**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 71 OF 2016**

**CHRISTINE JOSHI JEROME……..……..1ST PETITIONER**

**ROSELYN NJOROGE……..2ND PETITIONER**

**NAIROBI SWIMMING ASSOCIATION (NASA) ……....……3RD PETITIONER**

**VERSUS**

**THE KENYA SWIMMING FEDERATION…….....1ST RESPONDENT**

**BEN EKUMBO…….....2ND RESPONDENT**

**WINNIE KAMAU…….....…...3RD RESPONDENT**

**DAVID NGUGI….....4TH RESPONDENT**

**CAROL NZIOKI…….....5TH RESPONDENT**

**PATRICK MUYAH….…….....……...6TH RESPONDENT**

**ISAAC MUSEMBI…….....7TH RESPONDENT**

**ROSE MARIE OKWARO.…….....…….8TH RESPONDENT**

**OMONDI OTIENO…..…….……..….9TH RESPONDENT**

**FAKHRY MANSOOR…….……..…….…….10TH RESPONDENT**

**THE SPORTS REGISTRAR……..…….……11TH RESPONDENT**

**RULING**

**Introduction and prayers**

1. The question currently before me is whether the Petitioners are entitled to conservatory orders as sought in the application dated 24th February 2016. The Petitioners seek to restrain the Respondents, save the 11th Respondent, from carrying out swimming activities until the said 1st Respondent has complied with the Sports Act 2013 and put in place structures rules, regulations and processes to prevent abuse and violation of human rights. The Petitioners also seek an order to compel, the 11th Respondent to avail information on the registration of the 1st Respondent under the Sports Act 2013. Finally, the Petitioners seek an interim order to restrain the Respondents from discriminating in any way against any swimmer affiliated to the 4th Petitioner.
2. Alongside, the application the Petitioners also filed the substantive Petition on 24th February 2016. The Petition sought a declaratory relief to the effect that the rights of the Petitioners under Articles 33,35,36,46 and 53 of the Constitution had been denied or violated. The Petition also sought orders to restrain the Respondents from conducting swimming activities until the Respondents have fully complied with the provisions of the Sports Act, 2013.
3. The application for conservatory orders was supported by three Supporting Affidavits sworn by Reginald Okumu, Christine Joshi Jerome and Roselyne Njoroge Supplementary affidavits were again sworn by both Roselyne Njoroge and Reginald Okumu and filed on 3rd March 2016. Another Supplementary Affidavit was filed by Cardimore Avwonda.
4. The Respondents oppose the application. Rose M.N. Wasike swore a Replying Affidavit on behalf of the 11th Respondent while Ben Ekumbo swore another Replying Affidavit on behalf of the 1st through 10th Respondents.

**Background facts.**

5. The background facts can be retrieved from the various affidavits as well as the Petition itself. The facts may be stated briefly as follows.
6. The 2nd to 10th Respondents are officials of the 1st Respondent. The 1st Respondent on the other hand is an organization registered under the Societies Act (Cap 108) Laws of Kenya. It was registered in 2000. It is an affiliate of the International Swimming Federation (FINA). It is also affiliated to the National Olympic Council of Kenya (NOCK) as well as the Kenya National Sports Council (KNSC).
7. In Kenya, the 1st Respondent operates through branches. Originally, the 3rd Petitioner operated as a branch of the 1st Respondent. Then the former became a splinter organization and registered itself under the Societies Act. It became affiliated to the 1st Respondent. In 2014 it conducted its elections. The 1st Respondent detected irregularities. The 1st Respondent demanded that the elections be undertaken again. The 1st Respondent also demanded that the 3rd Petitioner's Constitution and charter be re-worked and placed in tandem with the 1st Respondent's Constitution. The 4th Petitioner was adamant. It neither conducted fresh elections nor amended its Constitution. Then up came another branch for Nairobi. It is named the Kenya Swimming Federation Nairobi Branch. This new branch or organization, according to the 1st Respondent took care of the interest of Nairobi swimmers. The 1st Respondent needed the 4th Petitioner no more. The 4th Petitioner was expelled from being an affiliate of the 1st Respondent. That was in August 2015.
8. In the meantime, the 1st Respondent continued to organize and manage the sport of swimming. In the process the 3rd Petitioner and all its members were then ignored by the 4th Respondent. The 3rd Petitioner and any individual associated with it were barred from competitions organized by the 1st Respondent. The 1st Respondent however recognized the Kenya Swimming Federation Nairobi Branch together with its members.

**The litigation and the Petitioners' case**

9. The Petitioners filed the Petition in February 2016. The Petitioners claimed that the 1st Respondent is an illegal outfit. The Petitioners state that the 1st Respondent is yet to comply with

the provisions section 46 of the Sports Act, 2013. Consequently, the Petitioners contend that it should not organize or manage swimming as a sport in the country.

10. The Petitioners contend that the other Respondents, save the 11th Respondents, have mismanaged finances as well as activities of the 1st Respondent. The Petitioners further accuse the Respondents of discrimination and point to instances in the town of Kisumu where members affiliated to the 3rd Petitioner were denied the chance to compete in a national event organized by the 1st Respondent.
11. The Petitioners seek orders barring the Respondents from interfering with its membership and also barring the Respondents from organizing and managing the sport of swimming.

**The Respondents' case**

12. The 1st Respondent denies that it is an illegal outfit. The Respondents state that the 1st Respondent has applied to be registered under the Sports Act 2013. Conversely, the Respondents accused the 3rd Petitioner of failing to register itself under the Sports Act, 2013.
13. The Respondents also state that the Petitioners have no locus and have further failed to illustrate which constitutional rights have been violated.
14. With regard to the alleged mismanagement and discrimination, the Respondents state that there is no such evidence as they consistently provide accounts and that even the 1st through the 3rd Petitioners children have been allowed to compete in the swimming activities organized by the 1st Respondent. The Respondents also point out that the Petitioners' allegations are general and lacking in material particulars. As to the violation of the rights of minors or children, the Respondents also state that the Petitioners have not specified the rights violated. Retrospectively, the Respondents do indeed acknowledge that some swimming competitors who are minors could possibly have gone through unsavory moments during a competition in Uganda. The Respondents however state that the host country was Uganda and that the Respondent facilitated the entire process by availing the required funds. The Respondents contend that they have always kept their members best interest at heart as demonstrated by the fact of the 2nd Respondent having personally flown to Uganda to attend to the alleged unsavoury situation.
15. The 1st Respondent further contends that having lodged its application with the Sports Registrar under the Sports Act 2013, the 1st Respondent is compliant and continues to ensure that its efforts and activities are in tandem with the Sports Act.
16. The Respondents urge that the application be dismissed as the threshold for granting both prohibitory and mandatory injunctions have not been met.

**Arguments in court**

17. The Parties respective cases were orally urged before me on 9th March 2016.

*Petitioner's submissions*

18. The Petitioners' counsel Mr. Makori submitted that there has been a violation of Articles 28,33,35, 46 and 53 of the Constitution. Counsel submitted that the evidence before the court established consistent discrimination by the Respondents being fetched on the 3rd Petitioner's members. He pointed to the various letters written by the 1st Respondent and annexed to the Supporting affidavits.
19. Counsel then argued that the 1st Respondent had failed to register with Registrar of Sports under the Sports Act, 2013 within the first year of the existence of the Sports Act. Consequently, continued counsel, the 1st Respondent was an illegal organization as it had not transited.
20. Mr. Makori assisted by Mr. K. Mbugua, concluded by submitting that the Petitioners have a prima facie case and further that the doctrine of proportionality ought to be invoked to ensure that qualified Kenyans are not locked out of international competitions simply by reason of their affiliation to the 3rd Petitioner. Reference was made by counsel to the case of **Kevin Mwiti –v- Kenya School of Law [2015]eKLR.**

*Respondents' submission*

21. Mr. Mutua, appearing together with Mr. Muia for the Respondents, submitted that an Association is not recognized in law as a competent party to file or maintain legal proceedings. Reliance was placed on the case of **Football Kenya Federation –v- Kenya Premier League Ltd & 4 others [2015] eKLR** for the proposition that an association cannot bring a case in its own name to court but must do so through its elected officials. Mr. Mutua added that the Petitioners lacked the requisite locus to commence and maintain the Petition.
22. Additionally, Mr. Mutua argued that the Petition did not raise any constitutional issue or question and that in any event the Petitioners had failed to demonstrate any violation of the Constitution.
23. On the issue of the 1st Respondent's registration, Mr. Mutua argued that there is now sufficient evidence on the record that the 1st Respondent is indeed compliant with the provisions of the Sports Act 2013.Counsel referred to the affidavit filed on behalf of the 11th Respondent which acknowledged that the 1st Respondent had lodged its application for registration under the Sports Act with the 11th Respondent.
24. Mr. Muia, also advocating for the Respondents, added that there was no evidence at all to demonstrate any discrimination by the 1st Respondent. Counsel then added that the balance of inconvenience was in favour of the Respondents who are the only ones mandated to organize swimming galas and had the necessary experience since the year 2000 unlike the 4th Petitioner who was only registered in the year 2009.

**Discussion and determination**

25. I have considered the pleadings as well as the arguments advanced by counsel. I must consider if the petitioners merit the conservatory orders sought.

*Applicable principles*

26. My starting point is that at this stage of the proceedings, I am not expected to and neither should I make any conclusive or definitive findings of fact or law. The Petitioners are merely expected to meet the criteria set for the grant of a conservatory order. The criteria has been neatly established in a series of cases and was well summarized in the case of **Kenya Small Scale Farmers Forum –v- Cabinet Secretary Ministry of Education, Science and Technology & 5 Others HCCP No. 39 of 2015 [2015] eKLR** where the court stated as follows:

> ***"[30]…I would state the principles which govern a court considering an application for interim or conservatory relief to be the following:***

- ***The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011.***
- ***The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter Musimba –v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.***
- ***If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.***
- ***The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya's decision in Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR.***

- ***The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters: see <u>Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012</u> as well as <u>Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.</u>***

27. I must also point out that proportionality is a principle to be considered in an application for conservatory orders: see **Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589**. It is important to finally note that conservatory orders in constitutional Petitions do not equate interlocutory injunctions whether prohibitory or mandatory. The test would consequently be dissimilar: see the case of **Attorney General vs. Sumair Bansraj (1985) 38 WIR 286** where Braithwaite J.A expressed himself as follows:

> ***"Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, … but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of … the provisions" of the Constitution…In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) "subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have…the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too…The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state."***

28. Accordingly, the core question is whether the Petitioners have met the criteria for the grant of a conservatory order rather than an interlocutory injunction.
29. Before answering the core question, it would be appropriate to deal with the two minor corollary questions raised by the Respondents.

*No standing, non-suited and formally incompetent ?*

30. First, it was contended that the Petitioners lack the necessary locus and further that the 4th Petitioner is non-suited. Secondly, it was contended that the Petition is drafted in such a general form that it fails to meet the competency threshold laid out in **Anarita Karimi Njeru –v- Republic [1980] KLR 154.**
31. With regard to the first corollary issue, it would be important to point out that the parameters as to who can commence and maintain a claim raising constitutional issues or questions were made wider in 2010 following the promulgation of the Constitution. Articles 22 and 258 of the Constitution see to it that virtually any person may bring an action claiming that a fundamental freedom or right has been violated or is threatened with violation (Article 22) or that the Constitution has been contravened or threatened with contravention (Article 258). Both Articles are permissive rather than restrictive and limiting. As under Article 3(1) of the Constitution every person is enjoined to 'respect uphold and defend' the Constitution, a liberal construction of Articles 22 and 258 must always be given. The guide however to Article 22 and 258 should be that

a party coming to court should be one with a genuine grievance or concern rather than a busy body.

32. In the instant case it is evident that the Petitioners are persons with genuine grievances and concerns. Indeed, their children are engaged or involved in swimming competitions and activities. Likewise the 1st and 2nd Petitioners have been involved in the management and operations of swimming as a sport. In my view, the Petitioners would fall squarely within the provisions either Article 22 or Article 258 or both. The petitioners are well suited.
33. With regard to the additional question as to whether the 3rd Petitioner is non-suited, it is my undiluted view that the 3rd Petitioner could rightly commence the Petitioner either alone or with the other Petitioners with whom the 3rd Petitioner shared a grievance. The Respondents contention was that "Associations" are strictly not juridical persons and thus cannot commence and sustain legal proceedings including Constitutional Petitions. Reliance was placed on the case of **Football Kenya Federation –v- Kenya Premier League Ltd & 4 Others [2015]eKLR** for that proposition.
34. Jurisprudence on this point has been relatively clear in so far as ordinary civil cases are concerned. A registered but unincorporated society has no legal persona with capacity to sue or to be sued: see **Eritrea Orthodox Church –v- Wariwax Generation Ltd [2007]eKLR** and **African Orthodox Church of Kenya v Charles Omuroka & another [2014]eKLR**. In ***John Ottenyo Amwayi & two others –vs- Rev. George Abura & two others – Civil Appeal No. 6339/1990*** Bosire J (as he then was) observed as follows :

> ***"The Societies Act does not contain provisions with regard to the presentation and prosecution of suits by or against the unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names."***

35. That observation and holding , in my view, may not apply to matters Constitution if one takes a closer reading of Article 259 as to definition of the word 'person' and juxtaposes the same with Articles 258 and 22 of the Constitution. Article 22(2)(d) even makes it clearer by reiterating that ***"an association acting in the interest of one or more of its members"*** may institute legal court proceedings in addition to a person already identified under Article 22(1) of the Constitution. The addition in Article 22(2)(d) is pretty telling. The Constitution in my view anticipated a situation where an unincorporated Association would commence and maintain legal action in its own name, a clear departure from the jurisprudence on actions by unincorporated associations.
36. The 3rd Petitioner is well suited. There is in my view no misjoinder of a party as well. The Association whose members it alleges have been or are directly affected may institute the Petition and seek to defend their rights through an action in court.
37. That takes me to the last corollary question as to whether the Petition meets the competency test laid out in the case of **Anarita Karimi Njeru –v- Republic [1979] KLR 154.**
38. The test in **Anarita Karimi Njeru –v- Republic** ***(supra)*** was clear. A party claiming that his or her constitutionally guaranteed fundamental freedoms and rights have been infringed or violated must with reasonable precision identify not only the relevant and specific provisions of the Constitution but also state the manner of such violation in his or her pleadings. It is not about absolute precision. If the Respondent is able to identify the case it is faced with, it could be presumed there has been reasonable precision. Likewise, if the court is in a position to 'painlessly' identify the petitioner's case, it must be presumed that reasonable precision has been met.
39. A cursory look at the Petition herein would reveal that the Petitioners have identified the relevant provisions of the Constitution. It is also easy to identify the complaint as to discrimination and unwarranted treatment of persons, the Petitioners say they represent.
40. I hold the view that the competency threshold has been met.
41. On the core issue in the application, it would be appropriate to point out that on two limbs the Petitioners state that they have a case. First, it is stated that the 1st Respondent and by extension the 2nd to 10th Respondents, are non-compliant. The requirements of the Sports Act, 2013 it is said have not been met. In particular, it is stated that the 1st Respondent has not applied for registration under Section 46 of the Sports Act, 2013. Secondly, it is stated that the Petitioner has violated

Articles 27, 28, 33, 35, 46 and 53.

*A case of non-compliance with the statute*

42. Under Section 46 of the Sports Act 2013, a sports organization is not to operate as a sports club, county or national sports organization unless registered under the Act. The application is to be made to the Sports registrar. Upon determination of the application , if successful a registration certificate would be issued. The application was to be made within one year of the commencement of the Act for the sports club or organization to be recognized under the Act, otherwise the sports club or organization would not be recognized under the Act. However under Section 49 of the Act, once the application was made and not rejected or rejected and the appeal mechanisms had not been fully exhausted by the concerned organization then the recognition would still subsist.
43. It is relatively clear that a party will be deemed to have complied even if no certificate has been issued signaling registration so long as the application for registration had been made. The affidavit evidence before me reveals that the 1st Respondent has made an application to the Sports Registrar. The application was duly acknowledged. It is unclear when the application was made. It is however clear that the application is being analyzed and processed. It is being considered. It has not been rejected.
44. It would consequently be inappropriate to fault and condemn the 1st Respondent wholesome at this stage of the proceedings without the benefit of a more indepth inquiry as to the effect of late application and the now legitimate expectation that the application be considered on its merits having been duly received and acknowledged.
45. The Petitioners may have a prima facie case that the 1st Respondent is operating and managing the swimming sport illegally but it is not one that is open and shut. It is potentially arguable that the 1st Respondent not withstanding any proven late or delayed application for registration is not operating illegally or irregularly. It is also not lost to the court that the 11th Respondent has not stood out to deny the 1st Respondents recognition and existence under the law.

*Violated Rights ?*

46. On the issue of alleged violation of rights, I would on the onset point out that apart from the allegation of discrimination and lack of respect of dignity, I have been unable to immediately see any prima facie case with a likelihood of success with regard to the other alleged violations of rights under Articles 33, 35, 46 and 53. The allegations in the case of the rights and freedoms protected by the latter Articles will have to be shown or proven at trial. The affidavit evidence is currently too scanty to enable me even make a preliminary view, especially when with regards to Article 53 the Respondents have explained themselves to a great extent on the treatment of the minors who attended the swimming competition in Uganda.
47. With regards to discrimination and lack of respect of dignity, the Respondents have admitted that it does not allow persons affiliated to the run-away 3rd Petitioner to compete in its events. I hold the preliminary view that the Petitioners have a prima facie case with a likelihood of success when they state that their members are being subjected to unfair discrimination.
48. In the case of **Peter K. Waweru -v- R [2006]eKLR** discrimination was defined as :

> ***"…a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured".***

49. Flowing from the above definition, I was unable to immediately find any reasonable distinction between the members of the 1st Respondent as favoured to compete in 1st Respondent events and those who are not favoured to compete in such events save the fact of association. Yet the 1st Respondent is the only national body recognized by the international bodies to organize swimming galas and competitions which lead to such world masterpieces like the Olympics. To allow only members or affiliates of the 1st Respondent to compete in such national fetes would be to discriminate unfairly with possible unfair impact on other Kenyans. It would also imply a situation where a person's freedom to associate is impeded by being forced to associate with a body or

persons he may not necessarily want to. Indeed, the Sports Act 2013 at Section 46(6) states as follows:

> ***" All national sports organizations registered under this Act shall <u>be open to the public in their leadership, activities and membership</u>."***

50. It is apparent that statute expressly preaches against any discrimination by national sports organizations, and the 1st Respondent is one of them.
51. On this front I believe the Petitioners have a prima facie case with a likelihood of success. The statute appears to prohibit the 1st Respondent from locking out the public from its activities and this includes competing in such activities subject to such conditions as to qualifying for such activities as may be imposed but not due to simple association.

*Would granting the conservatory orders sought serve to promote Constitutional values and principles? Would public interest be better served if the orders sought are granted?*

52. It would no doubt serve to promote the constitutional value as to equality if the Respondents were restrained from selectively denying other Kenyans a chance to compete and contest in galas which may lead to international swimming fetes. By the same vein however, if the Respondents were to be restrained from organizing and managing swimming events, it would lead to the likely scenario where the country's flag is not hoisted at the international swimming competition venues like the Olympics village. The country may miss-out.

**Conclusion**

53. I therefore conclude that the Petitioners' have made out a prima facie case of unfair discrimination with a possible unfair impact but that in the current circumstances, it would not be proportionate to grant the orders as sought. Rather, it would be more appropriate if orders were fashioned even at the interim to take care of both parties' interests.

**Disposition and final orders**

54. I would partially allow the application and fashion an order.I would consequently make an order, which I hereby do, that pending hearing and determination of the Petition herein the Respondents or any person acting in their stead are restrained from discriminating in any way or manner or form against swimmers affiliated to the 3rd Petitioner or swimmers in Kenya generally by denying such swimmers access to the 1st Respondent's activities.
55. As to costs, I direct and order that the costs of the application shall abide any orders as to costs made on determination of the Petition.

**Dated, signed and delivered at Nairobi this 30th day March, 2016**

***J.L.ONGUTO***

***<u>JUDGE</u>***