



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 559 of 2012

STEPHEN K A SOI.....PLAINTIFF

VERSUS

1. MWANGI MBUTU.....1ST DEFENDANT

2. SHADRACK MALUKI.....2ND DEFENDANT

3. JOHNSON MWADIME.....3RD DEFENDANT

**(The Vice-Chairman, Secretary General
and Sports Director respectively to the
Kenya Judo Association)**

4. KENYA NATIONAL SPORTS COUNCIL.....4TH DEFENDANT

RULING

By his Motion on Notice dated 16th November 2012 expressed to be brought under the provisions of Order 51 Rule 1 and 3, Order 40 rule 1, 2, 4 and 10 of the Civil Procedure Rules, section 3A of the Civil Procedure Act, the inherent jurisdiction of the Court and all other enabling provisions of the law, the plaintiff/applicant herein seeks the following orders:

- 1. That this matter be certified urgent and heard ex-parte in the first instance**
- 2. That an order of temporary injunction be and is hereby issued restraining the 1st, 2nd and 3rd defendants, the vice-chairman, the Secretary General and Sport Director to the Kenya Judo Association respectively from conducting, convening, officiating, presiding and/or in any other manner from conducting the Kenya Judo Association Annual General Meeting on the 17th November 2012 at Kenya National Sports Council Room starting from 1000 hours or at all or at any other date thereafter pending the hearing and determination of this application and/or until further orders of the Honourable Court.**
- 3. That an order of temporary injunction do issue restraining the Kenya National Sports council or any other agent acting as a returning Officer from conducting the elections of the office bearers to the Kenya Judo Association on the 17th November 2012 at the Kenya National Sports Council Board Room at 1000 hours or at any time or at any other date thereof pending the hearing and determination of this application and/or orders of the Honourable Court.**

4. That an order of temporary injunction be and is hereby issued restraining the 1st, 2nd and 3rd defendants, the vice-chairman, the secretary General and Sports director to the Kenya Judo Association respectively from conducting convening, officiating, presiding and/or in any other manner from conducting the Kenya Judo Association Annual General meeting on the 17th November 2012 at Kenya National Sports council Room starting from 1000 hrs or at all or at any other date thereafter pending the hearing and determination of the suit.
5. That an order of temporary injunction do issue restraining the Kenya National Sports Council or any other agent acting as a returning officer from conducting the elections of the office bearers to the Kenya Judo Association Room at 1000 hours at any time or at any other date thereof pending the hearing and determination of the suit.
6. That in the event that the election of the office bearers of the Kenya Judo Association are held on the 17th November 2012 or any other date thereafter, the Registrar of Societies be and is hereby ordered by an injunction restrained from registering the purported elected office bearers as the office bearers of the Kenya Judo Association pending the hearing and determination of this application.
7. That in the event that the election of the office bearers of the Kenya Judo Association are held on the 17th November 2012 or any other date thereafter, the registrar of societies be and is hereby ordered by an injunction restrained from registering the purported elected office bearers as the office bearers of the Kenya Judo Association pending the hearing and determination of this suit.
8. Costs of the application be in the cause.

On 27th November 2012, the defendants filed a Notice of Preliminary Objection dated 24th November 2012 in which they raised the issue that the proceedings filed by the plaintiff herein be stayed and proceed for Arbitration on the following grounds:

1. **The Kenya Judo Association is a member of the National Olympic Committee of Kenya a body affiliated to the International Olympic Committee.**
2. **The National Olympic Committees of Kenya's Constitution is mandated to refer all sports disputes to the International Olympic Committee or**
3. **The National Sports federations in Kenya are mandated to undertake not to refer any disputes to any Municipal Courts but to the National Olympic Committee of Kenya's Sport Arbitration Committee as Arbitrator as defined in Section 30.2 of its Constitution.**
4. **The Plaint discloses no cause of action or reasonable cause of action against the Defendants.**
5. **The plaintiff purports to sue as the Kenya Judo Association.**
6. **An injunction is an inappropriate remedy.**
7. **No Arbitration has taken place.**

In response to the said preliminary objections the plaintiff swore a replying affidavit 5th December 2012. In NBI High Court (Civil Division) Civil Case No 102 of 2012 - **Cheraik Management Limited vs. National Social Security Services Fund Board of Trustees & Another** I expressed myself, *inter alia*, as follows:

“Ordinarily, a preliminary objection should be based on the presumption that the pleadings are correct. It may also be based on agreed facts. It, however, cannot be entertained where there is a dispute as to facts for example where it is alleged by the defendant and denied by the plaintiff that a

condition precedent to the filing of the suit such as the giving of a statutory notice was not complied with, unless the fact of non-giving of the notice is admitted so that the only question remaining for determination is the legal consequence thereof. It may also not be entertained in cases where the Court has discretion whether or not to grant the orders sought for the simple reason that an exercise of judicial discretion depends largely on the facts of each particular case which facts must be established before a Court may exercise the discretion...In this case the both parties have adopted the unusual mode of arguing the preliminary objection by filing affidavits in support and in opposition thereof respectively. Accordingly part of the Court's task would be to determine what are the agreed facts contained therein whether expressly or by legal implication."

In arriving at that decision, I relied on the celebrated case of Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696. In that case Law, JA was of the following view:

"A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

As for Newbold, P:

"A preliminary objection is in the nature of what used to be called a *demurrer*. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop".

I also cited Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177 where it was held that:

"The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion."

Dealing with the same issue, Ojwang, J(as he then was) in Oraro vs. Mbaja [2005] 1 KLR 141 which expressed himself as follows:

"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on

occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a 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, 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant’s instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent’s very detailed “affidavit in reply to an affidavit in support of preliminary objection”, which replying affidavit was expressed to be “under protest”... The applicant’s “notice of preliminary objection to representation” cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute.”

In my view where a defendant has purported to raise preliminary points of law which the plaintiff believes do not meet the threshold for preliminary points of law, the option available to the plaintiff is not to swear an affidavit in response to the said issues as the plaintiff did in this case. What the plaintiff is expected to do is to oppose the said objections on the very grounds that the same do not strictly speaking amount to preliminary points of law. Accordingly, I do not wish to consider the contents of the replying affidavit sworn in response to the preliminary objections herein.

To properly understand the points raised herein it is important to recapitulate what the dispute here is all about. The plaintiff contends that he is the chairman of Kenya Judo Association a society registered under the Societies Act Cap 108 Laws of Kenya (hereinafter referred to as the Society). According to him the 2nd defendant issued a notice calling for the Annual General Meeting of the Society in breach of the Society’s Constitution and before the expiry of the terms of the current office holders of the Society hence the intended meeting was ultra vires the Society’s constitution. The plaintiff hence sought an order of injunction barring the defendants from holding the said meeting as scheduled or dealing with the affairs of the Society and declaration that the calling of the said meeting was unconstitutional, illegal, ultra vires, null and void.

In their submissions, the defendants contend that the matters in dispute herein ought to go to Arbitration since there is an existing arbitration Agreement since 4th October 2008 made by the Executive Committee of the Society. Where such an agreement exists, it is submitted that section 6(1) of the Arbitration Act allows for Arbitration. In the defendants’ view the Society being an affiliate of National Olympic Committee of Kenya (NOCK) has bound itself to pursue Arbitration under section 30.2 of the Constitution of NOCK which follows the requirement by the Olympic Charter that all sporting bodies prior to their affiliation incorporate Arbitration as a condition precedent to avoid Municipal Courts. In the defendants’ view the objection raised satisfies the requirement of a preliminary objection as stipulated in **Mukisa Biscuits Case (supra)** that there be an agreement for arbitration; that the parties must have agreed to submit; that the party bringing the application for stay must not file any pleadings save an appearance to the suit; and that there are no controverted facts. In the defendants’ view the plaintiff has failed to disclose to the Court that he is a suspended Chairman of the Society and is using the injunction to try and remain in power. The term of the plaintiff having expired, it is submitted that there is no right that the plaintiff seeks to protect or ventilate.

On the part of the plaintiff it is submitted that the issues raised by the defendants do not constitute pure points of law since facts are in dispute as demonstrated by affidavits on record which require ascertainment of facts such as the existence of a provision in the Society’s Constitution mandating the plaintiff to refer the dispute for arbitration to the NOCK. Further the issue whether the Society and the

National Olympic Committee of Kenya are different entities require to be ascertained. In the plaintiff's view the provisions of Article 30.2 of NOCK is merely directory since it is not entrenched in the Society's Constitution hence the High Court has the jurisdiction to intervene. In the absence of a clause mandating the reference of the dispute herein to arbitration, the plaintiff submits that section 6(1) of the Arbitration Act is inapplicable.

There were other issues raised by the parties in their affidavits which I have decided not to go into at this stage since in my considered view they are issues which ought not to be the subject of a preliminary objection.

The issue for determination by the Court at this stage is whether these proceedings ought to be referred to arbitration under section 6 of the Arbitration Act. The said provision provides:

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

Rule 2 of the Arbitration Rules provides that Applications under sections 6 and 7 of the Act shall be made by summons in the suit. The wisdom behind the requirement that the application be made by way of Chamber Summons is that for the Court to determine whether or not section 6 aforesaid ought to be invoked, it ought to be satisfied that there exists an agreement for reference to arbitration in the first place. In this case instead of filing a Chamber Summons exhibiting the documents containing the purported agreement the defendants have chosen the route of preliminary objection. Despite that I have perused the Constitution of the Society which forms part of the record of these proceedings and apart from clause 18 which affiliates the Society to NOCK there is no provision dealing with reference of disputes of the Society to Arbitration in that Agreement. Whereas clause 30.2 of the Constitution of NOCK a copy of which appears on the record requires as a condition for affiliation that the body being affiliated incorporates in its Constitution a clause referring all the disputes to arbitration, such clause does not seem to appear in the Society's copy of the Constitution which has been exhibited.

Based on the material presented before the Court, the Court is not in a position to uphold the preliminary objection which is hereby dismissed with costs to the plaintiff.

The plaintiff has urged the Court in dismissing the objection to extend the interim orders granted herein. Under section 1A(2) that the court is required in mandatory terms in the exercise of its powers under the Civil Procedure Act or the interpretation of any of its provisions, to seek to give effect to the overriding objective specified in subsection (1) of the section. The said overriding objective under subsection (1) on the other hand seeks to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

In **Teresa Shitakha vs. Mary Mwamodo & 4 Others [1986] KLR 445** the Court of Appeal stated:

“It would not be right to grant orders which would have the effect of paralysing the National

Organisation or bringing it to a halt, both by restraining the holding of meetings and by organisation of elections, pending a decision in the main action, or on the appeal from the learned judge's order. To do so would be out of proportion to the alleged wrongs suffered by the Applicant, and damages would be an adequate remedy for her if the allegations were proved".

In other words what the Court was stating was that in an application of this nature the Court ought to consider the principle of proportionality. This principle is now one of the matters to be considered under the overriding objective of civil dispute resolution provided in section 1A of the Civil Procedure Act. In interpreting the provisions of the Act and the Rules thereunder the Court is enjoined by section 1B thereof to ensure that the aims of the overriding objective are attained.

It is clear that what triggered the filing of the application dated 16th November 2012 was, from the plaintiff's point of view, the intended unconstitutional Annual General Meeting of the Society which was slated for 17th November 2012 before the expiry of the mandate of the office bearers of the Society which was due to expire on 24th November 2012.

In **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** the Court of Appeal dealing with the said Overriding Objective stated *inter alia* as follows:

"the applicant cannot be allowed to invoke the "O2 principle" and at the same time abuse it at will...All provisions and rules in the relevant Acts must be "O2" compliant because they exist for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day".

Similarly, the same Court in **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009** expressed itself thus:

"Section 3A and 3B of the Appellate Jurisdiction Act gives the Court the freedom in the circumstances of this case to ensure that the matter is handled in accordance with the relevant provisions of the Arbitration Act because it is in doing so that justice will be done to the parties. That is what matters. The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow".

Clearly therefore it would be contrary to the spirit of the overriding objective as well as Article 159(2)(b) of the Constitution, which mandates the Courts in exercising judicial authority to be guided by *inter alia* the principle that justice shall not be delayed, for this Court to extend the interim orders when the term of office of office bearers of the Society has expired.

Consequently, while dismissing the preliminary objection, it is my view that in the circumstances of this case the extension of the interim orders will serve no useful purpose and I decline to extend the same.

Dated and Delivered at Nairobi this 30th day of January 2013

**G V ODUNGA
JUDGE**

Delivered in the presence of:
Mr. Arusei for the Plaintiff

Non Appearance for the Defendants