REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION

MISC. APPLICATION NO. 367 OF 2017

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF THE SPORTS ACT, 2013

AND

IN THE MATTER OF IN THE MATTER OF THE MINISTRY OF SPORTS, CULTURE AND THE ARTS

IN THE MATTER OF THE REGISTRATION OF

BADMINTON KENYA FEDERATION

AND

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

ANNA NGANGA

PETER GACHERU

FRED GITUKU

JOSEPH KARURI

KALPESH SOLANKI

MAYUR SHAH

JOHN ODHIAMBO

GEOFFREY SHIGOLI MUKOT

(Suing as Steering Committee of Badminton Kenya)…….……APPLICANTS

AND

THE REGISTRAR OF SPORTS KENYA…….....1ST RESPONDENT

ROSE WASIKE…….....2ND RESPONDENT

AND

PETER MUCHIRI

MALIKA SOOD

JOHN MBURU…….....….INTERESTED PARTIES

JUDGEMENT

Introduction

1. By a Notice of Motion dated 29th June, 2017, the *ex parte* applicants herein (wrongly described as the Applicants which ought to have been the Republic) seek the following orders:

> **1. Certiorari to remove into this Court for the purposes of being quashed the decision of the 1st respondent to issue the Certificate of Registration of Badminton Kenya to the Interested Parties herein Peter Muchiri Kamau, John Mburu and Malik Sood on 24th March 2017.**
>
> **2. Prohibition to prevent the Interested Parties as alleged Officials of Badminton Kenya either by themselves or persons acting for or under them from effecting, performing or otherwise acting and/or assuming the office and carrying out the affairs of Badminton Activities in Kenya pending the hearing and determination of this application.**
>
> **3. Mandamus to compel the Respondent to revoke and cancel the certificate issued to the Interested Parties as officials of Badminton Kenya.**
>
> 4. **The Costs of this application be provided for.**

***Ex Parte* Applicants' Case**

2. According to the applicants, they are the steering committee of Badminton Kenya, the federation mandated to conduct and run the affairs of the sport of Badminton within the Republic of Kenya and duly recognized as such by the World Governing Body being Badminton World Federation. According to them, in their capacity as the officials of Badminton Kenya they have in their mandate ensured that the operations of the sport have met the requisite standards as required by the Badminton World Federation and have been paying the requisite affiliation/membership fees as is mandated by the Federation for purposes of recognition and governance in the sport.

3. The applicants averred that the law that Governs the Sports Fraternity in the Country is now ***The Sports Act*** (hereinafter referred to as "the Act) that would require all Sporting Federations to register and comply with the provisions of the Act in their operations, an Act that did away with the initial registration requirements with the Registrar of Societies which had been the norm from the onset. In light of the new statutory requirement brought about by the Act all Sporting Federations were mandated to register themselves with the 1st Respondent herein upon the expiry of the transition period that was provided under section 50 of the Act.

4. It was averred that in line with the Statutory Requirements envisaged by the Act, the Applicants sought to register Badminton Kenya with the Registrar of Sports but they were turned away on the basis that their constitution would have to be in line with the new Act and equally that they would require to fulfil conditions as set out by the Act. Upon the advice of the 1st Respondent the Applicants set up a committee for purposes of fulfilling the conditions as laid down by the 1st Respondent in preparation of having Badminton Kenya registered under the Act and further in their quest to streamline the operations in the counties and with the local clubs that formed their membership herein. In line with the preparations aforementioned the Applicants proceeded to share and circulate the draft constitution to its membership for due consideration and comments whilst having consultative meetings geared towards the eventual ratification of the Constitution on 6th May 2017.

5. Premised on the above preparations the Applicants proceeded to issue notices on 10th April 2017 to its membership of the intended Extraordinary General Meeting (EGM) that would be held on 6th May 2017 for purposes of ratifying the Constitution and regularize pressing in-house issues that would allow for the registration of the Federation with the 1st Respondent. However while in the process of initiating and preparing for the said meeting, three members of Badminton Kenya being the interested parties herein, opted through the back door to steal a match and illegally had themselves registered as the *bona fide* officials of the federation without following due process as provided for under section 47 of the Sports Act. The said interested parties, it was averred have been attending all the preliminary meetings and making the requisite contributions that have been held by the Federation for purposes of streamlining the federation and yet made no attempts of informing the applicants of their ill intended motives. The aforestated interested parties in the process issued a statement dated 22nd April 2017 indicating their new standing and of their purported legitimacy and their alleged road map for the federation.

6. In their attempt to clarify the stated position, the applicants visited the offices of the Respondents in their attempt to peruse The Badminton Kenya File for purposes of confirming the veracity of the allegations as made by the illegal officials but their attempts were rebuffed with no access being granted. On the 24th April 2017 the applicants did write to the Respondent a letter of protest with respect to the manner in which an interim certificate of registration was issued for the Federation without following due process a letter whose response they did not receive. Notwithstanding the foregoing, the applicants reached out to the Badminton World Federation vide an email dated 23rd April, 2017 seeking to inquire as to whether there had been a change of guard and whether they had been informed of the same and vide their letter dated 25th April, 2017 they confirmed the applicants' legitimacy and further stated that they were awaiting the outcome of the applicants' meeting and eventual ratification of the new constitution.

7. Un-cowed by the silence the Applicant further wrote a letter dated 14th May 2017 seeking the audience of the Registrar on the same issue a letter did not elicit any response from the Respondent.

8. According to the applicants, the Respondent had no colour of right to issue the certificate to the interested parties without properly addressing and complying to the provisions of the ***Sports Act, 2013***. In their view, the decision by the respondent to issue the interested parties is tainted and fraught with procedural impropriety as:

> i. No known Constitution as passed by Badminton Kenya has been endorsed and ratified by the Membership of the Association as required under Section 47 (4).

ii. No known affiliation international or otherwise has endorsed the interested parties as representing the Association as provided for Under Section 46(3) and yet the Respondent chose to overlook the same while issuing the registration certificate to them.

iii. the respondent having issued the applicants with the requisite registration form she was duty bound to inform the interested parties of the new application and vice versa bearing in mind the mandatory provisions of section 48(2) of ***The Sports Act***.

iv. The Respondent was equally duty bound to inform either the applicants or the interested parties of the fact that a different party had sought their registration and equally appended their signatures on the collection registry as provided by the Respondent for purposes of record keeping.

9. It was therefore the applicants' case that the interim certificate as issued by the 2nd Respondent to the interested party is not only illegal but is tainted with procedural impropriety and irrationality and should be quashed. They further contended that the Respondent's directive/order to issue the interested parties with the stated certificate of registration is based on a fundamental error of law by presuming she has power to overlook and subvert the provisions of an Act of Parliament enacted for the sole purpose of legally regulating Sporting entities.

10. It was their case that the action by the respondent is arbitrary and tainted with illegality, procedural impropriety and is as such ultra vires. To them, the respondent has acted defiantly and made a decision that is irrational and unreasonable by assuming that it has powers to overlook the provisions of the law and issue a certificate to the interested parties without necessarily interrogating the process therein. In addition, it was the applicants' contention that the respondent made a decision grounded on a fundamental error of fact and law in issuing the certificate to the interested parties on the strength of incomplete documents in utter disregard of the provisions of the Act.

11. The Court was therefore urged to quash the decision of the respondent to issue the interested parties with a certificate of registration and allow the Association to conduct in its house processes and present legitimate office bearers and not parties who have been super imposed upon the Association by the Respondent.

Respondents' Case

12. In response to the application the Respondents averred that pursuant to sections 45(2)(d) of the ***Sports Act*** No. 25 of 2013 (Revised Edition 2012), disputes relating to registration of sports organizations are supposed to be arbitrated upon by the Sports Registrar and a party that is not satisfied with the Registrar's decision can appeal to the Sports Disputes Tribunal and not the High Court as provided for under sections 58(c) and 59 (Revised Edition 2013) of the ***Sports Act*** No. 25 of 2013. It was therefore the Respondents' case that the matter should be referred to the Sports Registrar for arbitration or mediation or be transferred to the Sports Disputes Tribunal for determination.

13. The Respondents case was that section 50(1) of the ***Sports Act*** No. 25 of 2013 or 49 (1) of the Revised Edition of 2013 obliged all sports organizations that were previously registered by the Registrar of Societies under the ***Societies Act*** Cap 108 to make an application before the Sports Registrar within one year after commencement of the ***Sports Act*** to enable them transit as sports organizations. Section 50(3) and in the revised edition 49(3) of the Sports Act stipulated that "an existing organization that does not apply for registration within the time prescribed in subsection (1) shall not be recognized as a sports organization for the purpose of this Act"; a clause that bars the Sports Registrar from recognizing any sports organization that failed to transit under the ***Sports Act***.

14. In this case it was averred that Badminton Kenya is one of the organizations that failed to transit under sections 50 and 49 of the ***Sports Act*** and its revised edition respectfully; hence barring the Sports Registrar from recognizing the applicants as they have no *locus standi* before the Sports Registrar's Office.

15. The Respondents disclosed that the applicants picked an application form from our office on 3rd August, 2015 through someone called **Geodfrey Shikoli** of Identification Card No. 14417513 and Mobile No. 0722493147, Secretary General for Badminton Kenya one year after the transition period that lapsed on 1st August, 2014 and to date, the same form has not been returned to the Respondents' office; implying that they did not take the sport of Badminton at heart or just ignored the rule of law. Similarly, another form was picked on 1st April, 2016 by someone called **Jeff Shigoli** of National Identification Card No. 14417513 and Tel. No. 0722493147, Secretary to Badminton Kenya who have also not returned the form.

16. It was therefore contended that the deponent of the affidavit in support of the application, **Mr. Shigoli** picked forms twice using different twisted names to confuse the Respondents' office in violation of section 49(1)(b) of the ***Sports Act*** or section 48(1)(b) of the revised Act both of which stated that-

> ***"The Registrar may reject an application for registration of a body as a sports organization if the Registrar is satisfied that the body has given false information to secure registration."***

17. According to the Respondents, this implies that even if the applicant finally submitted their applications which are two and picked by the same person with twisted names, the Registrar would have rejected their application on the basis of false information having been entered in the collection form register. In the alternative, if the applicants had returned one of the application forms and a certificate issued to them, the same certificate would have been cancelled under section 52(1)(a) for having procured the registration through misrepresentation or non- disclosure of material facts. It was the Respondents' case that collection of two forms by the same person for the same organization shows the confusion and how unorganized the applicants are and therefore not fit to hold offices or even act on behalf of the organization before the Court. This is in addition to the fact that they do not have a locus standi before the Sports Registrar for not being registered legally recognized.

18. It was disclosed that on the other hand the interested parties in this cause picked their application form on 13th February 2017 and returned it with most of its attachments on 1st March 2017 and were issued with an Interim Certificate on 24th March 2017 since there was no other organization or party that had submitted a similar application. To the Respondents, the Certificate was issued in compliance to the Sports Disputes Tribunal Order of 17th May, 2016 and to fill the gap in the sports discipline of Badminton that had been left by the applicants. The said Order, it was disclosed empowered the Sports Registrar to issue an Interim Certificate with Conditions; a fact the Tribunal wanted the sports industry to move on as the Respondents progressively ensured compliance**.** The same spirit, it was averred is reflected in section 47(7)(b) that empowers the Sports Registrar to issue a certificate of registration that contains such terms and conditions as the Registrar may prescribe.

19. According to the Respondents, the Sports Registrar is not prohibited by the law to issue a certificate to any new organization as long as it is not double registration at the national level. In this case, there was no other organization that had submitted an application form or had been registered by the Respondents' office to bar the Sports Registrar from registering the interested parties as the interim officials of the Applicants Organization. In the Respondents' view, the interested parties are not a hindrance to operations of the organization but only filled a gap that was left after the applicants failed the organization by not transiting it under the ***Sports Act*** and also by not submitting back the forms they picked from the Respondents' office on 3rd August 2015.

20. It was the Respondents' view that officials of Sports Organizations change from time to time through elections, discipline, retirement, death, sickness and resignation and every time it happens they inform their international federations of the Change and what is required in this case is for the names of the interim officials to be send to their international organization for recognition and the ones for the applicants to be removed until elections are called by the interim officials and new officials are elected in office where the applicants will also have a chance to vie.

21. It was the Respondents' case that the organization or the Sports Registrar should therefore be ordered

to write to their international federation informing them of the change of office officials since the name of the organization did not change so as to affect its operations. Similarly the organization should be ordered to write to the banks to change signatories to the current interim officials to ensure continuous operation of the organization and the sports discipline of Badminton.

22. The Respondents denied that the Sports Registrar turned away the applicants when they brought back the application form. They disclosed that the office received and acknowledged in writing 189 application forms and issued out around 986 application forms. Not all the 187 organizations that returned forms amended their constitutions and that they were analyzing and writing to those who did not amend their constitution. They disclosed that the application form and the ***Sports Act*** (section 47 and the Second Schedule) has many other things that need to be attached on the application form apart from the Constitution and believed that maybe the applicants were unable to get clearance from the various institutions and that is why they failed to submit their application and not that the Registrar refused to accept their application. The Respondent revealed that the Registrar has many returned applications with copies with old constitutions attached and there was no way she would have refused to receive the applicants' application form on the basis of having an old constitution. It was averred that when the forms are submitted to the Respondents' office, they are received at the registry and a checklist is ticked if a document that is supposed to be attached on the form is attached or crossed if not attached and later acknowledged through a letter and analyzed before writing to organizations highlighting areas of none compliance**.**

23. The Respondents insisted that the Registrar never advised the applicants to form an interim committee to review the applicant's constitution and all allegations are subject to production of documentary evidence. On 10th April 2017 the applicants invited the 1st Respondent's office to attend an extra ordinary general assembly to be held on 6th May 2017 at Premier Club Forest Road, Nairobi while in full knowledge that the interested parties had an Interim Certificate of registration from the 1st Respondent's office. However the **o**ffice of the Sports Registrar could not have attended a meeting convened by unregistered officials who did not have a *locus standi* before the office of the Sports Registrar.

24. It was disclosed that on 22nd June 2017 the Sports Disputes Tribunal issued a temporary injunction restraining **Anna Njambi Nganga**, **Geoffrey Shigoli** and **Peter Gacheru** whether by themselves, their servants, their agents or otherwise howsoever from convening or proceeding with or chairing or holding an annual general meeting or any other meeting of Badminton Kenya on the 24th of June 2017 at Premier Club Nairobi at 10.00 a.m or at any other time. Therefore the Sports Registrar cannot accept the election returns filed in its office on 27th June 2017 by a Sports Officer in the name of **Joel Atuti**. To the Respondents, Sports Officers who are officers within the Ministry of Sports, Culture and the Arts are, pursuant to paragraph no. 20 of the Sports Registrar's Rules and Regulations of September 2016, supposed to be observers in Sports organization's elections. In addition, elections of all sports organizations should, pursuant to paragraph "d" of the Second Schedule to the Sports Act of 2013, be held in accordance with the principles of Article 81 of the Kenya Constitution 2010.

25. It was therefore the Respondents' position that the Notice of Motion application and the Misc. Application dated 20th June 2017 should be dismissed with costs as they lack merit and that the elections convened by the applicants and held on 24th June 2017 should be declared null and void.

Interested Parties' Case

26. The interested parties on their part opposed the application.

27. According to the interested parties, the applicants need to explain to this Honourable Court why they share a name similar to that of an organisation that the Interested Parties are the *bona fide* officials of. The interested parties noted that no Certificate of Registration for their "Badminton Kenya" issued by the Registrar of Societies or the Registrar of Sports is annexed to the Supporting Affidavit herein. According to them, a look at the Constitution presented before this Court purports to be for a federation called "Badminton Kenya". However, the last page of that Constitution reveals an official stamp for an

organisation called “Kenya Badminton Association”. In their understanding, those are two different names and cannot therefore be for the same organisation.

28. The interested parties asserted that unless the Applicants herein establish who they are, these proceedings risk being in vain, and a complete waste of valuable judicial time for this Honourable Court. It was also noted that whereas **Geoffrey Shigoli** and his co-applicants herein purport to be a care-taker committee, the letters issued and signed by him are as the Acting Secretary to Badminton Kenya.

29. It was the interested parties’ view that from the documents exhibited by the applicant, Badminton World Federation does not regard any of the Applicants herein as officials of Badminton Kenya, not even the deponent who is deemed a “contact person” and not caretaker committee member or acting Secretary as his letters allege.

30. It was their view that the purported claim herein seems to be seeking to overturn the decision of the Registrar of Sports Kenya. The Application herein also seeks to rely on express provisions of the ***Sports Act of 2013***, and in fact, the application makes reference to several sections therein yet there is no office of Registrar of Sports Kenya in existence in this country. However, Sports Kenya is a State Corporation established by the ***Sports Act, 2013*** and is given the mandate to carry out, amongst other things, the functions formerly performed by Sports Stadia Management Board and the Department of Sports. The interested averred that they had not interacted with Sports Kenya in the manner referred to or described by the Applicants in their Application herein. It was their case that the proceedings and the orders herein will therefore continue to be ineffective and confusing until and unless the Applicants herein bring their claims against the rightful parties.

31. As regards the claim against the Registrar of Sports, they contended that this Court has no jurisdiction to entertain the Application herein. This is because under the provisions of section 58 (c) of the Sports Act (which Act the Applicants are also purportedly relying on), the jurisdiction of resolving appeals against the decisions of the Registrar of Sports has been given to the Sports Disputes Tribunal. They therefore urged the Court to order the Applicants to direct their complaints herein against the rightful parties and in the proper forum.

32. The interested parties averred that the Applicants herein have also deliberately failed or refused or neglected to inform the Court the following pertinent facts pertaining to their claim herein. They disclosed that the issues that are the subject matter of their application for review herein have already been adjudicated upon by the Sports Disputes Tribunal in Sports Disputes Tribunal Appeal No. 13 of 2017 in which the Tribunal ruled on 4th May, 2017 that the *bona fide* officials of Badminton Kenya are the Interested Parties herein. In that matter, **Anna Nganga Njambi** and **Geoffrey Shigholi Mukot**, two of the Applicants herein were directly involved and they have, at all material times, had full knowledge of the ruling of the Tribunal yet they have chosen to keep that fact a secret from this Honourable Court.

33. It was therefore contended that this matter is *res judicata. Accordingly t was their position that* the Interested Parties that the Applicants wish to undermine the authority of the Sports Disputes Tribunal by bringing this Application before this Honourable Court in a manner that hides not only the facts that the Tribunal has already made a binding decision concerning the administration of Badminton Kenya, but that the Tribunal is the one that has been given the jurisdiction to entertain their claim herein at the first instance.

34. It was their contention that due to the fact that the Kenya Badminton Association failed (for four (4) years) to transition to become a National Sports Organisation as expressly required under the ***Sports Act, 2013***, and since this Court has been asked to stay the decision of the Registrar of Sports Kenya to register Badminton Kenya, the Sport of Badminton in Kenya potentially does not have a national sports organisation to administer it. They therefore requested for the urgent directions of the Court on this as it now means that there would be no body to undertake all the activities necessary for the Sport to thrive including organising and preparing for national and international tournaments.

35. According to the interested parties, the Applicant’s non-disclosure aforesaid, and their failure or

refusal to inform the Court that staying the decision of the Registrar of Sports would consign the sport of Badminton, its players and officials into statutory limbo and paralyse any activities therein is reckless, short-sighted and a sign of the bad leadership and governance that Badminton has been forced to endure for years.

36. It was further revealed that the Applicants herein did not disclose to this Court that they had, through **Geoffrey Shigholi**, without any colour of right, purported to call for a meeting of Badminton Kenya on 24th June, 2017, whereby they wanted to undertake fresh elections. At the same time the Applicants came to the Honourable Court, the Interested Parties filed an Appeal (Number 18 of 2017) against the Applicants to stop their illegal meeting. This was on the basis of the fact that the Tribunal has declared the Interested Parties as the *bona fide* officials of Badminton Kenya. The Tribunal gave orders stopping the meeting from taking place. At the time they did not know that this suit had been filed as the Applicants never bothered to serve them with the pleadings or the orders herein before then.

37. The interested parties explained that having been informed that there was no registered body in charge of Badminton, they as players organised themselves and elected persons to be in charge of the said sport and in so doing followed the legal procedures and were duly registered as officials of the said Association. They confirmed that they did submit an application to the Sports Registrar as required by section 46(3) of Sport Act No. 25 of 2013 and as at 3rd March 2017 no other organization had applied to be registered as the national organization for the sport of Badminton. To them, the Applicants negligently and indolently failed to transition as a sports organization as required by section 50 of the Sports Act No. 25 of 2013 and therefore ceased to be a sports organization on 1st August 2014; the deadline for transition.

38. As regards the claim that the Interested Parties' organisation is not recognized by the International Federation, they stated that an organization needs to first get a proper legal status and standing nationally before seeking international affiliation. They believed that international recognition is not mandatory for one to apply as a national sports federation. In their case, Badminton World Federation expects member national federations to first be legally registered in their country or territory before they grant anyone entity affiliation to it. They relied on section 8 of constitution of Badminton World Federation which states that members shall fulfil the criteria that a national federation must be *a legally registered body and/ or can satisfy the Federation that it has the legal and administrative ability to administer the sport to an acceptable standard.* It was their case that the Applicants have been in contravention of Badminton Word Federation constitution from the year 2014, and they have not disclosed this material fact to the international federation. The interested parties have however already contacted the international federation, and we are awaiting their response on this issue.

39. The interested parties averred that the Act seeks to harness sports for development, administration and management of sports in the country and for connected purposes. To this end, the Act created the Office of Registrar of Sports and all sports organizations registered under Societies Act were required to transition and register under the Sports registrar. The Applicants were supposed to transition within and not after the transition period. This is as is clearly set out in Section 49 (1) & (2) of the Sports Act. A sports organization, which was duly registered under the ***Societies Act*** (Cap. 108) and existing immediately before the commencement of this Act was required to apply for registration under the Act within one year after the commencement of the Sports Act and that a sports organization, which was duly registered under the ***Societies Act*** (cap. 108) and existing immediately before the commencement of the Sports Act would not be deemed to be unlawful sports organization before the one year period prescribed under subsection (1) had expired. Based on the foregoing, it was their case that the Applicants had a strict, statutory one (1) year period within which to transition from registration under the ***Societies Act*** (Cap. 108) to registration under the ***Sports Act*** No. 25 of 2013. However, they did not transition the organisation within the one year as was required by the ***Sports Act***. No one and nothing prevented them from transitioning the organisation. They also did not transition the organisation for another three years after the one year expired. No one and nothing prevented them from transitioning the organisation. This negligence and indolence it was contended cannot and should not be excused by this Honourable Court.

40. The interested parties averred that when the Applicants ignored their demand letter described herein,

they took that to mean that they had absolutely no interest in seeking registration of the organisation under the ***Sports Act***. It was their case that the Sport and stakeholders within the Badminton fraternity cannot wait for indolent, apathetic, indifferent and lethargic people such as the Applicants herein to lead them when they ignore basic legal requirements. The Applicants' lethargy further shines through the fact that they took no action when the Sports Disputes Tribunal ruled that we the Interested Parties are the bona fide officials of Badminton Kenya as registered by the Registrar of Sports. Since they lost their opportunity to appeal the decision of the Registrar of Sports, and that of the Tribunal through time wastage, they have now hatched this Application as a back – door appeal to the decisions of the Registrar of Sports, and the Tribunal.

41. It was the interested parties' case that the Applicant's claims that they had sought to register Badminton Kenya with the Registrar of Sports but were turned away on the basis of their Constitution is baseless and an afterthought as there is no proof to support any such claim. The Applicants have failed to act for four years, even after we wrote to them. This is simply inexcusable.

Determination

42. I have considered the application, the affidavits sworn both in support of and in opposition to the application and the submissions filed. 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.***

43. In this case it is clear that what the applicants are complaining against is the decision of the Registrar, the 1st Respondent herein. 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. To my mind if the Registrar had declined to entertain their complaint, the prudent option available to the applicants was to move this Court for orders compelling the said Registrar to hear and determine their complaint since the Registrar is under a legal obligation to resolve disputes arising from parties in the Sports fraternity. That however is not the order being sought before me. Whereas this Court has the power to issue appropriate relief in a matter before it, since the matter had proceeded to the Sports Disputes Tribunal by way of an appeal in my view the issue of compelling the 1st Respondent to entertain the complaint is now water under the bridge.

44. The applicants however contended that the Tribunal upon whom they were to lodge an appeal had as evidenced vide its decision locked out the applicants in Sports Dispute Tribunal Appeal Number 13 of 2017 by condemning them unheard yet they were naturally interested parties to the appeal hence filing the same before this Honourable Court. It is not in doubt that by its decision dated 4th May, 2017, the Tribunal found that the interested parties were the recognised officials of Badminton Kenya. The applicants contend that they only became aware of the said proceedings after commencing these proceedings. Assuming that their position is correct, though it is disputed by the interested parties, nothing stopped them from moving the Tribunal to set aside its orders on the ground that they were not afforded an opportunity of being heard. The law is clear that a party cannot evade the alternative dispute resolution mechanisms on the mere suspicion that the said mechanisms will not be fair to them. This was

the position of **Mohammed Ibrahim, JA** (as he then was) in **Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 Others [2014] eKLR** in which he expressed himself as hereunder:

> **"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".**

45. 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…"**

46. The applicants have not informed the Court that they have exhausted all the legal avenues available to them under the law. In the rejoinder the applicants in fact positively averred that they were alive to the provisions of the ***Sports Act*** and the mechanisms as provided therein and equally to the jurisdiction of the High Court. In this case since there is a decision of the Tribunal which has not been set aside, the grant the orders sought herein would in effect amount to appealing against the decision of the Tribunal through the backdoor. That would amount to an abuse of the process of the Court.

47. 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.***

48. It is however my view that the onus was upon the applicant to satisfy the Court that she ought to be exempted from resorting to the available remedies. This was the position adopted by the Court of Appeal in **Republic vs. National Environment Management Authority [2011] eKLR**, where the Court held that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment,

> **"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that 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. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge , in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge."

49. Therefore as was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief..."

50. This Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 held that:

"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute."

51. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425,** where it held that;

"Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that 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. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions."

52. It is now a 'cardinal principle that, save in the most exceptional circumstances the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

53. Lord Chancellor, **Lord Hailsham of St. Marylebone** in the House of Lords decision in **Chief Constable vs. Evans [1982] 3 ALL ER 141**, stated at p 143 as follows with respect to the judicial review remedy:

"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for declaration, is intended to protect the individual against abuse of power by a wide range of

authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner".

54. **Mumbi Ngugi, J** in **Rich Productions Limited vs. Kenya Pipeline Company & Another [2014],** explained why the Court must be slow to undermine prescribed alternative dispute resolution mechanisms thus::

> **"The reason why the Constitution and law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 of the Constitution to supervise bodies such as the 2nd Respondent such supervision is limited in various respects, which I need not go into here. Suffice it that it (the court) cannot exercise such jurisdiction in circumstances where parties before court seek to avoid mechanisms and process provided by law, and convert the issues in dispute into constitutional issues when it is not."**

55. In the absence of the evidence that the ex parte applicant resorted to the alternative remedy before commencing these proceedings and in the absence of an explanation as why this was not done, it is my view and I hold that this Court ought not to exercise its discretionary powers in favour of the applicant.

56. Apart from the issue of available alternative remedies, it is not in doubt that the decision whether or not to grant judicial review reliefs is an exercise of discretion which must however be exercised judicially. As is stated in ***Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270:**

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary.** ***The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief.*** **Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.** ***Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment.*** **The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."** [Emphasis added].

57. I have considered the issues raised herein and it is my view that the applicants' complaints can be determined by the Sports Tribunal and to grant the orders sought herein would only cause chaos and confusion within the Badminton Sports Fraternity.

58. Therefore based on both the failure to seek alternative remedies and the efficaciousness of the reliefs sought herein, I decline to issue the orders sought herein. Let the applicants seek the remedies available to them under the Statute.

Order

59. In the result the Notice of Motion dated 29th June, 2017 fails and is dismissed with costs.

60. It is so ordered.

Dated at Nairobi this 31st day of October, 2017

G V ODUNGA

JUDGE

Delivered in presence of:

Mr. Gichamba for the applicant

Miss Nyakora for the Respondent

Mr. Gitonga for the interested party

CA Ooko