal restrained the second Respondent from interfering with the third Respondent to run the KPL but the second Respondent has continued to disregard the orders and further the second Respondent has violated guidelines for promotion and undermined the agreement and continued to issue unilateral decisions in the print media, which conduct has led to 50% loss of revenue for the clubs and have also lost their broadcasting sponsor.

12. In an Replying affidavit sworn by Jack Ogunda, the Chief Executive Officer of the third Respondent avers that the agreement in question is binding and that no changes could be made to the agreement without following the laid down procedure and that any act or omission committed in the course of running the league affects many players.

13. He also avers that principles laid down in article 10 of the constitution binds all and that fair administrative action binds all persons exercising administrative authority. He also averred that the club licensing regulations purportedly promulgated by the second respondent do not meet the constitutional threshold on account of absence of public participation. He further supported the reliefs sought in the petition on grounds that they would enhance stability, efficiency and smoothness in the management of football and ensure that fundamental Rights and Freedoms are not infringed.

Submissions

14. Counsel for the petitioner submitted that there exists a valid agreement as correctly held by the tribunal, that the first Respondents acts are illegal, ultra vires, null and void, that it breached the principles of Fair Administrative Action Act and a violation to the right to earn a living and urged the court to issue the reliefs sought.

15. He also submitted that the agreement dated 24th September 2015 is legally binding and enforceable, that a court cannot re-write an agreement,^[1] and that the CAF and FIFA Rules govern the dispute between the parties. He also submitted that the club licensing Rules made by the second Respondent and subsequent relegations are null and void and urged the court to so hold. Counsel placed the blame on the third Respondent and urged the court to grant the reliefs sought in the petition save that the costs be paid by the third respondent.

16. The third Respondent submitted that the agreement dated 24th September 2015 is binding, that the CAF and FIFA rules govern the dispute between the parties, and that the rules made by the second Respondent and subsequent relegation are null and void and that the second Respondent is liable and urged the court to grant the reliefs sought save for costs to be borne by the second respondent.

Analysis of the facts, issues, law and determination

17. From the above diametrically opposed positionS taken by the parties, the following issues distill themselves for determination, namely, **(a)** whether the proper procedure was followed in the purported changing of the agreement in question; **(b)** whether the second Respondents violated the principles and values enshrined in article 10 of the constitution and **(c)** whether the petitioners have proved their case to the required standard, **(d)** and if so, what are the appropriate reliefs to be granted in this petition.

18. Article **10 (1)** of the constitution provides that "The national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them— *(a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.*

19. Sub-article **(2) (a)** and **(c)** provides that "The national values and principles of governance include— **(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (c) good governance, integrity, transparency and accountability.**

20. Article **10** of the Constitution expressly provides that public participation is one of the national values and principles of governance that bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. As was appreciated by the majority **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate:-**[\[2\]](#)

“Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.”

21. The South African Constitutional Court in *Doctors for Life International vs. The Speaker of the National Assembly & Others*[\[3\]](#) held that:-

“The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “(a) taking part with others (in an action or matter);...the active involvement of members of a community or organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something...it is clear and I must state so, that it is impossible to define the forms of facilitating appropriate degree of public participation. To my mind, so long as members of the public are accorded a reasonable opportunity to know about the issues at hand and make known their contribution and say on such issues, then it is possible to say that there was public participation.”

22. **Sachs, J.** in the South African case of the **Minister of Health vs. New Clicks South Africa (Pty) Ltd:-**[\[4\]](#) observed:-

“..... What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.” [Emphasis supplied]

23. In *Robert N. Gakuru & Others vs. Governor, Kiambu County* [\[5\]](#) it was held that:-

“...Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively.”

24. The essence of public participation was captured in the case of *Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 Others*,[\[6\]](#) in the following terms:-

“...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.”

25. In the Matter of the Mui Coal Basin Local Community^[7] a three-judge bench of the High Court considered relevant case law, international law and comparative jurisprudence on public participation and culled the following practical elements or principles which both the Court and public agencies can utilize to gauge whether the obligation to facilitate public participation has been reached in a given case:-

a) **First**, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

b) **Second**, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.

c) **Third**, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See **Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya** (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

d) **Fourth**, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e) **Fifth**, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

f) **Sixthly**, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

26. It is not in dispute that there are many players involved in football and from my analysis of the material before me, I am not satisfied that there was proper public participation in the manner in which the challenged decisions were made including the purported endorsing the challenged regulations. It is

alleged that they were passed in an annual general meeting. A list of all those who attended and minutes could have shed light on this. The opaque manner in which the decisions were made leaves me with no doubt that the petitioners' grievances are genuine.

27. In view of my findings herein above, I find that the answers to issues (a) and (b) above are in the affirmative. I also find that the petitioner has proved his case to the required standard. I also note that some of the Respondents supported the petition save for costs which they urge the court to order that it be paid by the second Respondent. In particular, I note and agree with the contents of the affidavit of Jack Ogunda and submissions by counsel for the third Respondent.

28. As for the appropriate reliefs and upon due consideration of the entire case and the need to bring sanity to the football industry, I allow the petition and make the following orders:-

a. A declaration be and is hereby issued that the Football Kenya Federation- Kenyan Premier League (FKF-KPL) agreement is valid.

b. A permanent injunction be and is hereby issued restraining the second Respondent from interfering with the third Respondent's rights to manage and own the Kenya Premier League during the period of the said agreement.

c. A declaration be and is hereby issued that the unilateral post-season relegation/promotion and addition of clubs by the second Respondent violated the agreement and also the sporting principle of merit and is therefore null and void.

d. A declaration be and is hereby issued that the Kenya Premier League shall have a maximum of 16 teams during the 2017 season, consisting of the fourteen (14) Kenyan Premier League teams which qualified for sporting merit on the field during the 2016 season plus the two (2) highest ranked clubs at the end of the 2016 season in the Football Kenya Federation's National Super League.

e. A declaration be and is hereby issued that the introduction and adoption of the FKF Club Licensing Regulations at the Football Kenya Federation AGM was irregular and therefore null and void for all purposes.

f. An order be and is hereby issued directing both the FKF and KPL to fully respect and implement the FKF-KPL agreement during the period 2017-2020.

g. No orders as to costs.

Orders accordingly.

Dated at Nairobi this 21st day of **September**, 2017

John M. Mativo

Judge

[1] National Bank of Kenya vs Pipe Plastics Samkolit (K) Ltd & Another {2002}E.A. 503

[2] Sup. Ct. Advisory Opinion Appl. No. 2 of 2012 at para 54

[3] (CCT 12/05) [2006] ZACC 11; 2006 (12) BCLR 1399(CC); 2006 (6) SA 416(CC)

[4] {2005} ZACC

[\[5\]](#) {2014} eKLR

[\[6\]](#) CCT 86/08 [2010] ZACC 5

[\[7\]](#) {2015} eKLR