REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NUMBER 58 OF 2015

KENYA RUGBY UNION..... PLAINTIFF

VERSUS

THE REGISTRAR OF SPORTS..... 1ST DEFENDANT

THE HON. ATTORNEY GENERAL..... 2ND DEFENDANT

ALEXANDER MUTAI. ..... 3RD DEFENDANT

GERALD CHEGE. ..... 4TH DEFENDANT

JACK OKOTH. ..... 5TH DEFENDANT

JOSHUA ARONI . ..... 6TH DEFENDANT

DR. OCHIENG AHAYA. ..... 7TH DEFENDANT

DAN KIMORO. ..... 8TH DEFENDANT

DORIS MWANZIA. ..... 9TH DEFENDANT

KEN MONARI. ..... 10TH DEFENDANT

BENJAMIN AYIMBA. ..... 11TH DEFENDANT

KENNEDY WASONGA. ..... 12TH DEFENDANT

R U L I N G

1. The application for consideration is the Notice of Motion dated 3rd March, 2015 by the 3rd to 13th Defendants (hereinafter **"the Applicants"**). It is brought under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 40 Rule 2 of the Civil Procedure Rules.

2. The relevant prayers read as follows: -

> ***1) That this application be certified urgent and be heard ex-parte in the first instance.***
>
> ***2) That pending the hearing and determination of this application, inter-pates, the Respondent, its employees, agents, assigns, servants and any other persons howsoever acting under its directions be restrained from holding the Annual General Meeting scheduled to be held on 17th March, 2015 at the RFUEA Grounds, Nairobi.***
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> ***3) That, pending the hearing and determination of this application inter-partes, the Respondent its employees, agents, assigns, servants and any other persons however acting under its directions be restrained from conducting any activities on behalf of the Plaintiff.***
>
> ***4) That the costs of this application be provided for.***

3. When the application came up ex parte, it was certified as urgent and ordered to be served upon the Plaintiff and the 1st and 2nd Defendant (hereinafter "**The Respondents**"). The Respondents and the Plaintiff filed Replying Affidavits and exchanged written submissions which were ably hi-lighted by the respective counsels on 16th March, 2015.

4. The Applicants case was that the Plaintiff-Union as constituted was non-existent for failure to comply with the Sports Act, 2013 (hereinafter "**The Act")** as a sports organization; that the activities of the purported officials of the Plaintiff was, therefore, a nullity; that the parties had recorded a consent on 2nd March, 2015 referring this dispute to the Sports Tribunal , that the Plaintiff had called for an Annual General Meeting to be held on 12th March, 2015; that the issues to be canvassed in the said proposed Annual General Meeting **("AGM")** are the very same issues to be determined by the Tribunal. It was contended by the Applicants therefore that if the proposed AGM proceeded, it will not only defeat the consent order of 2nd March, 2015 but it will also render the matter before the Tribunal superfluous to the detriment of the Applicants.

5. Mr. Wanjau, Learned Counsel appearing for Mr. Arimi Kimanthi for the Applicants submitted that; the dispute between the parties had been referred to the Sports Tribunal for determination; that there are two groups who are fighting over the leadership of the Plaintiff and that any action by way of the proposed AGM will be prejudicial to the matters that are pending before the Tribunal. Counsel further submitted that unless the AGM was stopped, the Applicants will suffer irreparable loss and damage; that there will be no prejudice to be suffered by the Respondents if the injunction sought is granted in that, only time for the holding of the AGM that would have been delayed. Counsel concluded that since Section 50 of the Act as to registration had not been complied with by the Plaintiff, the orders sought should be granted.

6. The application was opposed by both the Plaintiff and the 1st and 2nd Defendant. The Plaintiff filed Grounds of Opposition dated 10th March, 2015 and a Replying Affidavit by Ronald Bukusi sworn on 11th March, 2015. It was contended by the Plaintiff that the application was fatally defective and bad in law; that the orders sought had been spent and were incapable of being granted; that the application sought to mischievously vary the consent order of 2nd March, 2015; that the Applicants were in contempt of the orders of this court and that the orders sought would prejudice the Plaintiff.

7. It was further contended that the dispute was now in the arena of the Tribunal; that the constitution of the Plaintiff provided for the AGM to be held once in every calendar year, after notice by the Secretary of the Union; that the Secretary had properly issued the notice on 11th February, 2015 for the AGM of 17th March, 2015; that the Applicants had not raised any objection to the AGM when the consent of 2nd March, 2015 was being recorded; and that Plaintiff was properly registered under Section 49 of the Act.

8. Mr. Muchemi, Learned Counsel for the Plaintiff submitted that if the orders sought are granted, Order No. 4 of the order made on 16th February, 2015 and which was extended on 2nd March, 2015 would be

rendered nugatory; that the jurisdiction to hear the dispute lay with the Tribunal and not this Court. Counsel submitted that by dint of a letter dated 24th February, 2015 by the Sports Registrar the Plaintiff was deemed properly registered under Section 49 of the Act. According to Counsel, it was an abuse of the court process for the Applicants to have failed to inform the court of the AGM when entering the consent of 2nd March, 2015 and now turn around to purport to discharge that consent. Counsel urged that the application be dismissed.

9. The 1st and 2nd Defendant filed a Replying Affidavit sworn by one Rose M.N. Wasike on 13th March, 2015. She stated that she is the Sports Registrar and that the Plaintiff applied for registration on 30th July, 2014 as a Sports Organization; that the Plaintiff was accordingly transited as a Sports Organization pursuant to Section 49 (2) of the Act. According to her the GM slated for 17th March 2015 was lawful.

10. Ms. Kerubo learned counsel for the 1st and 2nd Defendant reiterated the position of her client and urged that the application for injunction be declined.

11. I have carefully considered the Affidavits on record, the written submissions, counsels able hi-lights and the authority relied on by Mr. Wanjau. This is an injunction application. The Applicants have to establish a prima facie case with a probability of success; they have to show that if the orders sought are not granted they will suffer loss that cannot be compensated by an award of damages. If the court is in doubt, it will decide the matter on a balance of convenience. That is what the case of **Giella Vs Cassman Brown (1973) EA 378** established to be the principles applicable in such an application.

12. Have the Applicants established a Prima facie case with any probability of success? The Sports Act, 2013 is an Act of Parliament to harness sports for development, encourage and promote drug-free sports and recreation, to provide for the establishment of sports institutions, facilities, administration and management of sports in Kenya and for other connected purposes.

13. Section 55 of the Act establishes the Sports Disputes Tribunal (hereinafter "The Tribunal"). Under Section 58 of the Act, the jurisdiction of that tribunal is established. The Section provides:-

> ***"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."***

14. From the foregoing, it is quite clear that not all or each and every dispute in the sports fraternity that is the preserve of the Tribunal. The jurisdiction of that Tribunal is restricted to those disputes that are specifically set out in Section 58 of the Act.

15. On 16th February, 2015, the Plaintiff approached this court by way of a Plaint of even date claiming, inter alia, that the Applicants had taken steps that were contrary to its Constitution which steps were geared towards interfering with the management and running of the Plaintiff. The Plaint alleged that the Applicants had held a purported Special General Meeting against a lawful court order wherein they carried out elections whose purported effect was their taking over the leadership of the Plaintiff. The Plaintiff therefore prayed for various injunctive orders, including a declaration to nullify the purported

elections, as well as orders restraining the Applicants from interfering with the management of the Plaintiff. That then was the dispute that was submitted to this Court.

16. Together with the Plaint, the Plaintiff filed a Motion on Notice seeking various injunctive orders and an order that the dispute be referred to the Tribunal. A temporary order barring the Applicants from interfering with the management of the Plaintiff was granted. On 2nd March, 2015, the parties appeared before me and recorded a consent to refer the dispute to the Tribunal. That consent brought the dispute squarely within the provisions of Section 56 (b) of the Act i.e. ***"other sports-related disputes that all the parties to the dispute agree to refer to the Tribunal."*** When referring the dispute to the Tribunal, this Court extended the order that was then in force that had been made on 16th February, 2015.

17. Part of the order of 16th February, 2015 that was extended until the first sitting of the Tribunal was to the effect that:-

> ***"4. THAT an order of injunction be and is hereby issued for 14 days against the 3rd to 14th Defendants from accessing the offices, trespassing or interfering in any way with the running of the Plaintiff."***

Of course the 14 days period was on 2nd March, 2015 replaced with the words **"until the matter first comes up for consideration by the Tribunal."**

18. This then is the background against which the application before me was made. I have set out the foregoing history deliberately. The main complaint in the Motion is that the Plaintiff has planned to be hold an AGM at 4.00 p.m. today, 17th March, 2015 whilst this dispute is pending before the Tribunal.

19. I have carefully considered the record. I note that the Notice requisitioning the AGM was issued on 11th February, 2015. It specifically called for the AGM for today the 17th March, 2015 at 4 pm. It set out the venue and the agenda to be canvassed at that meeting. To my mind, that AGM sought, inter alia, to undo part of what the Applicants had done on 10th February, 2015, i.e. to elect the Chairman and Four (4) Directors of the Plaintiff. Despite the matter coming up in court on 2nd March, 2015 for the hearing of the Plaintiff's injunction application, the Applicants did not bring the same to the attention of the court. Although the court was ready to hear the matter on that day, the parties informed the court that they were referring the dispute to the Tribunal.

20. The question, therefore, that arises is, if the Applicants knew that the principal dispute in these proceedings was management of the Plaintiff, why would they refer the issue to the Tribunal and yet there was a looming AGM that was intended to undo their very act that had resulted in the present proceedings? They very well knew that the AGM was a direct challenge to the SGM that had brought about these proceedings. In my view, it was incumbent upon the parties, who felt that the intended AGM was prejudicial to them to bring the matter to the attention of the court. For the Applicants to record a consent to refer the matter to the Tribunal and immediately thereafter rush to this court complaining about the AGM is not in good faith.

21. I have noted that the Applicants have attempted to explain that it was inadvertent on their part not to have informed the court about the intended AGM on the 2nd March, 2015. The court is not convinced with that explanation having in mind that at the centre of the dispute herein is the SGM of 10th February, 2015. That being the case, it must have been always in their mind that the Plaintiff or those behind it had put in place a process of undoing their action through the proposed AGM . To mind, therefore, the application was not well intended.

22. Supposing I am wrong on this, is the application capable of being granted? At the beginning of this ruling, I set out the actual prayers sought by the Applicants. Prayer No. 1 had been granted on 16th February, 2015. It is therefore spent. Prayer Nos. 2 and 3 are meant to last ***"pending the inter partes hearing of the application"***. Since the matter was heard inter partes yesterday 16th February, 2015, those

prayers are also spent.

23. I would have been willing to consider this to be technicality and overlook it. However, the issue was raised by the Plaintiff both in its Grounds of Opposition dated 11th March, 2015 as well as in the written and oral submissions of Mr. Muchemi. If the Applicants had intended those prayers to be otherwise than as they are worded, nothing would have been easier than to have applied orally in court for their amendment to read "***pending the hearing and determination of the dispute before the Tribunal.***" Now that there was no application to amend the prayers, this court cannot litigate on behalf of a litigant. The court being neutral arbiter, it cannot frame a case for any party more than that party has framed it. The court will be bound by the express intention of the party to the proceeding. In this instance, the Applicants prayers are that pending the hearing of the application, inter partes the injunctive orders be issued. Since the application has already been heard inter partes, the entire application is spent and there is nothing to grant.

24. The other issue is the order that is in force. I have already set out the terms thereof above. That order barred the Applicants from interfering with the running of the Plaintiff. Is the holding of the AGM of the Plaintiff, which is a process that began way back on 11th February, 2015 not a process of running the Plaintiff? The answer is in the affirmative. If that be case, what will be the effect of granting the orders sought? It will be to effectively countermand the order of 16th February, 2015. The running of the Plaintiff would have been curtailed at the instance of the Applicants. I do not think, that will augur well for the process of justice. Where a court of law consciously issues an order and thereafter undertakes proceedings to undermine or defeat that very order, it would be a traversity of justice! This court will be the last one to do so.

25. There was then the issue about the Plaintiff being a non-entity for having not complied with the provisions of the Act. According to the Replying Affidavit of one Rose Wasike, the Registrar of Sports, sworn on 13th March, 2015, the Plaintiff is a recognized sports organization by virtue of Section 49 of the Act having applied for registration in July, 2014. This piece of evidence was not controverted. Since there was no denial that the Plaintiff had applied to be registered as a Sports organization within 1 year of the coming into force of the Act,. I have no reason to disbelieve the assertions of the Registrar of Sports and the submissions of Ms Kerubo. Accordingly, I hold that prima facie, the Plaintiff exists as a Sports Organization in terms of the Act.

26. In view for the foregoing, I am of the firm view and so hold that the Applicants have not established a prima facie case with a probability of success. That being the case I do not think that I need to address the second limb of **Giella Vs Cassman Brown**.

27. Since however, I am not the final court, if my view is required on the second limb on the second limb of **Giella Vs Cassman Brown**, I hold that the Applicants fail also in that limb. They will not suffer any loss that is irreparable. They have not been barred from attending the AGM and participating thereat. They may as well view for positions that are up for grabs in that AGM. If they are popular, as it would seem from the way they swept the seats in the impugned SGM, they will still retain or will grab the positions they shall vie for.

28. As regards the balance of convenience, I think it lies in favour of rejecting the application. Sports in this country **MUST** be run smoothly. They have hitherto been run at the whim of those who are in leadership positions to the extreme prejudice of sporting fraternity. As a step to the right direction, the authorities have enacted the Sports Act, 2013. It is hoped that same will bring some sanity in the administration of sports in this country not only for the benefit of the sportsmen and women of this country, but also the lovers of the various activities that is sports.

29. In this regard, one of the contentions of the Plaintiff is that the proposed AGM is an attempt to comply with the provisions of the Act. Surely, what is more important, convenient and inviting to a court of law than compliance with the law? I have always known Rugby to be a sport. It is to be played on stadiums or designated fields. Sports are not to be played out in court rooms or before Tribunals. For the benefit of those Kenyans who are Sportsmen and women, for those Kenyans who are ardent lovers of

sport, for the sake of those youngsters whose talents require to be harnessed, the courts need to firmly tell the administrators of sports organizations that, the place of sports is in the fields and stadiums not in court rooms. Of course, where there are genuine grievances, the courts will be able, ready and willing to swiftly adjudicate on them if only to bring normalcy in the administration of any particular sport. I think I have said enough.

30. In this case, the balance of convenience lies in complying with the law, i.e. declining to grant the prayers sought. I therefore, find the application to be without merit and same is hereby dismissed with costs.

DATED, Signed and Delivered at Nairobi this 17th day of March, 2015.

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A MABEYA

JUDGE