REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 382 OF 2014

ABRAHAM MUTAI & 5OTHERS…….....PLAINTIFFS

VERSUS

PAUL M. MUTWII & 34 OTHERS..... DEFENDANTS

RULING

1. The subject matter of this ruling is the chamber summons dated 11th November, 2014 in which Abraham Mutai and 5 others hereinafter referred to as the Applicants sought for the following orders that;

   "(i) ***For reasons to be recorded notice of this application be dispensed with and heard ex-parte in the first instance.***

   ii. ***Pending the hearing and determination of this application, the Defendants whether by themselves, their agents or otherwise howsoever be restrained from convening a Special General Meeting of Athletics of Kenya either on the 14th November, 2014 or on any other date.***

   iii. ***Pending the hearing and determination of this application the Defendants whether by themselves , their agents or otherwise howsoever be restrained from interfering in any manner whatsoever with the running of the affairs of Athletics Kenya.***

   iv. ***The Defendants whether by themselves, their agents or otherwise howsoever be restrained from convening a Special General Meeting of Athletics Kenya either on the 14th November, 2014 or on any other date pending the hearing and determination of the dispute between the parties herein by Arbitration."***

The summons is supported by two affidavits sworn by Abraham Mutai. When served with the summons, Paul M. Mutwii and 34 others, hereinafter referred to as the Respondents vehemently opposed the summons by filing the replying affidavit of Paul M. Mutwii. When the summons came up for interpartes hearing, Learned Counsels appearing in the matter recorded a consent order to have the summons disposed of by written submissions.

2. Before considering the substance of the summons let me at this juncture state the brief background of this dispute. The substantive suit is expressed in the plaint dated 11th November 2014 in which the Applicants sought for judgment in the following terms:

   "(a) ***An injunction do issue restraining the Defendants whether by themselves, their agents or otherwise howsoever from convening a Special General Meeting of Athletics Kenya either on***

the 14th November, 2014 or on any other date pending the hearing and determination of the dispute between the parties herein by Arbitration.

b. ***An injunction do issue restraining the Defendants whether by themselves, their agents or otherwise howsoever from interfering in any manner whatsoever with the running of the affairs of Athletics Kenya pending the hearing and determination of the dispute between the parties herein by Arbitration.***
c. ***Costs of this suit.***
d. ***Any further or order as this Honourable Court may deem fit."***

3. Pending the hearing and determination of the suit by Arbitration, the Applicants have sought for interalia on order of injunction to restrain the Respondents from interfering in any manner whatsoever with the running of the affairs of Athletics Kenya. What precipitated the filing of this suit is the Respondents act of calling for a special general meeting of Athletics Kenya for 14th November, 2014 to discuss the conduct of the President of Athletics Kenya. The Applicants felt that the Respondents act breached the Constitution of Athletics Kenya in that those summoned the meeting did not mention that minimum membership threshold.
4. Having given in brief the history behind this summons, I now turn my attention to the merits or otherwise of the summons. I have considered the rival written submissions plus that oral highlights presented by Learned Counsels. I have also considered the authorities supplied to this Court. The applicants aver that they have filed this suit in their capacity as bonafide members of Athletics Kenya and they aver that they are entitled to have their affairs governed and regulated in accordance with the Constitution and Rules of Athletics Kenya. It is the submission of the Applicants that the Respondents without the requisite quorum called for a special general meeting to discuss the Federations President thus contravening the Federation's Constitution. The Applicants intimated their intention to have the dispute referred to arbitration as provided for by the General Disputes Clause. The Applicants argued that unless the Respondents are stopped from holding the meeting, their actions will gravely imperil and bring ruin the administration of Athletics Kenya hence the need to protect the Plaintiffs and the

Federation by way of an injunction pending the hearing and determination of the arbitral proceedings.

5. The Respondents are of the view that the Applicants have filed this suit in bad faith with the intention of frustrating members of the Federation from holding a special General meeting. It is the Respondents submission their right to call for such a meeting is enshrined in Federation's Constitution and the Constitution of Kenya. The Respondents attacked the competency of the affidavits sworn by AbrahmaMutai. It is said that AbrahamMutai was convicted in Kapsabet Court Cr. Case No. 187 of 2013 and sentenced to serve two years probation. It is argued that Abraham Mutai was automatically disqualified from being a member of the Federation under Articles 67 (a) and 15.1 (e) of the Constitution of the Federation. The Respondents contended the Applicants assertion that those who called for the holding of the special General meeting lacked the required quorum. They asserted that those who requisitioned the meeting were over 50% of the membership. The Applicants were accused of using the Court process as a shield through which they can escape their obligations under the Federation's Constitution. The Respondents further accused the Applicants of material non-disclosure. It is alleged they failed to disclose that they had filed another suit at Kapsabet being Kapsabet P.M.C.C No 187 of 2013 which is similar to this case in material respects. It is alleged that in the Kapsabet case, the Respondents were authorised to proceed to hold the special General meeting. For above reasons this Court was urged to dismiss the summons. In response to the averments in the replying affidavit of Paul Mutwii, Abraham Mutai urged this Court to strike out that affidavit on the ground that the deponent was not authorised by the other Respondents to make the averments under Order 1 rule 13 of the Civil Procedure Rules. It is further pointed out that Abraham Mutai's conviction was quashed on appeal vide Eldoret H.C.C.A No. 95 of 2013 hence Article 15.1(e) of the Federation's Constitution cannot be invoked. The Applicants further pointed out that the case which was pending at Kapsabet Law Courts i.e Civil Case No. 194 of 2014 has been withdrawn hence this case is not res-subjudice. The Respondents were accused of claiming to have 50% membership which called

the special General meeting without justification.

6. Having considered all the material placed before this Court together with the oral submissions of Learned Counsels, it is clear to my mind that one of the preliminary issues raised by the Respondents has been sufficiently answered by the supplementary affidavit proffered by the Applicants. It is clear from the submissions that Abraham Mutai's conviction by the Principal Magistrate's Court was set aside by the High Court sitting at Eldoret. The 1st Applicant is therefore a valid member of the Athletics Kenya hence competent to make the averments in support of the suit. The Applicants had been accused of material non-disclosure. The Applicants have been accused of failing to disclose the pendency of Kapsabet P.M.C.C.C No. 194 of 2014. There is no doubt that the Applicants have averred in Paragraph 15 of their plaint that there have been no previous proceedings between the parties over the same subject matter. The plaint is dated 11th November, 2014 and was filed in Court on 12th November, 2014.

The suit at Kapsabet is expressed by way of the plaint dated 11th November, 2014 and filed in Court on 12th November, 2014. The Plaintiff in the Kapsabet suit is Abraham Mutai who also swore theverifying affidavit. By a notice dated 25th November, 2014, Abraham Mutai, withdrew the Kapsabet suit. It is obvious that the two suits were filed at the same time contemporaneously. It is therefore difficult to say which of the suits is res-subjudice the other. The only inference I can make is that the Applicants may not have been sure which of the two advocates can file the suit earlier than the other. It can also be inferred that the 1st Applicant could have been forum shopping. It is unfortunate that the Respondents did not deem it fit to supply this Court the proceedings of the Kapsabet case so that it can make informed on decision. I am inclined not to make any adverse finding against the Applicants. I will give them the benefit of doubt. Now that the preliminary objections are out of the way, let me now deal with the substance of the summons. The Respondents have expressly stated that they intended to hold a special General meeting to discuss the manner in which Athletics Kenya is being managed and take remedy measures. The Applicants are saying that they are not averse to the meeting being held but what they object is that the Respondents do not meet the threshold required for members to requisition for a special General meeting hence a dispute has arisen which should be referred to Arbitration under Article 39 of the Federation's Constitution. The Respondents are of the view that a dispute capable of being referred to arbitration has not arisen as envisaged under Article 43 of the Federation'sConstitution.

I have carefully examined the averments and annexures availed to this Court. There is no dispute that on 14th October, 2014 the Respondents through the firm of Kwengu& Company Advocates demanded for inter alia that Isaiah Kiplagat the President of Athletics Kenya Federation, to step aside to enable the Respondentsand other members to discuss and pass resolution on contentions issues arising from his conduct. They also demanded for the AK Federation Executive Committee to invoke Article 10.2 (c) of the Federation's Constitution and call for a special General meeting not late than 31st October, 2014 to discuss the A. K Constitution and its implementation. The Respondents further demanded for all monies received from sponsors, donors and the Government to be accounted for. The Federation through the firm of Kemboy& Company Advocates rejected the request claiming that the same has no legitimate claim. Upon receipt of the Federation's response, the Respondents proceeded to convene a special General meeting for 14th November, 2014 to be held at Riadha House to discuss the conduct of the Federation's President. Under Article 10.2 (d) of the Federation Constitution a Special General Meeting for a specific purpose may be called for by an order in writing to the Secretary General of not less than 1/3 of the members. There is no dispute that the Federation has membership of over 4,000. The members who petitioned the Federation's Secretary General to call for an Special General Meeting were 35 in number. The Respondents later supplied to this Court a contentions list of 1297 members to be those who made the requisition.

The Applicants are of the view that the aforesaid figure did not meet the threshold of 1/3 membership leave alone being 50% as alleged by the Respondents. A careful perusal of the agenda of the intended Special General Meeting which was suspended by the order of this Court, will reveal that the alleged misconduct is a disciplinary matter and a resolution of the same is provided for under the **Discipline, Disputes and Appeals clause of the Athletic Kenya Federation's Constitution** and not through a Special General Meeting as contended by the Respondents. In my view, a dispute has arisen between the

Applicants and the Respondents on one hand and the Executive Committee and Respondents on the other hand. Under Article 39 of the A.K Federation's Constitution any general dispute arising between the Executive and any member or between one or more members will be settled amicably through mediation or in the alternative either party may refer the dispute to the Federation's Arbitration. In my view the Applicants have shown they have a primer facial case. By dint of Section 7f of the ArbitrationAct, the Applicants are entitled to approach the High to grant an interim measure of protection pending the hearing and determination of the Arbitral proceedings. I have already stated that the Applicants have shown that they have a prima facie case and that a dispute has arisen which can only be resolved through arbitration as be the Federation's Constitution. The next question is whether or not the Applicants will suffer irreparable loss if they are denied the interim order of injuction. I am convinced the Applicants have made a powerful submission that they may suffer irreparable loss in that the Federation's affairs may be disrupted and may attract adverse sanctions from the International Association of Athletics Federation (IAAF) to the utter detriment of Kenyan Sportsmen and Women. Such damage cannot be compensated by damages. It has been argued by the Respondents that if the orders are given it will paralyse the holding of meetings called by members of the Federation. With respect, that is true, but it is only pending the hearing and determination of arbitral proceedings which in any case should expeditiously be conducted and determined.

7. In the end I allow the summons in terms of Prayers 4 to last for 90 days. The Applicants are directed to make the formal application for the dispute to be referred to arbitration within a period of 30 days. The Arbitral proceedings should be conducted expeditiously.

Costs shall await the outcome of the Arbitral proceedings.

Dated, Signed and Delivered this 18th day of December 2014.

J. K. SERGON

JUDGE

In the presence of:

…….for the Plaintiff

.....for the Defendant