REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO.69 OF 2015

FOOTBALL KENYA FEDERATION …….... PLAINTIFF

VERSUS

KENYAN PREMIER LEAGUE LIMITED…….1ST DEFENDANT

KENYA FOOTBALL REFEREES

ASSOCIATION……..……..2ND DEFENDANT

SPORTS KENYA……..……....3RD DEFENDANT

AND

SAM TIYOI SHOLLEI…….……1ST INTERESTED PARTY

DAN A. SHIKANDA…….2ND INTERESTED PARTY

RULING OF THE COURT

Introduction

This ruling follows directions given by this court on 5th March 2015 with the agreement of parties' advocates to the suit that the substantive motion herein be heard jointly with the respondents' preliminary objections and applications, with the respondent's preliminary points of law and applications as well as the objections forming the basis of the reply to the substantive motion by the applicant.

By a plaint dated 20th February, 2015, the applicant/Plaintiff who is the Football Kenya Federation seeks from this court relief by way of a permanent injunction to restrain the defendants/Respondents from hosting , holding, playing , running, starting or managing a parallel league in Kenya known as Kenya Premier League or in any other name.

Contemporaneous with the filing of suit herein on 20th February, 2015, the then sole plaintiff/applicant, FOOTBALL KENYA FEDERATION did, by way of Notice of motion dated 20th February 2015, move this court seeking the following orders:

1. Spent
2. Spent
3. Pending the hearing and determination of this suit , the defendants/respondent be restrained by

way of injunction from hosting, commencing, starting, running, managing or in any other way conducting , a parallel premier league in Kenya in the name of Kenyan Premier League or in any other name.

4. Costs of this application be provided for.

The Plaintiff/Applicant's Case.

The notice of motion by the applicant is predicated on six grounds on the face of the application namely:

i. The first defendant had drawn and approved a 2015 season fixture for a parallel Premier League in Kenya
ii. The plaintiff is the only body recognized by the Government of the Republic of Kenya and by FIA to manage and run football in Kenya.
iii. In the event that the parallel league in Kenya is run Kenya risks being banned from regional, international and continental football
iv. All premier league clubs are members of the plaintiff society
v. The 1st defendant is hell bent on bringing disorder and chaos in the management of football in Kenya because it is neither recognized by FIFA, nor by the Government
vi. The first defendant has acted contrary to the Sports Act 2013 and FIFA Statutes.
vii. Unless restrained by way of an injunction such action by the defendants shall cause irreparable damages to the plaintiff and the country.

The above grounds are also supported by an affidavit sworn by Sam Nyamweya the Chairman/President of the applicant on 20th February 2015. Mr. Nyamweya deposes that Football Kenya Federation (FKF) is the sole governing body of football in Kenya. That the said body organizes Kenya Premier League, Kenya Women Premier League, Kenya National Football Team, FKF Division One and all other Leagues. FKF is also said to be affiliated to and recognized by Federation International de Football Association (FIFA), Council of East and Central African Football Association and Confederation of African Football. Mr. Nyamweya avers that its predecessor had unprocedurally given room to the 1st defendant/respondent to run and manage the Premier League (top tier) as a service provider in Kenya. It is contended that the 1st defendant is neither affiliated to nor recognized by FIFA. That on 30th January 2015, at a special general meeting held in Kakamega Golf Club, the applicants resolved that the top tier league in Kenya shall be referred to as Football Kenya Premier League (FKF Premier League), the participating teams shall be 18 in number and the League shall be managed by a company limited by guarantee namely FKF Premier League Limited. Present in the special general meeting were all Premier League clubs, representatives of the 2nd respondent and all members of FKF.

On 3rd February 2015, the 1st respondent Kenya Premier League Limited is then alleged to have organized a parallel premier league competition which drew and approved 2015 season fixtures for the games to commence on 21st February 2015. It is stated that the above action by KPL provoked the World governing body FIFA to intervene and issue a warning to the effect that should Kenya hold two parallel premier leagues, the country risked being slapped with a ban from FIFA membership as well as any participation in regional, international and global football activities by Kenyan Football clubs and players as well as referees. He annexed copies of letters dated 11th February, 2015 written by FIFA annex SN9.The parties tried to resolve the dispute, with the Government's as well as FIFA's intervention between 9th February to 18th February 2015 as shown by a plethora of newspaper extracts of those attempts.

The applicant then went ahead and drew the 2015 season fixture and announced in January 2015 with the first match being played on 14th February 2015. The applicant contends that the 1st respondent has no authority or mandate to run football in Kenya and their action is in breach of the FIFA statute and sports Act 2013. The applicants further state that unless the court restrains the respondent from implementing, running, managing or playing the Kenyan premier league, the plaintiff and the entire country shall suffer irredeemable loss and damage.

Responses to the plaintiff /applicants' claim

1st Respondent Case.

The 1st respondent filed a notice of preliminary objection dated 2nd March 2015 seeking to have the applicant's notice of motion dated 20th February, 2015 struck out on the following points of laws:

1. That this honorable court lacks the jurisdiction to hear and determine this suit and the instant application.
2. That the plaintiff has no *locus standi* to institute this suit in its own name.

The 1st respondent also filed a notice of motion dated 25th February 2015 seeking the following orders:

1. Spent
2. That pending the *interpartes* hearing and determination of the plaintiffs notice of motion dated 20.02.2015, the order granted by this honorable court on 20.02.2015 against the 1st defendants be discharged varied reviewed and set aside.
3. That in the alternative to prayer 2 above, the plaintiff's notice of motion dated 20.02.2015 be heard and determined as matter of urgency and priority together with the instant application on 26/02/2015.
4. That the plaintiff to provide appropriate security for costs.
5. That the cost of the application be borne by the plaintiff.

The said application is premised on the grounds stated in the supporting affidavit dated 25th February 2015 sworn by Ambrose Rachier, the chairman of the 1st respondent. The 1st respondent contends that the applicants obtained the order of 20.02.2015 after failing to disclose to the court relevant and crucial facts, material and information. They also aver that the applicant failed to disclose to the court that it is a shareholder of the 1st respondent company holding one special share. The rest of the directors/ shareholders of the 1st respondent are the sixteen (16) football clubs participating in the country premier league. The relationship between the applicant and the directors/members of the 1st respondent are football clubs engaged in the game of football that is all governed by:

1. Federation Internationale de football Association (FIFA) statute.
2. Confederation Africaine de football (CAF) statute
3. The constitution of Football Kenya Federation.

The 1st respondent claims that regulation 68 of the FIFA statute, Article 47 of the CAF statute and Article 67 of the constitution of FKF all deprive this court of any jurisdiction to hear and determine the current suit. The 1st respondent also avers that the applicant's letter dated 29/09/2014 written by their President to the Chief Justice of Kenya confirms that football disputes should not be resolved in court.

The respondent avers that the threats of sanction and disciplinary measures issued by the world football governing body FIFA can therefore only be as a consequence of FKF breaching the express provisions of the FIFA statute, the CAF statute and its own constitution. The respondent further claim that the applicants forwarded the issues in dispute to FIFA for determination and FIFA appointed a consultant who duly made recommendations to the parties. The applicants however, deliberately failed to disclose the said information to court which would have guided the court in deciding whether or not to issue an interim injunction. The respondent also states that section 55 of the Sports Act (ACT NO. 25 of 2013) establishes the Sports Disputes Tribunal which under section 58 of the said Act has the original jurisdiction to determine the dispute herein. The respondent argues that even if the court had jurisdiction to determine the dispute, which the respondent denied, FKF being a society registered under the societies Act, Cap 108 Laws of Kenya has no *locus standi* to sue in its own name.

The 1st respondent further claim that it has been in existence since 31st October 2003 and previously

known as the Kenya Football Group limited and has been managed by 1st respondent since 2006. That it has received recognition from FIFA, CAF, and CECAFA & KFF. That the applicants have also recognized the 1st respondent's role in the administration and management of the country's premier league in their 1st Annual General Meeting held on 28th June 2013. The 1st respondent also claims to be consistent in payments made to the applicants in form of affiliation fees totaling to Kshs 13,612,200.00.

The dispute between the applicant and the 1st respondent stemmed from a unilateral declaration by the President of the applicant on 10.11.2014 and 24.11.2014 after the end of the 2014 Kenya Premier League season to increase the composition of the Kenya Premier League from 16 teams to 18. It is contended that the President; Mr. Nyamweya made the said decision unilaterally without the involvement of the members of the plaintiff. That discontent was then forwarded to FIFA for determination of a brewing dispute. Its appears that after the report by FIFA's consultant which made some recommendations for implementation, the 1st respondent, relying on the said recommendations publicly announced the kickoff of the Kenya Premier League 2015 season and accordingly released the fixtures thereof. The applicants moved to court on the eve of commencement of the Kenya Premier League seeking to stop the 1st Respondent from starting the Premier League Matches. According to the 1st respondent, the applicant's injunctory move was done in bad faith and is malicious since the applicants were aware of the impending commencements for at least three weeks and that the participating football clubs had made logistical arrangements and travelled to the various venues ready for the matches.

The 1st respondent averred that the continued existence of the exparte restraining order by way of an injunction is very prejudicial to the 1st respondent in that over 500 players, coaches and thousands of funs cannot prepare for matches; the 1st respondent also risk breaching its contractual obligations with its broadcast partner Super Sport and the Kenya Premier League calendar which starts from February to November risked being disrupted.

The 2nd Respondent's case.

From the record, the 2nd respondent Kenya Football Referees Association did not file any opposing documents to any of the applications before the court for determination, stating in brief submission, and as expected of a prudent umpire, that it was not affected by any of the orders sought

3rd Respondent case

The 3rd respondent Sports Kenya opposes the Application dated 20/02/2015 through grounds of opposition dated 26th February 2015. The 3rd respondent also filed a notice of motion dated 5th March 2015 seeking orders to strike out the suit and the notice of motion against it on the grounds that the suit does not raise any reasonable cause of action; that the application dated 20/02/2015 by the applicant is misconceived, non-starter and unsustainable since there is nothing both in the motion or in the supportive affidavit that has any bearing on the 3rd respondent to warrant a grant of the injunctive orders sought against it. The 3rd respondent state that its mandate is donated by the Sport Act 2013, which mandate does not include managing, directing, controlling or in any other way interfering with composition or operation of the applicant, 1st respondent and 2nd respondent. The 3rd respondent further contended that it has never been a party to the alleged wrangles between the applicants and the 1st and 2nd respondent. Further, that the entire suit and motion is bad for misjoinder of the 3rdrespondent and it does not disclose any cause of action known to law against it. The 3rd respondent further contends that granting the injunctive orders sought against it will be an act in futility which is against equity.

Applicant's Reply to the application to discharge the order of injunction issued on 20th February, 2015

The applicant is opposed to the preliminary objection and application by the 1st Respondent seeking to set

aside, vary or discharge the order of interim injunction issued by this court in the first instance and contend that the deponent of an affidavit filed in support of the said application to discharge the injunction, Mr. Ambrose Rachier had no authority from the 1st respondent to swear the affidavit in the manner he purported to do. The applicants aver that the 1st respondent declined to sign or acknowledge on the duplicate copies of the court order and pleadings issued in this case. The applicant further states that the 1st respondent failed to demonstrate that the applicant did not disclose the material facts, accusing the said Mr. Ambrose Rachier of committing perjury and deliberately misleading the court. The applicant also contended that it ceased being a member, shareholder and Director of the 1st respondent on 30th January 2015 following a resolution at a general meeting.

On the issue raised in the preliminary objection, the applicant admitted that regulation 68 of the FIFA statute, Article 47 of CAF statute and Article 67 of the FKF constitution dealing with the jurisdiction of the court only relates to organizations that have been recognized by FIFA and that since the 1st respondent was not recognized by FIFA and the members of the applicant society, it could not fall within the provisions of the ouster clause of the FIFA statute which the 1st respondent is not also a member. The applicant also stated that the letter to the Chief Justice dated 29th September 2014 was written in the context of dispute involving members of football organizations and third parties like the 1st respondent. The applicant further rejected the claim that the issue before FIFA is the same as the issues before the court. According to the applicant, the issues that FIFA dealt with through the consultant was the question of expanding the teams in the league from 16 to 18 teams and that FIFA also did write back to confirm that the consultant's report was not binding and the parties could resort to local solutions. The applicant also claimed that section 55 of the sports Act was not applicable in this case since the Sports Tribunal is only applicable where the organization rules specifically allow for appeals to the tribunal after a decision by the national sports organization; disputes which the parties have agreed to refer to the tribunal and appeal against decision by the registrar. The applicant added that presently, the sports tribunal is yet to be operationalized. The applicant also admitted that the 1st respondent has managed the Premier League before it misconducted itself and continue to do so when they decided to run a parallel league despite advice from the applicant and FIFA thereby provoking this suit.

Interested Parties' case

On 6th March, 2015, this court did allow the Interested Parties Mr. Sammy Tiyoi Sholei and Dan Shikanda to be enjoined as Interested Parties, to participate in the proceedings herein as necessary parties, to articulate the interests of players and fans of football in Kenya.

Submissions by parties' advocates.

All parties agreed to prosecute the three applications by way of written submissions which they timeously filed as directed by the court.

Applicant's Submissions.

The applicant filed their written submissions on 9th March, 2015, commencing with the issue of jurisdiction. Mr. Mutua advocate for the applicant submitted that courts ought to first establish the status and position of the applicant, 1st respondent, 2nd respondent and the 3rd respondent before dealing with any other issues raised in these triple applications. The applicant's counsel submitted that FKF is the sole governing body regulating and managing football in Kenya, affiliated and recognized by FIFA, CAF, and CECAFA. That on the other hand, the 1st respondent is a private limited liability company which is neither affiliated nor recognized by FIFA as an association. It is not a member affiliated to or recognized by FKF, CAF or CECAFA. The 2nd respondent is an association of referees and member of the applicant. The 3rd respondent has the mandate under the sports Act to promote, coordinate sports programmes and sports facilities.

Counsel further submitted that the FIFA statute under Article 66 provides for establishment of a Court or

Arbitration for sports (CAS). The jurisdiction of the said court is to resolve disputes between FIFA, members, confederations, leagues, clubs, players , officials and licensed match agent and players. That the 1st respondent is not a member of FIFA, not a Confederation, a League, a club, a player, an official, licensed match agent. It was submitted on behalf of the applicant that the parties hereto do not fit the descriptions of any of the entities cited above therefore the dispute does fall within the jurisdiction of the CAS.

The applicant also submitted that Article 10 of the constitution of FKF identifies and names the members of FKF and that the first and second respondents are not its members. Further, that Article 66 and 67 of FKF constitution also deals with arbitration of disputes involving or between FKF members, players, officials and match and players Agent. Article 77 oust the court's jurisdiction and vests the jurisdiction over such disputes to FIFA, CAF and FKF. That the 1st respondent not being a member of the FKF is not subject of the arbitral process under the FKF constitution. Also, that the tribunal established under Article 66 of FKF lacks jurisdiction over the 1st respondent. The Applicant also argued that the instant dispute does not fall under section 56 and 59 of the Sports Act.

On whether FKF has *locus standi* in the matter: The applicant submitted that they amended their plaint to include the officials of FKF as parties to the suit therefore any perceived defect was cured by the amendments, pursuant to the provisions of Order 8 rule 1(1) which allows amendment of pleadings without leave of court and that the respondents have not challenged the said amendment. It was submitted that the Societies Act is bad law in that an organization registered pursuant to statute, like the Societies Act and under the hand of a Registrar must have legal capacity as a legal person and that the issue has to be determined by the Supreme Court. The applicants relied on the decision in the case of David Jonathan Grantham & Another vs National Social Security Fund (2007) eKLR Where Hon. Lesiit J. cited with approval the two Court of Appeal cases on the law relating to amendment of pleadings before close of pleadings.

The applicant further submitted that there was no single replying affidavit to the application therefore the matters of facts were not controverted by the 1st respondent's notice of motion dated 25th February 2015 hence the applicant's averments must be taken as factual. The applicant further submitted that the 1st respondent acknowledged the legal instruments used to govern Football in Kenya including the constitution of FKF, and that the Sports Act does not exclusively govern football in this county. It was submitted that Article 10 of FIFA statute only recognizes one association football in each country and the membership is only permitted if an association is currently a member of confederation and in this case FKF is the sole association recognized by FIFA and CAF. In addition, that Article 4(4) of the CAF statute also recognizes one national association per country which is FKF and its constitution recognizes it as member of FIFA, CAF and CECAFA. Article 10 of the constitution also identifies members of premier league clubs, and under article 13(1) the member of FKF must comply fully with the statutes, regulations, directives and decisions of FIFA, CAF, CECAFA and FKF. From the foregoing, it is submitted that the applicant therefore has the mandate to determine how the top league in Kenya is played and managed.

The applicant submitted that the court of appeal has also considered the effect of recognition of a body by FIFA and the threats of Kenya being banned from participating in international football. The applicants cited the decision in the case of SAMSON KEENGU NYAMWEYA & 3 OTHERS VS MOHAMMED HATIMY & 3 OTHERS (2008) eKLR, where the court in dismissing an application for stay and injunction brought under rule 5(2)(b) of the court of Appeal rules, the court observed that KFF was affiliated to FIFA.

On the 1st respondent's application to discharge the injunction, the applicant submitted that the 1st respondent's replying affidavit controverts the averments in the said application. That all the relevant material was disclosed in the suit papers which the court considered before granting the orders of interim injunction in the first instance.

On the 3rd respondent's application to strike out the suit against it, the applicant submitted that the 3rd respondent had been sued because of its unique position provided under the Act. It has the responsibility

of ensuring that the country is not banned from international matches.

1st respondent's submissions.

The 1st respondent submitted that the applicant described itself as a society duly registered under Cap 108 Laws of Kenya. That according to section 2 of the Societies Act , a society includes any club, company, partnership or other association of ten or more persons, thus according to the 1st respondent a society is an amalgamation of more than ten persons which is a unit formed by persons. The 1st respondent also relied on the definition of society under the common law and cited Halsbury's Laws of England Fourth Edition Volume 6. Paragraph 201 where a club is defined as: *defines a society of persons associated together not for purposes of trade but for social reasons, the promotion of politics, sport, art, science or literature or for other lawful purpose."*

The respondent further stated that under paragraph 286 of the same publication dealing with liability of club members, It is provided that "unincorporated *members' club is not a partnership or an association which, as an association is legally recognized.* Under paragraph 273 " *the rights and liabilities of the members of a club in contract made on their behalf are prima facie joint only and all members should be joined as plaintiffs or defendants, as the case may be in any action, on such contract although representatives proceedings may be brought in suitable cases.*

The 1st respondent submitted that the applicant cannot institute legal actions in its name because it is not a person in law. A person under Order 1 rule 1 is either an individual or corporate entities and in this case the applicant is described as a society. The respondent submitted that the applicant lacked capacity to institute any civil suit. The respondent relied on the High Court decision in the case of HOUSING FINANCE COMPANY OF KENYA LTD VS EMBAKASI YOUTH DEVELOPMENT (2004) 2KLR 548 where the court held that only juristic persons, that is, an entity endowed with legal personality can have locus standi before the court and can be the subject of the rights and liabilities as may be decided by the court. The 1st respondent also relied on African Orthodox church of Kenya versus Rev Charles Omuroka and Lagos Ministry for Orthodox Renewal (2014) eKLR, Matinyani Women Development Group vs Group Four Security Limited (2005) eKLR, Simu Vendors Association vs the Town Clerks City Council of Nairobi & Another (2005) eKLR, Eritrea Orthodox Church vs Wariwax Generation Limited (2007) eKLR , Living water Church International vs City Council Nairobi (2008) eKLR. Where the court pronounced itself on the legal status of registered societies to the effect that they were not legal personalities capable of suing and being sued in their own names but through their officials or trustees as per their respective constitutions.

The 1st respondent submitted that FKF, has no locus standi to institute proceedings and the plaint filed in court together with the notice of Motion are null and void. The 1st respondent submitted that the same cannot be cured despite the applicant's efforts to amend the plaint as the applicant, Football Kenya federation could not include the official since the pleadings were a nullity ab initio. Further, relied on the latin maxim that out of nothing comes out nothing. The court's attention was drawn to the decision in the case of SIMU VENDORS ASSOCIATION, ERITREA ORHODOX CHURCH AND MACFOY VS UNITED AFRICA CO. LTD (1961)3 ALL ER 1169 that as the applicant in law could not bring an action, an amendment or joinder or substitution could not cure the fatal defect. The respondent submitted that the proposed amendments to introduce the names of the officials of the society were mooted after the preliminary objection was filed. The respondent further submitted that amendments which deny a defendant a right to rely on a defence raised should not be allowed by any court of law.

On the jurisdiction to hear and determine suit the 1st respondent submitted that this court has no jurisdiction to entertain this dispute in the light of express provisions of FIFA, CAF and CECAFA statutes which are binding on both the plaintiff and the 1st respondent which the applicants have undertaken to uphold by incorporating them in their constitution. The 1st respondent further submits that the applicant is estopped from invoking the jurisdiction of this court having acceded to the jurisdiction of FIFA to determine the matter. The respondent further submitted that the High court has always

recognized the jurisdiction of FIFA for purposes of settling football disputes and this suit should not be exceptional. Courts attention was drawn to the decision in Alfred Wekesa Sambu (2000) eKLR and Sammy Tiyoi Shollei versus Football Kenya Federation and Sam Nyamweya. The 1st respondent urged the court to uphold the preliminary objection and strike out the plaint and all pleadings arising there from.

On the application to discharge the injunction the 1st respondent submitted that there was no justification at all to grant an interlocutory injunction in the first instance. The respondent stated that the applicant chose to conceal material and relevant information which would have guided the court at the time of issuing the interlocutory injunction. The respondent relied on communications addressed to the applicant's exhibit and marked "AR5a" and AR 5b in the supporting affidavit sworn by Ambrose Rachier which gave a background to the dispute but the applicants chose to ignore. The applicant also chose to ignore the FIFA recommendations given to the parties that the league should continue to have 16 teams, the applicant should recognize the 1st respondent as the organizer of the league, sign a license agreement ,establish modalities of sharing responsibilities, agree on road map for increasing number of league teams from 16 to 18. The 1st respondent submitted that where an applicant fails to disclose material facts to the court at the exparte stage the court will set aside the exparte orders obtained. The 1st respondent relied on the court of Appeal decision in the case BAHADURALI EBRAHIM SHAMJI VS AL NOOR JAMAL & 2 OTHERS (1998) eKLR, HUSSEIN POTHIWALLA VS GRACE MWAI MATHENGE & ANOTHER (2012) eKLR. The 1sr respondent stated that the applicants made matters worse by leading the court to believe that FIFA was about to ban Kenya from participating in international football tournament because the 1st respondent was organizing a parallel league.

On the merits of the main application for injunction pending the hearing and determination of the suit. The 1st respondent submitted that applicants must meet the threshold established in the case of GIELLA VS CASSMAN BROWN (1973) EA 358. The 1st respondent stated that based on the case of MRAO VS FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125, the applicant has not shown that there exist a right which the respondent have infringed. The respondents submitted that the applicant case is riddled with misrepresentation and inconsistencies. The respondent pointed out that in the supporting affidavit sworn by Sammy Nyamweya the applicant claim that it organizes Kenya premier league but the constitution does not provide for that and that to purport to organize and manage the same would be ultra vires its own constitution and that FIFA roots for the 1st defendant to organize the league. That it has paid affiliation and licensing fees to the tune of 13,612,200 between 2012-2014 and a loan of sh. 2000000. The applicants have no right to interfere with the 1st respondent obligation to organize and manage Kenya premier league. That the purported resolutions had not been implemented especially the incorporation of the FKF Premier League Limited. The respondent further submitted that the applicant demeanor in this saga has been wrought with utmost bad faith coupled with illegal and inequitable conduct. The respondent stated that he who seek equity must also do equity similarly he who comes before a court of equity must come with clean hands. It is the respondent submission that the applicant's conduct disentitles it from being granted the equitable remedy of injunction.

On whether the applicant will suffer irreparable harm, the respondent submitted that the applicant had not demonstrated that is will suffer irreparable harm and injury if the injunction is not granted it stated that on the contrary it is the 1st respondent who will suffer irreparable harm and injury if the injunction is granted.

The respondent also submitted that the balance of convenience tilt in favour of the 1st respondent which has been running the Kenyan premier league for the last decade. The mandate to run was given to the 1st respondent by FKF. The balance of convenient cannot favour the applicants also since it rejected a solution provided by FIFA, a party who breaches its own constitution with impunity and a party will who willfully chooses to conceal relevant information and material from the Honorable court.

In concluding its submissions, the 1st respondent urged the court to dismiss the application for injunction and allow the application to discharge the interim orders.

2nd Respondent submissions.

The 2nd respondent submitted that the Notice of Motion, supporting affidavit and the annexure did not contain specific allegations against it. It stated that it was improper to be enjoined in this suit. The 2nd respondent urged the court to dismiss both the application and the main suit with costs against it.

Third defendant's submissions

The 3rd respondent filed their submissions in support of their notice of motion dated 5th March 2015, the submissions are also in opposition to the notice of Motion dated 5th March 2015 and filed on 20th February 2015.

The respondent submitted that there is no single allegation of any Act of omission or commission by the 3rd defendant that has contribution to the dispute now before the court. It claims that it is mentioned once alongside the other defendants in paragraph 11 of the plaint.

The 3rd defendant submitted that it is not capable of doing the things it is now sought to be injuncted against. The respondent submitted that the 3rd defendant is a creature of the sports Act and the successor to the former Sports Stadia Management Board. The mandate of the 3rd defendant as set out in the Act section 4 is to among others to promote, co-ordinate and implement grassroots, national and international sports programs for Kenyans and to manage and maintain sports facilities. The 3rd defendant submitted that their main mandate is to manage and maintain sports facilitate at both national and county level.

The 3rd defendant submitted that both the Notice of Motion and the plaint do not disclose any reasonable cause of Action. It further submitted that the plaintiff has got no case at all and none can be created since the facts as pleaded will not change. In support of its submissions the respondent relied on the case of DT Dobie and Company (Kenya) Limited vs Joseph Mbaria Muchina & Another C.A. no. 37 of 1988 (1982) KLR 1 , Nguruman Limited vs Shompole Group Ranch & other C.A no. 73 of 2004 (2007) 2 EA 353, Okongo vs Kenyatta University (2007) 2EA.

Interested parties submissions.

The interested parties submitted that the balance of convenience tilt in favour of the 1st respondent. The interested parties claim that the 1st respondent has for the past ten (10) years been organizing the premier League in Kenya which has become very competitive and more appealing to the fans and lovers of football. They submitted that the players and the sponsors, fans and other stakeholders will be the greatest losers. The players will lose matches which are their source of income, sponsors will also miss the visibility that they get from sponsoring football clubs and the 3rd respondent will miss income from the lack of use of its facility.

The interested party also submitted that the football industry in Kenya attracts public interest. This is because the game is loved by very many people who are always willing to make time and financial sacrifice to watch a match between their favorite teams. The parties submitted that the court should refrain from granting an injunction in matters where public interest is concerned and hear the matter on merit. The interested party stated that the fourth schedule of the constitution of Kenya, 2010 stipulates that the national government has the responsibility to ensure promotion of sports and sports education whereas the county government is given powers in cultural activities. Further, that the Sports Act on the other hand clearly shows how public interest in sports has been protected by enactment of the sports Act 2013. The same is also demonstrated in the vision 2030 under social pillar provision for youth and sports which recognizes sports as a means to social and economic prosperity of the country.

The interested parties also submitted that the recommendation made by the FIFA through the consultant, Dr Robert Niemann in the report titled *League size of KPL* dated 20th January 2015 were made on the same day the court issued the injunctive orders. The interested parties accused the applicants of not

disclosing to court the existence of the report at the time of filling the suit. They submitted that the applicant lacked respect for the world Football governing body.

The interested parties also submitted that the plaintiff is governed by its constitution and the 1st respondent is governed by its memorandum and Articles of Association both which provide for dispute resolution mechanism. Article 65, 66 and 68 of the plaintiff constitution provides for disciplinary process and other dispute resolution mechanisms which had not been exhausted by the plaintiffs before coming to this honorable court. The parties also submitted that the court should be guided by Article 159(2)(c) of the constitution which empowers the honorable court to promote alternative dispute resolution. Courts attention was drawn to the High court decision in the case of Japheth Kenyatta and 12 Others vs Football Kenya Federation, petition 75 of 2012.

In concluding their submissions the interested parties urged the court to dismiss the application dated 20.02.2015 and allow the premier league to proceed.

FINDINGS AND DETERMINATION

Having set out the respective parties' positions and having considered all the eminent points of view of all the parties advocates, the affidavit evidence, pleadings, the applicable statutory and case law for and against the substantive motion by the applicant and the opposing motions and points of law raised, I now embark on the journey of analyzing and determining the matter by framing the issues as follows:

1. **Preliminary objections to the suit and application dated 20th February, 2015**

It is now established that the proper practice is to determine the preliminary objections first especially where such preliminary objections are likely to dispose of the suit or application entirely. The case of Mukisa Biscuits Manufacturing Co. Ltd vs West end Distributors Ltd(1969) EA 696 delineated that-Per Law JA that :

"a preliminary objection consists of a point of law which has been pleaded or by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

Sir Charles Newbold P. on the other had held that:

"a preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

J.B Ojwang J. as he then was succinctly put it thus in the case of Oraro vs Mbaja(2005) eKLR:

" I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Iam in agreement.. that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

What then are the preliminary points of law raised by those opposing this suit and therefore the application dated 20th February, 2015 for a temporary injunction against the defendants/ respondents?

1. **Whether this court has jurisdiction to hear and determine the dispute herein.**

From this issue flow other ancillary questions that I will endeavor to deal with.

It is pleaded and submitted by the respondents and interested parties that this court *lacks* jurisdiction to

hear and determine this suit and application hence the entire suit should be struck out with costs.

The grounds relied upon are that:

i. The applicant Football Kenya Federation (FKF) being an association lacks the legal standing to initiate proceedings in its own name the defendants.
ii. The FIFA and FKF statutes and constitution as well as the Sports Act, 2013 expressly prohibit parties from resorting to courts of law in the resolution of a dispute of this nature and therefore those instruments oust the jurisdiction of this court by establishing alternative dispute resolution mechanisms in the form of tribunals.

On the first point, the respondents argue that only registered officials of the Federation can sue and be sued on behalf of the society. The plaintiff Federation on the other hand avers that it is the only body recognized by FIFA, CECAFA and CAF, and that it is bad law that a creature of a statute can lack legal capacity as a legal person. It hopes that the Supreme Court can determine that issue.

Further, that in any event, the plaint was amended on 2nd March, 2015 to cure any perceived defect, which amendment was done before pleadings closed, as provided for in Order 8 rule 1(1) of the Civil Procedure Act hence leave of court was not necessary.

It is not in dispute that on 20th February, 2015, the suit herein, together with the Notice of Motion dated the 20th February, 2015 were initiated by Football Kenya Federation. It is also not in dispute that the said application for an injunction was heard exparte in the first instance owing to the urgency displayed on the face thereof as the KPL was scheduled to play what is described as parallel league matches on 21st February, 2015. It is further not in dispute that on 25th March, 2015 when the 1st defendant herein filed its notice of preliminary objection, grounds of objection and application to discharge the injunction, it based the said documents on the served pleadings disclosing all the parties to the suit. However, the record bears that on 2nd March, 2015, the applicant upon being served with those opposing documents did file an amended plaint.

The question is whether or not that filed amended plaint had any curative effect of the suit and application for injunction as originally instituted.

The plaint as filed does describe the plaintiff as a registered society under the Societies Act, Cap 108 Laws of Kenya. It is trite law that a society as the plaintiff herein, which fact is not denied by the plaintiff, that is an unincorporated entity and therefore it has no legal personality with the capacity to sue and be sued in its own name. However, Mr. Mutua advocate submits that that is bad law and that the Supreme Court must determine that fact. Until that happens, it remains law- I hear him saying.

The 1st respondent has cited a plethora of decisions that have determined that point of law and all are unanimous without exception that an incorporated society cannot sue and be sued in its own name, but that its officials or trustees can institute suit on behalf of the society. I accept those decisions which I have extensively referred to in this ruling and they include: African Orthodox church of Kenya versus Rev Charles Omuroka and Lagos Ministry for Orthodox Renewal (2014) eKLR, Matinyani Women Development Group vs Group Four Security Limited (2005) eKLR, Simu Vendors Association vs the Town Clerks City Council of Nairobi & Another (2005) eKLR, Eritrea Orthodox Church vs Wariwax Generation Limited (2007) eKLR , Living water Church International vs City Council Nairobi (2008) eKLR. Where the court pronounced itself on the legal status of registered societies to the effect that they were not legal personalities capable of suing and being sued in their own names but through their officials or trustees as per their respective constitutions.

The above decisions, in my humble view, give the correct legal position and as I have no good reason to depart from their reasoned findings, I adopt them.

In my exploration for some good law on this point, I globally searched many jurisdictions that I came

across- England, New Zealand, Malaysia, USA, Canada, among others, are all in agreement that a registered unincorporated society has no legal persona with the capacity to sue and be sued.

In *Unincorporated Associations as Parties to Action, 33 Yale Law Journal 383 (1924) a Yale Law School Yale Law School Legal Scholarship Repository, Faculty Scholarship Series Yale Law School*, **it is written as follows:**

"The cases are remarkably in accord that, in the absence of enabling statute, an unincorporated association cannot sue or be sued in the common or association name. Like unanimity substantially obtains in the reason assigned for the general rule. The following excerpts are cited as typical:

"Since a partnership is not a person, either natural or artificial, it cannot sue as a party plaintiff in the firm name." Lister v. Vowell (1898) 122 Ala. 264, 267, 25 So. 564, 565.

"As we have said, the plaintiffs have undertaken to make three unincorporated labor unions parties defendant. That is an impossibility. There is no such entity known to the law as an unincorporated association, and consequently it cannot be made a party defendant." PICKETT V. WALSH (19O6) 192 MASS. 572, 589, 78 N. E. 753, 76O.

"A voluntary association, being only a collection of individuals, could not, at common law, sue or be sued by its associated name .. ... Lewelling v. Woodworkers Underwriters (1919) 14o Ark. 124, 128, 215 S. W. 258, 259.

"There is no principle better settled than that an unincorporated association cannot, in absence of a statute authorizing it, be sued in its society or company name, but all the members must be made parties, since such bodies have, in the absence of statute, no legal entity distinct from their members." BASKINS V. UNITED MINE WORKERS (1921) 15O ARK. 398, 4OL, 234 S. W. 464, 465.1"

The scholarly article goes further to explain that there must be a statutory provision that permits a society to sue in its name for good reason, especially where the society comprises a large number of members. But that even where such happens, it can only be by way of a representative suit where only a few members would sue on behalf of the rest.

The article further states:

"But while the general rule stands with its corollary, and though its hardships and inconveniences remain unmitigated by Code provisions, still perhaps a change should be resisted. A rule of law may be so uniformly pronounced, that despite its logical imperfection and actual inconvenience, it is better to leave it undisturbed than to upset the status quo. This consideration demands attention if our daily affairs have become adjusted to the enormity. Has the general rule under consideration any such pervading effect? It is believed not, in the light of its application by the courts. Although it is very uniformly recited that suits in the common name cannot be maintained--even that it is impossibility- this is only extravagance of expression. And so the Massachusetts Court in Pickett v. Walsh, quoted from at the outset, to the effect that it is an "impossibility" to sue unincorporated labor unions in their common name, remarks in a subsequent portion of the opinion: "A trade union was made a party defendant in Vegelahn v. Guntner, 167 Mass. 92, and the anomaly seems to have escaped attention.

What is this "impossibility" which can be done if done unconsciously? Likewise, it is at times asserted that the defect goes to the "jurisdiction" of the court:" "There must be a suable party before the court.. A suable party is essential to jurisdiction whether by compulsory writ or voluntary submission."

This was provoked by a special appearance to move to quash summons and pleading in abatement because the union was named defendant in the union name.

IN I8O2 LORD ELDON OPINED AS FOLLOWS IN *'LLOYD V. LOARING* (1802, CH.) 6 VES.

773, 777. ACCORD: *PIPE V. BATEMAN* (855:

"It is the absolute duty of Courts of Justice not to permit persons, not incorporated, to affect to treat themselves as a corporation upon the Records . . . . I desire my ground to be understood distinctly. I do not think, the court ought to permit persons, who can only sue as partners, to sue in a corporate character; and that is the effect of this bill."

A similar position is taken in other cases: ***SEELY V. SCHENCK & DENISE QUOTED*** **WITH APPROVAL IN *RICHARSON V. SMITH & CO.* (I885) 21 FLA. *336,* 341**

"Thus, a society is a number of persons taking to themselves a fictitious name, and by that name, protruding themselves into a court of justice.... But by this assumed name, they cannot appear in a court of justice. They can neither sue nor be sued by it. This is a privilege appertaining to corporate bodies only **...** To sue and be sued, in their corporate name, is one of the great privileges granted to corporate bodies. It can only be authorized by statute. It is too plain for any argument that the unincorporated societies in their own name cannot be so sued. The right to sue and be sued is a corporate franchise."

It therefore follows that the suit as initially instituted had no initiator. However, the moment the advocate for the non- entity discovered the problem, following the objections raised by the defendants, and even before taking out summons to enter appearance and therefore before pleadings could close, he timeously filed an amended plaint on 2nd March, 2015 incorporating the three officials of the Society as the 1st, 2nd and third plaintiffs, with the society becoming the 4th Plaintiff.

In my considered view, that amendment saved this suit from abating for reasons that the appropriate parties with legal persona were now before the court which is given the power to enjoin any party to a suit or to even strike out any party who it finds wrongly enjoined. The amendment of the plaint on 2nd March, 2015 therefore resuscitated the suit which would otherwise have been dead. I also find that the amendment did not require leave of court as the pleadings had not closed, pursuant to the provisions of Order 8 rule 1 of the civil Procedure Act.

Nonetheless, there still remains a problem. That the application dated 20th February, 2015 was never amended and served upon the defendants for purposes of the hearing subject matter of this ruling, to implead the officials of FKF. More so, the amendment to the plaint still retained the Society (FKF) as a primary party to the suit –as plaintiff no, 4. Therefore the question is, did the amendment to the plaint have the retrospective effect of amending the pending application for an injunction, and is the presence of the name of FKF on the amended plaint valid?

The answers to the above two questions are as follows:

First, it is clear that the suit was in its very nascent stages and summons to enter appearance have not even been issued /sealed by the court. Secondly, although the plaint was amended on 2nd march, 2015, that amendment, in my view, did not cure the fatal defect to the application by way of notice of motion as that motion was solidly grounded on no suit in the first place. The suit only became a suit on 2nd march, 2015 following the amendments to the plaint. Thirdly, the advocate ought to have amended the notice of motion subsequent to the amendments to the plant, which amendment would have then cured the defect as it would have followed and be grounded on an amended plaint which had the natural persons/ officials of the society. Fourth, that the subsequent amendment which retained the society as a party to the suit was not fatal save that since the society has no legal capacity to sue and be sued, this court proceeds to strike out the name of the society in so far as it refers to it as a party.

Iam fortified on this point by the decisions in the cases cited by the 1st defendant in its submission among others, **LIVING WATER INTERNATIONAL and KIPSIWO COMMUNITY SELF HELP GROUP VS ATTORNEY GENERAL AND 6 OTHERS** (supra)

Fifth, the law does not operate in retrospect. In Atieno vs Omoro and another 1985 eKLR the court held

that:

" to permit the present proceedings to proceed against the second plaintiff as if the amendments took place with retroactive effect to the date the original plaint was filed would most certainly be prejudicial to the rights conferred on her by the limitation of Actions Act. The Civil Procedure Act and Rules make clear distinction between the substitutions or addition of a party to proceedings and the amendments of the pleadings and the position in this case is governed by order 1 rule 10. At the time the name of the present defendant was added, the plaintiff had lost the right to sue."

In the instant case, it should be noted that at the time the officials of the society were added, the 1st respondent had already filed an application to strike out that suit and although this court has given latitude that the suit is sustainable following the amendments, it nonetheless finds that failure to amend the notice of motion to accord with and stand on the amended plaint is fatal as the notice of motion was grounded on pleadings which were fundamentally nonsuited.

Am also enjoined to accept the ruling **in SAMUEL KAMAU MACHARIA & VS KCB AND 2 OTHERS 2012 EKLR** where the court was categorical that:

> **"most constitutions in common law jurisdictions almost invariably frown upon retroactive or retrospective criminal statutes. This general prohibition finds expression in Article 50(1) (n) of the Constitution that :-**
>
> **"every accused person has a right to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law.**
>
> **As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was an intention of the legislature."**
>
> In as much as the Civil Procedure Act is a procedural law with provisions as to parties to suits and amendments of pleadings, I do not find any express or implied words in the Civil Procedure Act that would persuade me to find that it appears the Act intended that pleadings which were filed without the legal standing of parties would nonetheless be sustained without any specific amendments. In my view, such pleadings would only be sustained by an amendment before the hearing or at the hearing stage. Sixth, that the court has no jurisdiction to hear an application filed by a non-entity. Seventh, that although Order 1 rule 10(2) of the Civil Procedure Rules provides for amendment of pleadings at any stage of the proceeding, in this case, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party……whose presence before the court may be necessary in order to enable the court to effectually and completely to adjudicate upon and settle all questions involved in the suit be added," It is my humble view that the presence of proper parties before the court is sine quo non exercise of jurisdiction of the court. Iam fortified on this point by the holding In **Appex International ltd &Anglo leasing &Finance International ltd vs Kenya Anti-Corruption Commission 2012eklr citing with approval GOODWILL &TRUST INVESTMENTS LTD &ANOTHERVS WILL &BUSH LTD (SUPREME COURT OF NIGERIA), the court held**
>
> **"it is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in *limine*. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which**

it does not have, the proceedings before it and its judgment will amount to a nullity no matter how well reasoned. ”

Applying the above holding to this application, I find that the applicant in the application dated 20th February, 2015 filed on the same day simultaneous with the suit does not constitute a legal persona.

The justice of the case required that an amendment to the application be made since the application was grounded on a plaint which was a non-starter. And even if I was wrong in my finding, I would still take solace in the case OF MUMO MATEMU VS TRUSTED SOCIETY 2014) EKLR where the CA in applying the provisions of Articles 22 and 258 of the constitution, was clear that it is only where a person was acting in the [public interest and when instituting proceedings before a court challenging the contravention of the Constitution, would they, be they NGOS or associations be permitted to institute proceedings as persons, as defined under their respective statutes and when such definition of who the bodies are is read together with Article 260 of the Constitution.” Article 260 of the Constitution is an interpretation **Article**

Further, in KIRINYAGA UNITED BAR OWNERS ORGANIZATION VS COUNTY SECRETARY KIRINYAGA COUNTY GOVERNMENT & 6 OTHERS {2014} EKLR, the court was categorical, and I concur that:

> “The above Constitutional provisions for me indicate that a person named with a capacity to act on his own can bring a representative suit on his behalf and on behalf of others. A person who lacks capacity to institute a suit can also bring an action under **Article 22(1)** through another person. The person bringing the action should clearly indicate his name in the suit stating that he/she is bringing the action on behalf of another or on his own behalf in addition to others who for purposes of clarity must be named and must give authority or mandate if they wish to benefit or obligated from the reliefs sought. In the absence of a named person, then it becomes difficult to know whether legal capacity is vested or not. Under **Article 260** of the **Constitution** a “person” includes a company, association or other body of persons whether incorporated or not. Of course bodies have capacity to sue or be sued as the law vests them with legal capacity. What the Constitution addresses here are unincorporated bodies or class of persons such as self-help groups. The law does not bestow them with the legal capacity per se but Constitution provides for an avenue through which they can competently appear in court and this is through person(s) vested with legal capacity. It is a bit absurd to imagine that the new Constitution has opened doors for anybody including people of unsound mind, minors, bankrupts etc to institute proceedings without a next friend or a person with legal and sound capacity to represent them. Self-help groups or community based organizations were created by the government to address poverty eradication and other noble causes but were not clothed with the capacity to sue but can do so through its elected officials whose description should be given to show who they are and who they represent.”

I further accept the decision of **PHAKEY VS WORLD WIDE AGENCIES LTD 1948 815 EACA 1, FREE PENTECOSTAL FELLOWSHIP IN KENYA VS KCB NRB HCC 5116/2002(OS) Bosire J(as he then was) stated:**

> **“the position in common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 of the CPR. In the instant case, the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal**

personality. That being so, it lacked the capacity to institute proceedings in its own name."

Unfortunately for the applicant herein, being a nonentity it could not have initiated a suit on behalf of anyone who had the capacity. On the other hand, unlike in the Kirinyaga United Bar case, which involved a petition for infringement of rights, the applicant herein is not alleging that its fundamental rights and or freedoms guaranteed under the Constitution are infringed or threatened with infringement by the defendants. I hasten to add that not every justiciable cause has a constitutional bearing. In this case, the applicant claims that its mandate as per its constitution is being usurped by the 1st respondent. There is whole difference between a mandate or duty or obligation/objective under the constitution of a society or organization, and a right under the bill of rights of the Kenyan Constitution! As I have stated, the applicant is not saying that its rights under the Constitution have been infringed or threatened to be infringed. If it were so, nothing would have prevented it from petitioning the court to that effect. In my view, the bill of rights does not include the bill of mandates.

In this case, the applicant's advocates did not seek even by way of an oral application to have the notice of motion amended before proceeding to hearing of the notice of motion, to add the officials of the society and have the name of the society struck out from being an independent party in the suit and neither did they make any submissions seeking the court to exercise its discretion to have the notice of motion amended. Eight, this court is empowered, on its own motion, to amend pleadings. However, in the glare of the serious preliminary objections raised by the defendants as to the capacity of the applicant to sue and be sued in its own name, which objection I find the applicant did not take seriously, to amend the application on my own motion is tantamount to jumping into the arena of the dispute between the parties and litigating for one of the parties which in my view would be prejudicial to the other party who had raised the preliminary objection from the onset and before amendments to the plaint were effected. Further, I find that *suo motu* amendments by the court without the advocate seeking for such an order of discretion, in the circumstances of this case, had to be exercised cautiously and judiciously, not with caprice.

As I have stated above, this court would be leaping into the battlefield and would be clouded with the dust of the disputants. This court's mandate is that of a referee and in the circumstances of this case, to do otherwise would be like a referee proceeding to score an inchoate goal on behalf of one party(team) just because that team's best striker nearly scored a goal but slipped on his own and fell inside the box! So then the referee completes the score and awards that goal to that striker's team! **That is unacceptable as it would not amount to fairplay.**

Iam further enjoined by the holding in the recent case of **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE VS MUMO MATEMU & 5 OTHERS2014EKLR** that:

> ***"24] a suit in Court is a 'solemn' process, "owned" solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Act, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it……."***

Furthermore, Cap 108 does not contain any provisions with regard to the suing and being sued of a registered or exempted unincorporated society under the Act. It would therefore appear to me that the legislature never intended that suits be brought by or against those societies in their own names. BOSIRE J in the case of **JOHN OTENYO AMWAYI AND 2 OTHERS VS REV GEORGE OBURA AND 2 OTHERS CA 6339/1990.**

Has the law changed? Not that iam aware of any such changes until the Supreme Court pronounces itself as hoped by the applicant's counsel otherwise it remains the law.

In my view, that preliminary point of law as raised by the 1st defendant is not a mere procedural technicality which can be laid to the altar of substantive justice and cured by Article 159(2)(d) of the Constitution and the Oxygen principle enshrined in sections 1A and 1B of the Civil Procedure Act. The

decision in **RAILA ODINGA VS IEBC AND 4 OTHERS PETITION NO. 5 OF 2013** by the **Supreme Court** comes to live on whether or not, in the prevailing circumstances of this case, I can apply Article 159(2)(d) when it pronounced thus:-

> **"the essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. <u>On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and requirements of a particular case, and conscientiously determine the best outcome</u>"**

I reiterate that a proper party is one who is recognized under the law as having the legal persona to sue and be sued, and one who is impleaded in a suit, not those sitting on the hedge waiting to be enjoined. And until such proper parties are enjoined by, either, an order of the court, or without such order, where pleadings have not closed, by way of an amendment, they remain mere observers to the proceedings.

Having conscientiously examined this point, I find that it goes to the root of the matter, and I would not belabor applying the Oxygen Principle and the substantive justice principles of Article 159, which principles only apply to parties who are before the court. In this case, the court would be going on a fishing expedition or on its own frolic to try and clothe nonparties with the capacity to litigate if I were to rule otherwise.

The law is clear that parties are bound by their pleadings. In this case, the applicant was bound by its pleading in the notice of motion As was stated by ***LORD NORMOND*** AT PP 238 – 239 IN ***<u>ESSO PETROLEUM CO. LTD -VS- SOUTH PORT CORPORATION (7) [1956] AC 218</u>*** which was cited with approval in ***<u>PUSPA -VS- FLEET TRANSPORT COMPANY</u> [1960] EA 1025:AND COURT OF APPEAL IN NYABICHA VS KENYA TEA DEVELOPMENT AUTHORITY & OTHERS [2010]eKLR*** *that**:***

> ***"The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them."***

In this case, the correct parties, fortunately, have now been introduced to the proceedings and their rights to litigate are not extinguished if this court proceeds to strike out the non-parties and the notice of motion dated 20th February, 2015 to which the new parties were never privy to anyway. The newly introduced parties, in my view, were attempting prosecute someone else's application, a practice which is restricted by law.

It should also be noted that in this case, the applicant is not a wrong party to the suit which this court can exercise its discretion under order 1 rule 10 of the Civil Procedure Rules to strike out and or order for substitution for purposes of the notice of motion. In my view, the wrong party mentioned in that rule is one that has the legal capacity but for inadvertent mistake, was erroneously enjoined. The provisions of order 1 rule 10 are therefore not available to the applicant to sustain that application.

Consequently, that part of the preliminary objection succeeds in so far as the capacity of the applicant Football Kenya Federation to sue and be sued in its own name is concerned.

The second objection relating to jurisdiction is that the dispute as filed herein is in contravention of the applicant's Constitution and FIFA Statutes which contain ouster clauses barring the applicant herein from filing any dispute in a court of law but revert to the tribunals or mechanisms established under the statute and or Constitution of FKF.

The issue of jurisdiction was extensively dealt with by the Court of Appeal in the case of **OWNERS OF MOTOR VESSEL LILIAN "S" VS CALTEX OIL KENYA LTD 1989 KLR 1 IN WHICH NYARANGI JA, CITING WORDS AND PHRASES LEGALLY DEFINED VOL. 3 I-N PAGE 13**

held:

"By jurisdiction, is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it had jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

The Court of Appeal further held that:

"Jurisdiction is everything without it; a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

It is therefore from that point of jurisdiction that I must determine the justiciability of this dispute, assuming that the parties before court are proper parties.

The respondents have pleaded and submitted that the applicant society is recognized by FIFA, CECAFA and CAF hence, it is bound by their statutes which prohibit the institution of suits in courts to resolve disputes of this nature. Article 66 of the FIFA statute provides for arbitration by establishing a Court of Arbitration for Sports (CAS) **to "resolve disputes between FIFA, MEMBERS, Confederation, Leagues, clubs, players, officials and licensed match agents and players' agents."** They have also ably submitted that the society's own constitution provisions replicating the FIFA statute's provision and does not permit filing of a dispute in court but instead revert to the arbitration process and further, that the Sports Tribunal was established to hear and determine such disputes relating to football matters. The 1st defendant maintains that since it is the organizer of Kenya's Premier League, any dispute it might have with the plaintiff can only be resolved in accordance with the FIFA statutes and the plaintiff's own constitution which bars resorting to courts of law for resolution of the dispute. Several decisions were relied on by the 1st defendant, which I take cognizance of including the case wherein the interested parties herein were suspended from office and even banned for 6 years for participating in all football activities, for filing a dispute between them and the federation officials in court.

In the case of **PATEL & ANOTHER VS DHANJI &OTHERS (1975) EA 301 MILLER J** held that the courts will entertain suits by members of societies or clubs for improper expulsion or violation of the principle of natural justice based on the members' rights in property, but the courts should be slow to interfere in the running of club affairs, the remedy being in the hands of the members."

In the case JR 317/2013 BETWEEN KENYA MEDICAL PRACTIONAERS AND DENTISTS UNION, KENYA NATIONAL UNION AND NURSES AND KENYA HEALTH PRACTIONERS VS TRANSITIONAL AUTHORITY AND COUNCIL OF GOVERNORS, the court held, citing with approval the decision in the **SPEAKER OF THE NATIONAL ALLEMBLY VS KARUME [2008] 1 KLR 426 th**at:

"Where an obligation is created by statute and a specific remedy is given by that statute, the person seeking the remedy is deprived of any other means of enforcement. **Further, that rules of procedure cannot oust the clear constitutional and statutory provisions."**

However, in **REPUBLIC VS PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

& ANOTHER EXPARTE SELEX SISTEMI INTEGRATI NRBI HCMA NO 120 OF 2007[2008] KLR 728, the court held that ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality. In the said case the learned judge recognized that the court's jurisdiction may be precluded or restricted either by legislative mandate or certain special texts. Where the ouster clause leaves an aggrieved party with no effective remedy at all, such ouster clause will be struck down as being unreasonable.

In SAFMARINE CONTAINER NV OF ANTWERP VS KENYA PORTS AUTHORITY MBSA HC CC 263 OF 2010, the court held that to the extent that it is not only the Constitution that can limit/confer jurisdiction of court but also any other law may by express provision confer or limit jurisdiction.

The leaned judge in the above case relied on Article 159 of the Constitution, clause 2© which provides that in exercising judicial authority, the courts and tribunals shall be guided by the principles that alternative forms of dispute resolution including conciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. And that courts of law and tribunals cannot be said to be promoting ADR when they readily entertain disputes which ought to be resolved in other legal forums. Accordingly, the court agreed that where there is alternative remedy and procedure available for the resolution of a dispute, that remedy ought to be pursued and the procedure adhered to. Nevertheless, he was categorical that any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act. He stated "In other words, where the issue is whether the court has the jurisdiction, the judge will lean against a construction which purports to oust the jurisdiction of the court and in the event that jurisdiction is to be ousted, it will be done only on very clear words and the mere use of the word "shall" cannot oust the jurisdiction of the High Court because the word is not necessarily mandatory. As was held by Ringera J.in STANDARD CHARTERED BANK LIMITED VS LUCKTON KENYA LTD NRBI HCC 462/1997, the use of the word shall, in a statute only signifies that the matter is prima facie mandatory and its use is not conclusive or decisive and it may be shown by consideration of the object of the enactment and other factors that the word is used in a directory manner sense only."

A similar holding from the Court of Appeal in Narok County Council vs Trans Mara County Council & another CA 25/2000, the court held inter earlier,

"although section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a Minister as part of his statutory duty; it is otherwise where the statute is silent on what is to be done in the event of a disagreement----where the statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by applying to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit. ..if the court acts without jurisdiction, the proceedings are a nullity.. …….the jurisdiction of the High Court can be limited by a statute and in such cases all the High Court can do is to enforce by way of judicial review proceedings, the implementation of the provisions of the Act. Certainly not to usurp the powers of the Minister, even though resort to judicial review proceedings may in appropriate cases not be a bar to other proceedings such as a plaint… where the law provides for a procedure to be followed to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a court of law as the court would have no jurisdiction to entertain the dispute.

In the case of **SAMUEL KAMAU MACHARIA V. KENYA COMMERCIAL BANK AND TWO OTHERS, CIV. APPL. NO. 2 OF 2011**, THE SUPREME COURt of Kenya had the following to say with regard to jurisdiction:

> ***"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Const. Appl. No. 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law."***

In the instant case, it has been submitted that the Sports Act ousts the jurisdiction of this court to entertain the dispute. However, section 59 thereof which provides the jurisdiction of the Tribunal as established under section 56 of the Act provides that:

"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-
b. appeals against disciplinary decisions;
c. appeal against not being selected for a Kenyan team or squad;
d. other sports related disputes that all parties to the dispute agree to the Tribunal and that the Tribunal agrees to hear; and appeals from decisions of the Registrar under the Act.

Clearly, there is no express provision ousting the jurisdiction of the High Court from entertaining the dispute herein. Secondly the Sports Act and therefore the Sports Tribunal are both in the transitional period having been established only in 2013. There are no known elaborate rules of procedure or structures established by the newly appointed team which is still trying to find their ground, for resolving disputes as none were exhibited to this court. Third, it was not shown that any of the sports organizations have already incorporated in their constitutions and promulgated rules specifically allowing for appeals to be made to the Tribunal and material to this dispute---"other sports related disputes that all parties to the dispute agree to refer to the Tribunal and the Tribunal agrees." Fifth the suit herein is not an appeal from either the decision or lack of it of the Minister in the exercise of powers under the Sports Act.

To crown it all, I accept Mr. Mutua's submission that this dispute does not fall in any of the categories of disputes referred to in the Act.

On the submissions by the first respondent that FIFA and FKF statutes and constitutions oust this courts' jurisdiction to hear this dispute, may I remind the parties that in the cases I have referred to above, all relate to ouster of jurisdiction by either the constitution or the statute and where the ouster is by statute, it must derive that ouster from the constitution.

In my view, to hold that FIFA statute or the FKF statute would oust the jurisdiction of this court is laughable for the following reasons:

i. that jurisdiction of this court is conferred by the Constitution and enacted statutes and therefore only the Constitution or statute can limit such jurisdiction, not by parties to a suit or bodies' constitutions.
ii. Article 165(3) of the Constitution of Kenya 2010 is clear on this point. It enacts:

" subject to clause 5, the High Court shall have unlimited original jurisdiction in criminal and civil matters…….

(e) any other jurisdiction, original or appellate, **conferred on it by legislation.**

(5) the High Court shall not have jurisdiction in respect of matters-

a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution

b. falling within the jurisdiction of the courts contemplated in article 162(2) – Environment and Land Court and the Employment and Labour Relations Court.

iii. that the High Court has supervisory jurisdiction over the subordinate courts and over any person or body or authority exercising a judicial or quasi-judicial function and such supervisory jurisdiction extends to calling for records of those subordinate courts, bodies or authorities and making any order or giving any direction it considers appropriate to ensure the fair administration of justice

iii. What that means is that subordinate courts, bodies, tribunals or authorities cannot limit the jurisdiction of the High Court and neither can they clothe it with jurisdiction which the Constitution or statute has limited.
iv. In other words, it is only instruments which have the force of law that can confer or limit jurisdiction of the High Court. This is fortified by Article 94 (5)of the Constitution which enacts that:
v. "(5) no person or body, other than parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this constitution or by legislation. Albeit one may think of rules and regulations which may be under an Act of parliament, my take on this is that those rules form part and parcel of the statutes as they are made pursuant to the edict of a particular statute to operationalize the statutes in question hence they are made by Parliament under subsidiary legislation. That notwithstanding, it is my humble view that subsidiary rules cannot oust jurisdiction of the court.

Iam fortified by the decision in the case of **ALFRED OBUYA OBENGO &ANOTHER VS CHAIRMAN NATIONAL NURSES ASSOCIATION OF *KENYA AND ANOTHER[2014] EKLR KASANGO J held:***

"***in my view, members of the NNAK are bound by provisions of the society's constitution. Rules and by-laws are not in themselves Acts of Parliament. They are not even subsidiary legislation promulgated under the provisions of the Societies Act or any other statute. In my view, they are only made to govern the affairs of the society and to regulate dealings between members. Although binding on members, they do not have statutory force and cannot bind persons or institutions outside the society. Can the hands of this court therefore be tied by the NNAK's constitution, rules and by laws which are not Acts of Parliament or even subsidiary legislation? To put it differently, can the jurisdiction of this court be ousted by the society's constitution, rules and by-laws?***

The learned judge in answering that question relied on the Court of Appeal decision in **PETER GICHUKI KINGARA VS IEBC AND 2 OTHERS[2013**] where the learned judges of the superior court held that:

"the Election petition Rules are rules and procedures and the question whether rules of procedure can confer jurisdiction must be answered. The issue for determination is whether the jurisdiction of the Court of Appeal or any other court for that matter can be created, established, limited or governed by a subsidiary legislation more particularly a regulation and rules of procedure made by the Rules Committee.

Jurisdiction is specified either by the Constitution or statute. In Samuel Kamau Macharia and another vs Kenya Commercial Bank and 2 others- Supreme Court Civil Appeal Application No. 2

<u>of 2011, the Supreme Court</u> delivered itself as follows on the issue of jurisdiction:

"A court's jurisdiction flows from either the Constitution or legislation or both"

It is our considered view that a subsidiary legislation or rules of procedure or a rule made by a rules committee cannot confer, create, establish, limit or subtract the jurisdiction of any court of law, or tribunal as established by the Constitution or Statute….we hold that Rule 35 of the Election Petition Rules being a subsidiary legislation is not a jurisdictional Rule and cannot confer or limit the jurisdiction of the Court of Appeal to hear and determine Election Petitions. We also hold that the election petition rules cannot limit the jurisdiction of the Court as granted under Article 164(3) of the Constitution and as operationalized by section 85A of the Elections Act. A subsidiary legislation cannot add, expand , add to or reduce the jurisdiction of any court as spelt out in the Constitution or by statute. Jurisdiction is neither derived nor does it emanate from regulations or rules; jurisdiction is either from the Constitution or statute. A rule cannot limit the jurisdiction of a court of law."

vi. FIFA is a world governing body in matters of football hence it is not a local body referred to in article 165 (6) of the Constitution. However, I hold that FIFA statute, it has not been shown, that it is one of those Treaties or Conventions ratified by Kenya, and therefore forming part of the law of Kenya under our Article 2(6) of our 2010 Constitution which imports monism, and neither has it been illustrated that the FIFA statute is a *jus cogens* (general rules and principles of international law recognized by civilized nations thereby forming part of the law of Kenya pursuant to Article 2(5) of the Constitution of Kenya. According to FIFA statute, it an association football registered in Switzerland for commercial purposes and not an international organization. The applicant herein is its affiliate member in matters of football. It therefore follows that neither FIFA statute nor the FKF constitution can oust or limit the jurisdiction of this Court to hear and determine this dispute, especially when we take into account the fact that FIFA decisions are usually advisories and recommendations to member associations, and not binding as seen from the consultant's report attached to the affidavit of Ambrose Rachier. If that were not the case, this court does not understand FIFA never summoned both parties to this dispute early enough to appear before the (CAS).

vii. What this court is saying is that even international treaties and conventions ratified by Kenya are not superior to the Kenyan constitution and statutes and are implemented in accordance with international norms and principles of *pact sund servanda, (in utmost good faith) as that is what each country as a member of the international community endeavors to do.*

viii. *That although the FKF constitution prohibits filing of disputes between it and its members in court, it is clear that in this case, FKF is the aggrieved party and to let the dispute be adjudicated upon by a tribunal under FKF would no doubt mean that FKF becomes a judge in its own cause contrary to the rules of natural justice.*

In the result, I associate myself fully with Justice Majanja J. in **DICKSON MUKWELUKEINE VS ATTORNEY GENERAL &4 OTHERS NRB HC PETITION NO 390/2012 that:**

"The alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2) of the Constitution of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with the Constitution……..and that the court is entitled to either stay the proceedings until such time as the alternative remedy has been pursued or bring an end the proceedings before the court and leave the parties to pursue the alternative remedy."

In this case, the parties have had, and still possess every opportunity, with the blessings of this court to resolve this dispute out of court.

Regrettably, this court is concerned that FIFA, the world football governing body, after the dispute between the applicant society officials and the 1st defendant was declared, instead of convening the CAS between the warring parties, dispatched a consultant to inquire into the matter. The said consultant simply

made recommendations and since then, there have been threats to the effect that the parties should look for local solutions while otherwise Kenya stands to be banned from participating in regional, continental or international involvement in Football if parallel leagues are commenced. That in it left the Kenyan Federation without an effective remedy outside the court room. In established equitable principles, there can be no wrong without a remedy. The Federation had therefore to forum shop to find a local remedy because the world governing body did not, it appears seem keen on intervening in the resolution of the dispute herein.

viii. It would be denial of access to justice if the suit herein was struck out on account that the now new plaintiffs must either go FIFA or the Federation's tribunal, contrary to the provisions of Article 48 of the Constitution which enacts that the state shall ensure access to justice for all persons.

I emphasize that this court is seamlessly entitled to take into account the existence and efficacy of a remedy outside the judicial process in deciding whether or not to entertain the dispute and may decline to do so not only for want of jurisdiction, but also in order to avoid abuse of its process where the process is being invoked to achieve some ulterior motive. That is not the case here. On that note I need not go into the aspects of whether or not the 1st defendant is affiliated or recognized by FIFA since the record is clear that the 1st defendant is a domestic private company whose shareholders are members of the Federation affiliated to and recognized by FIFA and more so, the 1st Defendant pays such affiliation fees faithfully to the Federation. That connection, it cannot be denied, the 1st Defendant is a member of the Federation whether by affinity or consaquinity, even if the Federation by resolution did withdraw its shareholding to the 1st Defendant which resolution it has not been shown, has been implemented by registration with the Registrar of Companies, as at the time this suit was initiated.

This court therefore finds that it is seized of the necessary jurisdiction to entertain the claim between the plaintiffs and the defendants as per the amended plaint filed in court on 2nd March, 2015.

2. **Whether the applicant should deposit security for costs**

On the 1st defendant's prayer for security for costs, the commencement point is order 26 of the Civil Procedure Rules which provides:

"**In any suit the court may order that security for the whole or part of the costs of any defendant or third or subsequent party be given by any other party."**

In **GATIRAU PETER MUNYA VS DICKSON MWENDA KITHINJI & 2 OTHERS (2014) EKLR** the Court of Appeal held that in an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs in the event that he is unsuccessful. In **Ocean View Beach Hotel Ltd Vs Sultan Moloo & 5 Others (2012) eKLR,** The Court of Appeal citing with approval C.A No. 9/2005 **Messina & Another Vs Stallion Insurance Co Ltd (2005) 1 E A 264** which decision embraced the 7 principles laid down in **Keary Development Vs Tarmarc Construction (1995) 3 ALL ER 534** as the guide on how a court should exercise its discretion on whether to order the plaintiff limited company should provide security for costs to a Defendant in a suit and establish that the purpose of an order for security for costs is to protect a party from incurring expenses on a litigation which it may never recover from the losing side. It is not to deter the plaintiff from pursuing its claim.

In this case, as the applicant was nonsuited, I decline to exercise the discretion to order for security for costs. Furthermore, it has not been demonstrated that the new plaintiffs' case is such hopeless and or that if it is lost then they shall be unable to recompense the 1st defendant in damages or costs anticipated or unanticipated for reasons of pauperism.

3. **Whether the 3rd Defendant is a necessary party**

On the 3rd respondent's application seeking to strike out the suit against it. The 3rd defendant alleges that it is not involved in the management, hosting, directing, controlling or in any way interfering with the composition or operations of the plaintiffs and 1st Defendant; that it has never been part of the wrangles between the plaintiffs and 1st defendant and that the suit herein is bad in law for misjoinder of parties. The third defendant also claims that it has not been shown that it is a necessary party to these proceedings as the plaintiffs have not alleged that it has violated any of its rights.

I hold the view that the 3rd respondent has not been wrongly sued. Order 1 rule 3 of the Civil Procedure Rules provides that:

"All *persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."*

The 3rd respondent as stated earlier is a body established to promote co-ordinate and implement grassroots, national and international sports programs for Kenyans, in liaison with the relevant sports organizations and facilitate the active participation of Kenyans in regional, continental and international sports, including in sports administration. The 3rd defendant also manages the sports facilities. In my view, the 3rd defendant need not be interested in all relief claimed.

From the onset, it should be understood that the application by the 3rd defendant was filed after the plaint was amended on 2nd March 2015 enjoining the officials of the FKF.

In **JAN BOLDEN NIELSEN VS HERMAN PHILIPUS STEYN & 2 OTHERS (2012) EKLR HON MABEYA J** defined a necessary party as:

"In my view, a necessary party' is a person who ought to have been joined as a party and in whose absence no effective decree can be passed in a proceeding by the court. If a necessary party is not impleaded, the suit may be a non- starter as the reliefs sought if granted, may be ineffective."

Examining the plaintiff's claim as amended, it appears bare as relates the role, if any, of the 3rd Defendant in the wrongs that constitute the basis of this case. However, the said plaint describes the 2nd Defendant as ..

"the third defendant is the successor to the Sports Stadia Management Board whose mandate is inter alia to promote, coordinate, and implement grass root, national and international sports programmes and also run the football and other football facilities"

In **Amon Vs Raphael Tuck & Sons Ltd (1956) 1 ALL ER 273**, the court held that:-

"The party to be joined must be someone whose presence before the court is necessary as a party. What makes a person a necessary party?.....the only reason which makes a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party. It is not enough that the intervener should be commercially or indirectly interested in the answer. The person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally. That is by curtailing his legal rights. That will not be the case unless an order may be made in the action which he is legally interest."

In the instant case, the plaintiff recitals did not make any allegation of any wrong doing against the 3rd Defendant and no such wrong doing was pleaded.

However, from the description of the 3rd Defendant, the injunction herein if granted will directly affect

the 3rd Defendant as it is responsible for managing and or maintaining the sports facilities wherein the disputed leagues are played. If the 3rd defendant locked the gates to those facilities, none of the members of the plaintiffs and 1st defendant would have any stadia to host any football match.

Black's Law Dictionary 9th Edition page 251 defines a cause of action as:-

"A group of operative words giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person."

In other words, if the 2nd & 3rd Defendants were to allow their members and stadia utilized for the scheduled alleged "parallel" matches they would give the plaintiff a cause of complaint.

This court is alive to the established law that the power to strike out a pleading or even a party is one that a court should exercise sparingly and cautiously, as the same is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. In the case of **DT Dobie & Company (K) Ltd Vs Muchina (1982) KLR 1 page 9 Madam J** held

*" **The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before missing a case for not disclosing a reasonable action for being otherwise as abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that function is solely received for the trial judge as the court itself is not usually fully informed so as to deal with the merits. No suits ought to be summarily dismissed unless it appears so hopeless that is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption… A court of justice ought not to act in darkness without the full facts of the case before it."***

It therefore follows that whatever orders that may issue against the 1st Defendant with regard to hosting of football matches, will have a trigger effect and legal consequences on the 3rd Defendants. Furthermore, under order 1 rule 9 of the Civil Procedure Rules, misjoinder or non- joinder of parties is no ground to defeat a valid suit. The rule provides:

"no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the party actually before it"

Consequently, I decline to grant the orders for striking out the 3rd and 2nd defendant from the suit herein. The latter only sought the order for striking them out through their submissions. Being officiators of the football matches, they are necessary parties to the suit.

4. **Whether the interim injunction granted on 20th February, 2015 should be discharged**

Order 40 Rule 7 of the Civil Procedure Rules provides that any order for an injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied by such order. It is also settled law that an interlocutory injunction will be set aside or discharged if it has been obtained by means of misrepresentation or concealment of the material facts. SEE **STAR PUBLICATION LIMITED & ANOTHER V AHMEDNASIR ABDULLAHI & 5 OTHERS [2015] EKLR**

In **REEF BUILDING SYSTEMS LTD NCC HCC 1337/01/ (UR).** Ringera J held:-

"**An order of injunction is an equitable relief issued to prevent the ends of justice from being defeated, it may be discharged or varied or set aside if it is shown that it is contrary to the ends of justice to retain it in force. Such would be the case, I venture to think, if it is to show, for example, that the order was irregularly obtained, or there is subsequent change in circumstances that it was unjust to maintain it in force, or it was otherwise unjust and inequitable to let the order remain".**

So, was the injunction issued on 20/2/2015 obtained irregularly?

The law Permits the court to issue an interim order of injunction. The court did exercise its discretion given in the law, and found it equitable to do so, pending the hearing of the application interpartes. But the court, at that time of issuing the interim injunction did not have the benefit of hearing both parties on the serious issues that have been raised hereto, including jurisdiction and the legal capacity of the applicant who sought the interim order of injunction. In my view, the injunction was issued in favour of an entity that was not ***ab initio***, entitled to the order. On the other hand, at the prosecution of the said application for injunction, different parties who were not privy to the application availed themselves to prosecute it. It was not their cause.

Has there been change of circumstances to persuade the court that it is unjust and inequitable to maintain the order as it was. The answer is Yes. The circumstances prevailing are that the party seeking to confirm and enforce the injunction is different from the initiator of the proceedings for injunction and the application for interim orders, and who, this court has found, was non suited .

In this case, the goal posts have shifted and so the court must also change its position, as no orders can be made in favour of a non-party and if that happens, upon discovery, the court must correct the position and in this case, the only way to correct that position is by discharging the interim order of injunction issued on 20th February, 2015 as extended from time to time.

The merits of the substantive motion dated 20th February, 2015

Having discharged the interim injunction granted on the stated grounds, and which prayer for injunction is the fulcrum of the application dated 20th February, 2015, iam not inclined to go into the merits of the substantive motion as that motion has sunk for reasons that it was initiated by a person devoid of the legal capacity to seek and obtain a remedy in its own name. Furthermore, to delve into the merits of the substantive notice of motion filed by the nonentity would be prejudicial to the now parties to the fresh suit as instituted on 2nd March, 2015 by way of an amendment to the original plaint.

Conclusion

The upshot of all the above expositions is that I make the following orders:

1. The notice of motion dated 20th February, 2015 filed by Football Kenya Federation (FKF) is struck out for abatement as there was no applicant persona party capable of and with the legal capacity to initiate and prosecute the said application.
2. The name of FKF is hereby also struck out of the amended plaint filed in court on 2nd March, 2015 in so far as it is retained and described as the 4th plaintiff.
3. The prayer for striking out of the entire suit for want of jurisdiction of the court to hear the dispute on account of ouster clauses of the FIFA and FKF Instruments is declined and the suit is sustained.
4. The prayer for depositing of security for costs is declined.
5. The application dated 5th March 2015 by 3rd defendant seeking to strike out the application dated 20th February, 2015 is allowed in part in line with the reasoning for granting order no. 1 above. The prayer for striking out the 3rd defendant from the suit is declined.
6. Although the 1st defendant Kenya Premier League Limited and 3rd defendant Sports Kenya have substantially succeeded in the multiple applications, as there was in the first place no proper party in court to institute and prosecute the application for injunction, I decline to make any order for costs in favour of any successful party and order that each party to bear their own costs.
7. The plaintiffs to the suit herein are at liberty to apply.

5. Parties are implored and encouraged to explore a negotiated settlement of this matter out of court.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MARCH, 2015

ROSELYNE EKIRAPA ABURILI

JUDGE