



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 382 OF 2014

1. ABRAHAM MUTAI
2. DAN MUCHOKE
3. PATRICK KIPSANG
4. MICHAEL ROTICH
5. MUTAHI KAHIGA
6. PAUL TUITOEK.....PLAINTIFF

VERSUS

1. PAUL M. MUTWII
2. BARNABAS KORIR
3. PETER ANGWENYI
4. JAMES M. MWARINGA
5. JOSEPH KINYUA
6. DIMMY W. KIMONI KISALU
7. STEPHEN OLEMARAI
8. ABDULLAHI SALAT
9. JAPHETH KIPKIRUI KEMEY
10. THADDEAUS MKALA
11. NICHOLAS K. MASWAI
12. PAK KARIUKI
13. FRANCIS C. AFUNDI
14. EDWARD MUEMA MUNGUTI

15. FELIX NGALA
16. THOMAS M. ONGWACHO
17. JONATHAN K. KOSKEI
18. JACKSON P. KEMOI
19. BENJAMIN LIMO
20. JOSEPH OCHIENG
21. FRIDAH K. OKWOMI
22. ALICE A. ADALA
23. JOSHUA CHELANGA
24. J. MUTISYA
25. HOMER MUGALITSA
26. KITHINJI
27. KENNETH BORO
28. DAVID OGECHI ONGERA
29. ALFRED KIPKEMBOI
30. AHMED ABDI
31. MOHAMED SIYAD
32. BILLY KONCHELLAH
33. GEORGE KARIUKI
34. EVANS BOSIRE
35. ABDULKADIR ALI.....DEFENDANTS

RULING

1. The Defendants' notice of motion is dated 30th January, 2015. They seek orders that the orders made on 18th December, 2014 (*the order*) be set aside and the parties herein proceed with the Special Annual General Meeting. The motion is premised on the grounds on the body of the application and the supporting affidavit of Paul K. Mutwii (*the 1st Defendant*) sworn on 30th January, 2015.
2. The 1st Defendant averred that the order was to the effect that the matter to proceed to arbitration as per the constitution of Athletics Kenya (*A.K.*) but that the Plaintiff failed to disclose to court that there was no existing arbitration panel at the time. He stated that the constitution of A.K. provides that arbitration should be conducted through an arbitration panel established under their

constitution. That the Plaintiffs and the president of A.K. being interested parties in the matter should not be seen to form a panel after the order since the said panel will be without the input of the Defendants and such attempts should be nullified by this court. He stated that the Plaintiffs purported to refer the matter to sports tribunal without the consent of the parties while knowing that the tribunal had no such jurisdiction. He contended that the move by the Plaintiffs to refer this matter to sports tribunal without the consent of all the parties is an admission on the part of the Plaintiffs that the order as obtained was incapable of enforcement since there was no arbitration panel. He stated that Article 10. 2 (c) of the Federation Constitution (***the constitution***) indicates that the meeting can be convened for any specific purpose. That members who are stipulated in Article 11 (a) for a general meeting to be held have appended their signatures in support of the general meeting. He stated further that Article 39 requires A.K. to refer a dispute, doubt or difference arising from a non-disciplinary context to Federation Arbitration Panel. He contended that the Plaintiffs are guilty of perjury since they swore an affidavit in 12th November, 2014 stating that there was no suit pending yet there are two suit in court.

3. Vide the replying affidavit of the 1st Plaintiff sworn on 10th February, 2015, the Plaintiffs explained their reason for referring the dispute to the sports disputes tribunal that; their choice of the tribunal was based on the rationale that the dispute between the parties herein falls within the sports disputes tribunal's statutory mandate and that the tribunal presented a suitable forum given its independence and competence. It was stated that both the Plaintiffs and the Defendants were by a letter dated 8th January, 2015 communicated to by the Dispute Tribunal instructing them to endorse the rules of the tribunal if they were agreeable to the tribunal handling the matter to enable the tribunal convene a pre-hearing conference. It was stated that the Defendants neither rejected nor embraced the proposed course until 16th January, 2015 when the Defendants alleged that the tribunal lacked jurisdiction to handle the dispute. The deponent stated that Athletics Kenya Federation Arbitration Panel through a letter under reference number AK/LEGAL/VOL.3 /2015 communicated to its advocates confirming the existence of the panel and enumerated the members of the panel as had been appointed by the executive committee. That by a letter dated 22nd January, 2015 the Plaintiffs' advocates referred the dispute to the panel and requested it to set an urgent preliminary meeting before it so that necessary directions may be laid out with regard to hearing and determination of the dispute. That from the foregoing it is clear that the Plaintiffs have put in efforts to have the dispute heard and determined expeditiously and it is the Defendants who belated it by their rejection. It was contended that the court having determined that there is a dispute between the parties that ought to be resolved by arbitration, the issue is *res judicata*. That the Defendants have not disclosed that the Federation will suffer substantial loss and that the federation is now seized of the dispute since it has called for a preliminary meeting and that the dispute resolution mechanism is underway.
4. The application was canvassed by way of written submissions which basically reiterated the depositions of parties save that the Plaintiffs referred court to the law and authorities on setting aside of *ex parte* orders. I have duly considered the depositions and the submissions on the law in that regard.
5. In determining this application I am fortified by the case of **Shah v. Mbogo & Another (1967) EA 470** where the Court of Appeal for Eastern Africa held as follows:-

“IV. Applying the principle that the court’s discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.” (Emphasis own).

6. The Defendant's gravamen is that the Plaintiffs obtained the order on non-disclosure of a material fact. Non-disclosure of facts was discussed in **Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** where the Court of Appeal stated as follows:-

“It is perfectly well-settled that a person who makes an *ex parte* application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest

possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an *ex parte* statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an *ex parte* injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A *locus penitentiae* (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed...In the instant case the so-called material facts repeatedly alleged to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so...It is accepted that in cases of *ex parte* proceedings there must be full and frank disclosure to the court of all material facts known to the applicant but in the instant case everything was in the court record and was available to the learned judge for perusal. There was no deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not in any sense misleading. Granted that the respondents did not inform the learned Judge of the pending applications, the issue

is: were the material facts those, which it was material for the learned judge to know in dealing with the application as, made? The answer to this must be in the negative since the learned Judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and the suit had not been heard on merit. He was also concerned that injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted”.

7. I note that the Plaintiffs have not directly controverted this allegations made against them. The letter referred to by the Plaintiffs stating that the Athletic Kenya Federation Arbitration Panel confirmed its existence. The said letter is dated 20th February, 2015 and from it can be inferred that the Plaintiffs' advocates wrote a letter to the panel on 19th January, 2015 way after the order was granted. The letter dated 19th January, 2015 referred to in that of 20th February, 2015 has not been exhibited for this court to confirm that its contents were not to the effect that the Plaintiffs requested for the constitution of the panel. Further, the letter dated 20th February, 2015 is not clear on the exact date when the panel was constituted. I draw an inference that the Plaintiffs knew of the non-existence of the panel and failed to disclose that fact to court otherwise the letter dated 19th January, 2015 would have been exhibited. The court therefore made orders not knowing of that fact which would have a bearing on the ruling. In view of the foregoing, I am inclined to set aside my orders of 18th December, 2014 thus paving the way for the parties to proceed and hold a Special Annual General Meeting as provided for under the Federation’s constitution. Since this dispute pits members of the same Federation I direct that each party meets their own costs.

Dated, Signed and Delivered in open court this 24th day of April, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the Defendants