



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
PETITION 153 OF 2011

BENSON L VIOYA.....PETITIONER

VERSUS

GEORGE WASONGA..... 1ST RESPONDENT

SULEIMAN SUMBA.....2ND RESPONDENT

**(SUED AS SECRETARY
GENERAL AND CHAIRMAN RESPECTIVELY**

**OF THE KENYA
TAEKWONDO ASSOCIATION)**

HASTINGS NGALA..... 3RD RESPONDENT

SECRETARY **THE PERMANENT**

MINISTRY OF GENDER SPORTS & YOUTH AFFAIRS.....4TH RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner is a registered taekwondo coach and was at the time material to this petition appointed by the Kenya Taekwondo Association (“the Association”) as the head coach of the female team for the national taekwondo team proceeding to the 10th All Africa Games to be held in Maputo from 7th September 2011.

2. After his appointment on 2nd June 2011, the petitioner proceeded to train the female taekwondo team in readiness for the Games. However, on 30th June 2011 the petitioner learnt that the 2nd respondent, the chairman of the Association, had appointed the 3rd respondent to replace him as the female team head coach.

3. The petitioner is aggrieved because he was never informed why he was being replaced. He also contends that he learnt that the 2nd and 3rd respondents hail from the same ethnic background and that the appointment of the 3rd respondent to replace the petitioner was done secretly and without concurrence of the executive committee as required by the constitution of the Association and was in flagrant abuse of the petitioner's fundamental rights.

4. According to the petition dated 1st November 2011 the petitioner seeks the following reliefs;

(i) *An order of injunction and/or prohibition restraining and or prohibiting the 3rd respondent from taking up or proceeding to Maputo for the 10th All Africa Games as the female head coach.*

(ii) *A declaration that the decision by the executive committee of the Kenya Taekwondo Association to replace the petitioner with the 3rd respondent unconstitutional and violated the constitutional and fundamental rights of the petitioner and the same should be set aside.*

5. The petitioner's case is supported by his affidavit sworn on 1st September 2011. There is also replying affidavit of George Wesonga sworn on 2nd September 2011 which supports the petitioner.

6. According to George Wesonga, the Secretary General of the Association, the petitioner had been appointed as the head coach for the female team at an executive committee meeting of the Association held on 25th June 2011. He was shocked that the Association's chairman had appointed the 3rd respondent to replace the petitioner as the head coach of the female team without authority of the executive committee.

7. The facts as set out by the petitioner have not been controverted by the 2nd and 3rd respondent and I shall consider them true and correct for purposes of these proceedings. I also note that the Court, (Ang'awa J.) granted temporary orders on 5th September 2011 restraining by the injunction the 3rd respondent from proceeding to Maputo to the 10th All Africa Games as female team head coach. According to the petitioner, the 2nd and 3rd respondents flagrantly disobeyed this order and have shown contempt to this court by declining to honour court summons.

8. The 4th respondent, the Permanent Secretary, Ministry of Gender, Sports and Youth Affairs has been sued. The petition does not disclose any relief against it but according to the petitioner's submissions, *"it is sued as the Government of Kenya authority in charge of regulation of sports and sporting authorities in Kenya and with whom the financial decision lay to do justice in deciding who between the lawfully appointed National Female Coach for the 10th All Africa Games, that is the petitioner, or the 3rd respondent travelled to Maputo."*

9. The petitioner has filed written submissions dated 2nd May 2012 which Mr. Kamau, counsel for the petitioner, adopted. The petitioner's case is that the petitioner's rights under **Article 27** and **47** of the Constitution have been violated.

4th Respondent's Case

10. The 4th respondent opposed the petition through written submissions dated 20th February 2012. The gist of the submission is that there is no cause of action against the 4th respondent. It relied on the principle established in the case of **Anarita Karimi Njeru v Attorney General (1979) KLR 54** and

subsequent cases that a person who seeks enforcement of fundamental rights and freedoms under the Constitution must state his case precisely by not only setting out the particular sections infringed but by demonstrating how these rights are infringed in relation to him.

11. The 4th respondent also avers that there have been no constitutional issues raised. It is stated that the matter in issue is really a dispute between members of an association and therefore the procedure under **Article 22** should not be used to litigate what are ordinary civil claims. The respondent relied on the case of *Harrikisoon v Attorney General of Trinidad and Tobago (1979) 3 WLR 63* and *Rodgers Mwema Nzioka v Attorney General Nairobi Petition No. 613 of 2003(Unreported)* to support this contention.

12. Finally the 4th respondent contended that **Article 14** of the Association constitution obliged the petitioner to invoke the provisions of the arbitration clause before moving the court for any redress. The court, it was urged, should retreat from hearing this matter and permit the internal dispute resolution procedures to be exhausted.

Issues for determination

13. Upon perusing the respective submissions by the parties, I consider that the following issues necessary for determination;

(i) Whether the petition discloses a cause of action and more particularly against the 4th respondent and whether there has been breach of the petitioner's rights by the respondents.

(ii) Whether the petitioner should have invoked alternative dispute resolution procedures under the constitution of the Association and if so whether the petitioner is entitled to relief.

Whether the petition discloses a cause of action

14. The 4th respondent relied on the principle established in the case of *Anarita Karimi Njeru v Attorney General (Supra)* to attack the petition. The reasons for this principle were further elucidated in the case of *Joseph Kimani Mwai v Town Clerk Kangema Nairobi Petition No. 1039 of 2007 (Unreported)*. The court observed that, *"Our courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of rights, they must state the provision of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement. The cases of Anarita K Njeru v R (No. 1) (1979) KLR 154 and Cyprian Kubai v Stanley Kanyonga Mwenda Nairobi HC Misc. No. 612 of 2002 (Unreported). The reason for this requirement is twofold; first the respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by section 84 of the Constitution is a special jurisdiction to enforce specific rights which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to man but specific rights defined and protected by the Constitution. It is not sufficient to rely on a broad notion of unconstitutionality but rather point to a specific provision of the Constitution that has been abridged. Unfortunately, the petitioner does not set out specific provisions of the Constitution infringed. It is true that the submissions point to specific provisions but it is the pleadings that enable the party to respond to specific allegations. I hold the view that unless specific provisions are cited or pleaded with sufficient particularity, the respondent, who is being accused of violation, may not be able to furnish evidence or bring facts which bring it within the specific exceptions, provisos or limitation. The nature extent of particularity must depend on each case but it must nevertheless enable the court identify the violation and enable the respondent defend himself."*

15. The petition filed by the petitioner does not set out or refer to the specific provisions of the Constitution infringed. However, what is required is sufficient particularity to show what is complained about in a manner that does not prejudice or embarrass the party who is required to respond.

16. In the instant case, the petitioner has complained about discrimination and the fact that he “*has a right to be heard where a public body takes a decision that negatively impacts on him.*” These matters fall within the provisions of **Article 27** and **47** of the Constitution that protect the individual from discrimination and ensure a fair administrative process.

17. The petitioner apart from identifying the right infringed must demonstrate in the pleadings and depositions such infringement by the respondents. The petition does not set out any allegation or relief against the 4th respondent. Making a case against a party in submissions, as the petitioner has done, denies the party the right to counter the allegations against it.

18. I therefore conclude that there is no allegation or relief against the 4th respondent and the case against it is dismissed.

19. As regards the case against the Association represented by the 1st 2nd and 3rd respondents, I am not satisfied that the petitioner has made out or demonstrated how he was discriminated against. The mere fact of appointing a person belonging to the same ethnic background cannot, of itself, constitute discrimination and therefore any claim under **Article 27** of the Constitution is rejected.

20. The substantive relief sought is in respect of **Article 47** which entitles every person to fair administrative action. **Article 47** provides, in part;

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

21. The uncontroverted grounds set out in the petition and supporting affidavit and replying affidavit to support the breach of **Article 47** are as follows; First, the petitioner was removed from his position without a hearing. Second, no reasons, written or otherwise were given to petitioner for his removal. Third, the chairman acted contrary to the constitution of the Association in unilaterally removing the petitioner from his position.

22. The facts I have outlined clearly make the 2nd respondent’s decision untenable. It was not reasonable or fair and is in breach of **Article 47**.

23. **Article 19(2)** of the Constitution provides that the purpose for recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and to promote social justice and realisation of the potential of all human beings. **Article 20(1)** state that the Bill of Rights applies to all law and binds all state organs and persons. Furthermore, **Article 20(2)** entitles every person to enjoy the fundamental rights and freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right and fundamental freedom.

24. The effect of these provisions is that the Bill of Rights can no longer be separated for the day to day lives of the mwananchi, it must permeate all aspects of life so that the aspirations set out in the preamble are achieved and that every person reaches their full potential as a human being.

25. Thus the Bill of Rights is not excluded from application merely because the acts complained of are matters of a private members’ Association. The Kenya Taekwondo Association, as one participating in teams in the All Africa Games, participates in a national endeavour, which is of interest to all Kenyans. Participation in National and International Games by sports teams enhances national unity and where the state is involved in organisation and financing, these association must adhere to the standards, values and principles established in the Constitution.

26. I must therefore find that petitioner’s right to fair administrative action was infringed when he was

removed without notice or reason as the head coach of the female team of the Kenya taekwondo team.

Whether the petitioner should have invoked Alternative dispute resolution procedures.

27. The **Article 14** of the *Association's Constitution* states as follows;

All differences/misunderstandings etc shall be referred to the Executive Committee/Administration Board for arbitration. In the event that the dispute cannot be resolved within reasonable time in this case one month, then the matter will be referred to the National Olympic Committee of Kenya (NOCK) and/or the Kenya National Sports Council (KNSC) for final verdict.

Under No circumstances should disputes involving the association be referred to the courts.”

28. The 4th respondent has argued that the constitution of the Association obliges the petitioner to invoke internal remedies first. The petitioner on the other hand has contended that it would be impossible for him to obtain justice given his disagreement with the chairman of the Association. Furthermore, he argues that the court's jurisdiction cannot be ousted in a manner that takes away the petitioner's right to enforce fundamental rights and freedoms under the Bill of Rights.

29. This petition concerns the enforcement of fundamental rights and freedoms under **Article 22** of the Constitution. This is an independent and enforceable right and it cannot be taken away by the provisions of the Association's constitution. The arbitration clause is relevant as establishing a dispute resolution process within the Association and may be given effect in other disputes other than those concerning enforcement of fundamental rights. The High Court has jurisdiction to determine any matters concerning the threat, infringement, breach or violation of fundamental rights and freedoms protected by the Bill of Rights and that jurisdiction cannot be taken away by an arbitration clause.

30. It must be recalled that **Article 159(2)(i)** obliges this court to promote modes of alternative dispute resolution. This objective is not inconsistent with enforcement of fundamental rights and freedoms but in exercising its jurisdiction under **Article 22** the Court must give primacy to the Bill of Rights.

Relief and Disposition

31. I am alive to the fact that the Association has established mechanisms for appointment of staff members including coaches and for resolution of internal disputes. The All Africa Games upon which this petition was brought has now taken place, therefore prayer (i) of petition has now been overtaken by events.

32. **Article 23** obliges the Court to frame “*appropriate relief*” in order to vindicate the petitioner's rights. In the circumstances, I would grant a declaration of violation and award damages to the petitioner.

33. A consideration of the material before the court shows that that the 2nd respondent, as the Chairman of the Association, was the cause of the petitioner's grievance. The Secretary-General of the Association has disavowed the acts of its chairman. As damages were not prayed for, I will direct the 2nd respondents to show cause why damages and costs of this petition should awarded against him.

34. In light of my findings I now make the following orders;

(a) **The case against the 4th respondent is hereby dismissed.**

(b) **A declaration be and is hereby issued that the petitioner's rights under Article 47 were infringed by the 2nd respondent, when he was removed as the Female Head Coach of the Female Team of the Kenya Taekwondo Association.**

(c) **2nd respondent, SULEIMAN SUMBA, shall show cause why he should not pay damages**

and costs of this suit to the petitioner.

DATED and DELIVERED at NAIROBI this 11th day of May 2012

D.S. MAJANJA
JUDGE

Mr Kamau instructed by P.K. Kamau and Company Advocates for the petitioner.

Ms Barasa, Litigation Counsel, instructed by State Law Office for the 4th respondent.