



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION 115 OF 2011

**IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA  
AND THE CIVIL PROCEDURE ACT CHAPTER 21 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION BY HEZEKIEL C. ANUNDA AND JAPHLET  
LUBANGA OMUSULA FOR ORDERS OF CERTIORARI PURSUANT TO LEAVE GRANTED  
BY THE HONOURABLE JUSTICE MUSINGA ON THE 6<sup>TH</sup> DAY OF JUNE 2011**

**AND**

**IN THE MATTER OF THE SOCIETIES ACT CHAPTER 108 OF THE LAWS OF KENYA**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**1.THE MINISTER FOR YOUTH AFFAIRS**

**AND SPORTS ..... 1<sup>ST</sup> RESPONDENT**

**2.THE SECRETARY, SPORTS, MINISTRY OF**

**YOUTH AFFAIRS AND SPORTS ..... 2<sup>ND</sup> RESPONDENT**

**3.THE REGISTRAR GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**4.THE HONOURABLE ATTORNEY GENERAL ... 4<sup>TH</sup> RESPONDENT**

**AND**

**ALEX OLE MAGELO as Chairman**

**JOSEPHAT BUKACHI as Secretary General**

**PATRICK KOYONZO NGAIRA as Treasurer .....INTERESTED  
PARTIES**

**of AFC Leopards Sports Club**

**EX PARTE**

**1. EZEKIEL C. ANUNDA**

**2. JAPHLET LUBANGA**

**OMUSULA**

**JUDGMENT**

On 6<sup>th</sup> June, 2011 the ex parte applicants were granted leave to apply for an order of certiorari to remove into this court and quash the decision of the 1<sup>st</sup> respondent embodied in a letter dated 24<sup>th</sup> February, 2011 from the 1<sup>st</sup> respondent to the Registrar General. Leave was also granted to apply for an order of certiorari to remove into the High Court and quash the decision of the 3<sup>rd</sup> respondent embodied in a letter dated 7<sup>th</sup> March, 2011 to Doctor Dan Shikanda as Presiding Officer and Steve Nyakina as Assistant Presiding Officer referenced “**SOCIETIES ACT (CAP 108) AND SOC/6031 – AFC LEOPARDS SPORTS CLUB**”.

The substantive application was filed on 14<sup>th</sup> June, 2011. The application was supported by the usual statutory statement and a verifying affidavit sworn by **Hezekiel C. Anunda**, a member of the **AFC Leopards Sports Club**, hereinafter referred to as “**the Club**”, who swore the same with full authority of the 2<sup>nd</sup> ex parte applicant. The 2<sup>nd</sup> ex parte applicant is also a member of the said Club. The Club is a duly registered society under the provisions of **Societies Act**. A copy of the Club’s Constitution is annexed to the affidavit of Mr. Anunda.

On 13<sup>th</sup> February, 2011 the Club held an annual general meeting whose agenda included, *inter alia*, the election of its officials. The elections were disrupted by some people and the police dispersed members who had attended the annual general meeting. Consequently, the elections were called off. The existing Executive Committee was not dissolved.

On 15<sup>th</sup> February, 2011 the Ministry of Youth Affairs and Sports, hereinafter referred to as “**the Ministry**”, through the 2<sup>nd</sup> respondent wrote a letter to the Registrar General, the 3<sup>rd</sup> respondent, seeking advice on, *inter alia*, whether it would be in order to form an Interim Committee to run the affairs of the Club until proper elections are held.

The Registrar of Societies, hereinafter referred to as “**the Registrar**”, replied to the said letter on 18<sup>th</sup> February, 2011 by stating that it would be in order for the Ministry to urgently form a steering committee with a specific mandate to organize elections within 60 days. The Registrar further advised the Ministry that once elections were held under the supervision of the steering committee and the Ministry, the names of the elected officials should be forwarded to the Registrar’s office within 14 days after which the steering committee should hand over the running of the Club to the elected officials.

On 23<sup>rd</sup> February, 2011 the Club through its Chairman, Julius Ochiel, wrote to the office of the 4<sup>th</sup> respondent informing him that:

**(a) The Societies Act does not give the Registrar of**

**Societies the mandate to impose a third force such as an interim board, Ministry of Sports and Kenya National Sports Council to oversee or run the affairs of the club.**

**(b) The club was not under the supervision of either the Ministry of Sports nor the Kenya National Sports Council which bodies lacked the legal mandate to advise, intervene and/or interfere with the affairs of the club as an affiliate of the Football Kenya Limited and the Federation Internationale de Football Association (FIFA). The letter sought the intervention of the 4<sup>th</sup> respondent to adjust the requirements of the Registrar to be in line with the requirements/instructions from Football Kenya Limited/FIFA to guarantee stability at the club.**

On 23<sup>rd</sup> February, 2011 Football Kenya, which is the body charged with the responsibility of managing football in Kenya, wrote to the Registrar informing him of the decision that the current Executive Committee was to remain in force until such time as a proper Constitution with well constituted rules of elections for the Club will have been put in place to enable elections be held.

The said letter further informed the Registrar that the Club cannot participate in the league with interim office bearers as that was in contravention of FIFA rules **Articles 17 and 18** which prohibit third parties from making decisions on behalf of or for members of the Club.

On the same date the Club wrote to the Registrar informing him that its annual general meeting that had been called for the 13<sup>th</sup> February, 2011 was not successful after the meeting turned chaotic and the police dispersed members. The said letter further advised the Registrar to take into account the contents of the letter dated 23<sup>rd</sup> February, 2011 from Football Kenya Limited and ensure that FIFA rules were adhered to.

On 24<sup>th</sup> February, 2011 the Registrar wrote to the Commissioner for Sports in the Ministry of Youth Affairs and Sports informing him that due to the contents of the letter dated 23<sup>rd</sup> February, 2011 from the Chairman and Secretary General of the Club and the letter dated 23<sup>rd</sup> February, 2011 from Football Kenya the specific mandate of the purported interim steering committee which was to be formed by the Ministry to conduct the elections within 60 days may not be tenable.

Despite the contents of the said letter, the 1<sup>st</sup> respondent purported to write a letter to the Registrar informing him that he had formed an Interim Management Board to manage the affairs of the Club and organize the elections within 60 days from the date of the letter. On the same date, an amorphous body calling itself the AFC Leopards Elections Board purported to issue a notice to **Mr. Julius Ochiel, Mr. Alex Ole Magelo** and **Mr. Wilston Kitui**, all aspiring candidates, calling for repeat elections and scheduled the same for 6<sup>th</sup> March, 2011. The said body also issued a similar notice to the Registrar and requested him to send a representative to witness the elections.

The ex parte applicants contended that the said notice was issued in total disregard of the Club's Constitution which requires a notice of not less than 21 days to be sent to all members accompanied by the annual statement of account and the agenda of the meeting and where practicable by press advertisement not less than 14 days before the date of the meeting. The Registrar replied to the Commissioner of Sports and stated that it may be appropriate to withhold the interim Electoral Board until measures were put in place to enable the elections comply with the directive from Football Kenya Limited. The said letter was written on 1<sup>st</sup> March, 2011.

On 4<sup>th</sup> March, 2011 the ex parte applicants filed a suit at **Milimani Commercial Courts, CMCC No. 374 of 2011**, seeking, *inter alia*, injunctive relief to restrain the said Board from purporting to conduct the elections. The court granted the orders sought. That notwithstanding, the Club purported to hold its elections on 6<sup>th</sup> March, 2011. It is not clear whether the injunctive orders had been served upon the Club or not. Consequently, on the same day the Chairman and the Secretary General of the Club wrote a letter to the Registrar taking issue with the purported elections which were conducted by the Board in their absence. Subsequently, the said suit was withdrawn.

On 7<sup>th</sup> March, 2011 the Ministry through the Secretary, Sports, wrote a letter to the Registrar purporting that the Club had held elections and a new set of officials elected. The letter further stated that the elections had been conducted legitimately and in accordance with the wishes of the members and permitted the Registrar to register the said officials as the duly elected office bearers of the Club. Upon receipt of the said letter, the Registrar wrote to Dan Shikanda as the Presiding Officer and Steve Nyakina as the Assistant Presiding Officer and purported to confirm the list of officials of the Club as follows:

- a) **Chairman – Alex Ole Magelo**
  
- b) **Vice Chairman – George Wesonga**
  
- b) **Secretary General – Josephert J. Bukachi**
  
- c) **Assistant Secretary General – Geoffrey Mulanya**
  
- d) **Treasurer – Patrick Keyonzo Ngaira**
  
- e) **Assistant Treasurer – Dr. Antony Walela**
  
- f) **Committee Member – Duncan Angode**
  
- g) **Committee Member – Fredrick Luta**
  
- h) **Committee Member – Ken Bunyasi**

On 10<sup>th</sup> March, 2011 Mr. Anunda instructed the firm of **Mukele Moni & Company Advocates** to write a letter to the Registrar wherein counsel took issue with the Registrar's blatant violation of the law and the Club's Constitution. The said advocates requested the Registrar to rescind or withdraw the decision to confirm the purported new officials of the Club. The Registrar responded to the said letter by stating that he had properly and legally executed the statutory mandate under **Section 17** of the **Societies Act**.

The ex parte applicants contend that the Registrar has no power in law or otherwise to delegate to another institution or organization the power to run or manage the affairs of the society and that the Registrar acted in contravention of the provisions of **Section 18** of the **Societies Act**. They further stated that the Registrar, in confirming the purported list of officials, acted unreasonably and irrationally in the exercise of his powers under the said Act.

The respondents did not file any affidavit in response to the ex parte applicants' affidavit but the interested parties and the Executive Committee members of the Club filed a replying affidavit that was

sworn by **Alex Ole Magelo**, the Chairman of the Club. He stated that the Club held its elections on 6<sup>th</sup> March, 2011 wherein the current Executive Committee headed by himself were elected as officials of the Club. Prior to the said elections the Club had no officials as the previous committee had been dissolved on 13<sup>th</sup> February, 2011 during the Club's annual general meetings but the elections aborted as the last time on the agenda well after the previous committee had dissolved itself. After the elections aborted there was a crisis as the Club remained without officials, considering the fact that the Kenya Premier League wherein the Club participates was just about to start, Mr. Magelo stated. He added that according to the Club's Constitution the Executive Committee remains in office for a period of only one year after which an annual general meeting is held to elect new office bearers. The previous Executive Committee was elected on 16<sup>th</sup> December, 2009 and therefore ceased to be in office on 16<sup>th</sup> December, 2010.

On 1<sup>st</sup> December, 2010 the Registrar had written a letter to the Club Executive Committee directing them to hold elections within 30 days in line with the Club's Constitution but some of the executive office holders went to court and filed a suit, to wit, **CMCC No. 8094 of 2010**. The then Secretary General, Robert Asembo, acting on the Registrar's direction, issued a 21 days' notice for elections to be held on 28<sup>th</sup> December, 2010. However, on 24<sup>th</sup> December, 2010 the court issued an order temporarily stopping the annual general meeting and the elections scheduled for the 28<sup>th</sup> of December, 2010. But on 14<sup>th</sup> January, 2011 the court dismissed the suit that had been filed and the elections were to proceed on 16<sup>th</sup> January, 2011, having been postponed from 28<sup>th</sup> December, 2010.

On 16<sup>th</sup> January, 2011 the Club held its annual general meeting but the elections aborted. Due to the vacuum in the Club leadership the Registrar in consultation with the Ministry of Sports appointed an Interim Board to organize fresh elections. The new Electoral Board, which was formed on 21<sup>st</sup> January, 2011, invited all members and stakeholders for a meeting whereafter all members agreed that the Ministry of Sports through the Commissioner of Sports would call for the annual general meeting and complete the Club elections on 13<sup>th</sup> February, 2011.

On 31<sup>st</sup> January, 2011 at a consultative meeting with the Club's sponsors, Mumias Sugar, the Executive Office together with all stakeholders agreed to work with the Electoral Board under the supervision of the Ministry of Sports, so that the Board could carry out the elections on a date to be fixed by the Board. It was further agreed that the Club recruitment of members be undertaken and all persons wishing to be registered as members pay Kshs.100/= to be members for the year 2011. It was during that membership recruitment drive that the ex parte applicants registered themselves as members, the deponent stated. Mr. Magelo added that it was illogical for the ex parte applicants, who were recruited by the Ministry of Sports to be members, to claim that the Ministry had no mandate to call for the Club's elections.

The interested parties contended that on 6<sup>th</sup> March, 2011 the Club held successful elections at Nyayo National Stadium. From that time the elected officials have been running the affairs of the Club satisfactorily and the former office bearers have not complained or petitioned the court for annulment of the elections.

The interested parties further stated that if the orders sought are granted they will have very adverse effect to the Club as it will be left without leadership in the middle of a competitive league. That will in turn frustrate the Club's determination to regain its old glory. Further, the term of the current executive office bearers ends in December, 2011 and any member interested in taking part in the forth coming elections can wait until then.

The interested parties added the calendar of the Kenya Premier League Company does not allow the Club to hold elections while the league is ongoing. If fresh elections are to be called now the same may lead to the Club being disqualified from the league and the Club may die, thus affecting lives of many young Kenyan footballers. The interested parties further stated that under FIFA regulations football matters are not to be deliberated in courts of law but should be resolved through arbitration. The ex parte applicants have not sought arbitration as the first option in resolving the dispute now before the

court. They are therefore acting contrary to the Club Constitution and FIFA rules, it was contended. The interested parties further defended the Registrar, stating that under **Section 18 of Societies Act** the Registrar acted within her mandate in authorizing the Ministry of Sports to ensure that the Club holds its elections.

On 6<sup>th</sup> June, 2011 **Mr. Mukele** for the ex parte applicants, **Mr. Kabaria** for the respondents and **Mr. Namada** for the interested parties agreed by consent that they would file their respective submissions on specified dates and thereafter the substantive motion would be heard on 28<sup>th</sup> July, 2011. Come that date the respondents and the interested parties had not put in their submissions and counsel agreed that the said parties be given more time to do so and the hearing of the application was adjourned to 4<sup>th</sup> August, 2011.

On that day, Mr. Airo appeared for the respondents and told the court that his clients had neither filed a replying affidavit nor submissions since the Attorney-General wanted to have the matter resolved out of court and had forwarded certain proposals to the other parties. That notwithstanding, Mr. Mukele for the ex parte applicant and Mr. Namada for the interested parties briefly highlighted their respective clients' submissions and in view of the proposed settlement it was agreed that the matter be mentioned on 5<sup>th</sup> August, 2011. Come that day counsel told the court that they were still working on the proposed settlement and requested that the matter be mentioned on 24<sup>th</sup> August, 2011 before the Duty Judge. On 24<sup>th</sup> August, 2011 counsel informed Karanja J. that no settlement had been arrived at and consequently the matter was referred to this court for further orders.

On 27<sup>th</sup> September, 2011 Mr. Odera for the applicants and Ms. Baraza for the respondents asked the court to deliver its judgment based on the submissions on record.

I have perused the submissions and my take on the matter is as follows.

It is not in dispute that according to the Constitution of the Club all its officials are elected at the Club's annual general meeting and remain in office for a period of one year. The Club held its annual general meeting on 16<sup>th</sup> January, 2011 but elections were not conducted because of disruption by some members of the Club. The Club's Constitution does not specifically state what ought to happen in such an event, that is, where the term of the elected officials has come to an end and for some reason elections are not held until a further date. The minutes of the annual general meeting held on 16<sup>th</sup> January, 2011 were not annexed to the affidavit of the ex parte applicants.

The interested parties stated that following the aborted elections scheduled for 16<sup>th</sup> January, 2011 the Registrar of Societies in consultation with the Ministry of Sports appointed an Interim Board to organize fresh elections. That Board was formed on 21<sup>st</sup> January, 2011. There was no objection by any of the Club members regarding involvement of the Registrar of Societies and the Ministry of Sports in the appointment of the Interim Board.

On 31<sup>st</sup> January, 2011 a consultative meeting involving the Club members, the Executive Committee and the Club sponsors, Mumias Sugar, was held. In that meeting it was agreed, *inter alia*, that an Electoral Board for purposes of overseeing the elections of the Club be set up. It was also resolved that representatives from the Ministry of Sports and from Football Kenya Limited be incorporated to oversee the election process. Again none of the Club members opposed the inclusion of the two representatives from the Ministry of Sports and Football Kenya Limited. The Electoral Board organized a meeting on 13<sup>th</sup> February, 2011 but again elections were not conducted due to wrangles among members of the Club. The Board scheduled another meeting to be held on 6<sup>th</sup> March, 2011. However, in the intervening period fresh wrangles seem to have erupted. Mr. Gordon Oluoch, Commissioner for Sports, wrote to the Registrar enquiring whether it would be in order to form an interim committee to run the affairs of the Club until the elections are held and if so who the appointing authority would be.

Vide a letter dated 18<sup>th</sup> February, 2011 the Deputy Registrar of Societies responded to the letter by

Mr. Gordon Oluoch and stated, *inter alia*:

**“With regard to your request to form an interim committee to run the affairs of the Club until the elections are held, we are of the view that it is in order if the Ministry of Youth Affairs and Sports can urgently form a steering interim committee with a specific mandate to organize for elections of the Club within 60 days.”**

An Interim Committee was therefore formed and according to a supplementary affidavit sworn by the 1<sup>st</sup> ex parte applicant, that is the Board that is being challenged and not the Electoral Board that was formed during the consultative meeting.

The ex parte applicants submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have no power in law to appoint a Board to manage the affairs of the Club and to organize elections.

Strictly speaking the 1<sup>st</sup> and 2<sup>nd</sup> respondents cannot interfere in the running of the Club affairs. The Club is a society registered under the provisions of **Section 10** of the **Societies Act** and its Constitution is clear as to how its elections ought to be conducted. However, it is the Club that invited the 1<sup>st</sup> and 2<sup>nd</sup> respondents to participate in its affairs following the aborted elections. The Club even invited its sponsors, Mumias Sugar, in its consultative meeting.

If the 1<sup>st</sup> and 2<sup>nd</sup> respondents had unilaterally intervened or involved themselves in the affairs of the Club the court would have no hesitation in holding that their actions were ultra vires. But given the state of affairs at the Club at the time when the 1<sup>st</sup> and 2<sup>nd</sup> respondents were called in, it is my considered view that their participation in organizing the Club’s elections cannot be questioned at this juncture.

The second issue raised by the ex parte applicants is that the 3<sup>rd</sup> and 4<sup>th</sup> respondents had no power to confirm the officials of the Club based on elections organized by the Board appointed by the 1<sup>st</sup> respondent under the hand of 2<sup>nd</sup> respondent. **Section 18** of the **Societies Act** provides as follows:

**“18 (1) If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar is not satisfied as to the identity of the persons who have been properly constituted as officers of the society, the Registrar may, by order in writing, require the society to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the institution of proceedings for the settlement of such dispute.**

**(2) If an order under subsection (1) of this section is not complied with to the satisfaction of the Registrar within the period of one month or any longer period which the Registrar may allow, the Registrar may cancel the registration of the society.**

**(3) A society aggrieved by the cancellation of its registration under subsection (2) may appeal to the High Court within thirty days of such cancellation.”**

From the aforesaid section of the Societies Act it is clear that the Registrar of Societies has limited powers in helping to resolve disputes that occur among members or officials of a society. Where the Registrar is not satisfied as to the identity of the persons who have been elected as officials, for example, where different names are forwarded to his office by wrangling members or officers of a Club, the Registrar may require the Club to resolve the dispute within a period of one month and if they fail to do so, the Registrar may cancel the registration of the society or Club.

The provisions of **Section 18** of the **Act** do not grant the Registrar any other power. Under **Section 31** of the **Act** the Registrar may require a registered society to furnish him with a true and complete list of officers and members and where, for example, a society has not held its elections within the required period the Registrar may direct the society to do so within a specified period, not less than 21 days.

In this case, the Registrar merely acted on a letter dated 6<sup>th</sup> March, 2011 which forwarded the names of the officials who were elected on 6<sup>th</sup> March, 2011 at Nyayo National Stadium. The Ministry of Youth Affairs and Sports had written to the Registrar and stated that the elections had been conducted legitimately and in accordance with the wishes of the members of the Club. In the circumstances, the Registrar had no option but to recognize the persons who were said to have been elected in the said meeting as the officials of the Club.

If any member of the Club was dissatisfied with the outcome of the said elections for whatever reason, he ought to have filed a suit immediately thereafter to specifically challenge the outcome thereof. However, that was not done. What is now being challenged is the decision of the 1<sup>st</sup> respondent contained in the letter dated 24<sup>th</sup> February, 2011 and the Registrar's letter dated 7<sup>th</sup> March, 2011.

It is instructive to note that the application was filed long after the elections were conducted and none of the former officials made any specific complaint.

The judicial review remedy of certiorari is a discretionary remedy. It may be denied even if an applicant demonstrates to the court that the order is otherwise deserved. In granting an order of certiorari the court must weigh all the relevant factors and ask itself whether such an order would be the most efficacious remedy in the circumstances. See **Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 2 page 805 paragraph 1508.**

In this case, the court was told that club elections cannot be held during the period when the Club is engaged in the premier league. If the orders sought are granted it will mean that the Club is left without officials until fresh elections are conducted. That would jeopardize the Club's participation in the ongoing league. The court was further informed that the premier league will end sometimes next month. Even if the ex parte applicants had demonstrated to the court that the orders sought herein ought to be granted, for the reason that the premier league is almost coming to an end, it cannot be in the interest of the Club to hold elections at this point in time.

All in all, for the reasons stated hereinabove, I am not satisfied that the orders sought by the ex parte applicants ought to be granted. Consequently, the ex parte applicants' application is dismissed. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF OCTOBER, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Muriithi – Court Clerk**

**Miss Odera for the Applicants**

**Mr. Omogo for the Interested Parties**