



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 152 of 2009**

**TWAHA MBARAK**

**LORDVICK OMONDI ADUDA**

**Suing as officials: Senior Vice Chairman (Acting Chairman And Secretary**

**General of Kenya Football Federation (KFF) ...  
PLAINTIFF**

**Versus**

**FOOTBALL KENYA LIMITED..... 1<sup>ST</sup> DEFENDANT**

**MOHAMMED HATIMY ..... 2<sup>ND</sup> DEFENDANT**

**TITUS KASUVE ..... 3<sup>RD</sup> DEFENDANT**

**SAMMY JOEL OBINGO ..... 4<sup>TH</sup> DEFENDANT**

**ERASTUS OKUL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

Before the court is a Preliminary Objection dated 1<sup>st</sup> April, 2009. The same objection is towards the Chamber Summons dated 25<sup>th</sup> March, 2009 filed by the Plaintiffs.

The chamber summons was brought under Section 3, 3A, 63 (c) and (d) of the Civil Procedure Act, and Order XXXIX Rules 1, 2 and 9 of the Civil Procedure Rules.

The application is seeking for orders that:

- (1) That this Application be certified as urgent and be heard Exparte in the First Instance.
- (2) That prayer 3 and 4 herein be granted Exparte in the First Instance pending the Hearing and Determination of this Application.

(3) That the Defendants whether by themselves or through servants, employees and/or agents be and are hereby restrained by an injunction from trespassing unto, remaining upon, assuming and/or remaining in ownership and/or possession of and/or enjoying any rights appurtenant to the ownership of all that Building, construction and/or structures erected on an unsurveyed plot delineated on plan number 42/31/2004/014 and more particularly being premises referred to in letter of allotment Ref:34480T.C/13 dated 9<sup>th</sup> June, 2005 pending the Hearing and Determination of this suit.

(4) That the Defendants whether by themselves and/or servants, employees and/or Agents be and are hereby restrained by injunction from selling, Transferring, charging, letting and or alienating in any other manner and or from constructing; building and/or erecting any other structure, demolishing and/or modifying construction on that premises comprised in the letter of allotment Ref: 34480.TC/13 shown on plan No. 42/31/2004/01A pending the hearing and final determination of this suit.

(5) That an order of mandatory injunction be issued directed to the Defendants ordering the Defendants to forthwith vacate and give vacant possession of the premises comprised in the letter of allotment Ref: 34480 T.C/13 shown of plan No.42/31/2004/01A to the Plaintiff.

(6) That the costs of this Application be awarded to the Plaintiff/Applicant.

Prayers 1 and 2 have been overtaken by events. What remains for consideration by the court are prayers 3, 4, 5 & 6 of the said application.

The grounds of the Preliminary Objection by the Defendants are as follows:-

1. That the Plaintiffs' application is fatally defective for combining a prohibitory and mandatory injunction in the Chamber Summons.
2. The application is in essence seeking final orders under the guise of an interlocutory injunction.

Learned counsel for the defendants' cited several authorities in support of the preliminary objection.

While responding to the Preliminary Objection the learned counsel for the Plaintiffs sought to amend the Chamber Summons by way of an oral application. He sought to amend the same by withdrawing/or deleting prayer 5 of the said application.

The learned counsel for the defendants objected to the amendment stating that the same was an abuse of the court process as the enactment should have come before the Preliminary Objection was raised.

Before the court are two issues for consideration. The Preliminary Objection and the oral application to the Chamber Summons.

The Court will first consider the oral application to amend the chamber summons. Should the court allow the amendment both limbs of the preliminary objection will fail.

Learned counsel for the defendants in opposing the application for amendment relied on Hon. Nicholas Kipyator Kiprono Biwott versus Paul Kibugi Muite & Baraza Ltd H.C.C.C. No. 1309 of 2003.

The view of the court is that the facts of the two cases are distinguishable in that in the Biwott case the plaint was amended after the parties had for 3 days submitted on the preliminary objection and submissions closed. The amended plaint without leave of the court was filed just before the ruling was delivered. In the current case the amendment sought was during the plaintiffs' submissions.

In arriving at its decision in regard to the amendment sought by the defendants the court has been guided by Order VIA rule 3(1) and 8 of the Civil Procedure Rules.

Order VIA rule 3(1) provides as follows:-

“Subject to Order 1, rules 9 and 10, Order XXIII rules 3, 4, 5, and 7 and the following provisions of this rule the court may at any stage of the proceedings, on such process as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend its pleadings.

This rule no doubt allows the court wide discretion in regard to this subject.

In KISANDA KILANDA ENTERPRISES LTD VS. LENPA EKEDIENYE OLE KISAU & 2 OTHERS Civil Appeal No. 863 of 1990 Visram J had this to say:-

“Although Order VIA rules are titled “Amendment of pleading” rule 5 of that Order specifically empowers the court (Even on its own motion) to order any document to be amended in the interest of justice. Such a documents includes an application.

It must always be remembered that the power of the court to amend documents before it is discretionary power which is to be exercised to enable it to conclude the real issue in controversy. The practice of the court has to be allow amendments freely where they do not occasion any undue prejudice to the innocent party.”

In MICROSOFT VERSUS MITSUMI COMPUTER GARAGE & ANOTHER H.C.C.C. No.810 of 2001- Ringera J on his part had this to say on this subject of amendments.

“I am of the firm belief that it is in the overall interest of justice that procedural lapses should not be invoked to defeat application unless the lapse goes to the jurisdiction of the court or substantial prejudice caused to the adverse party.”

Guided by the above authorities the court is of the view that it has wide discretion that ought to be freely exercised in allowing amendments that will place before the court the real issue in controversy, the court’s jurisdiction is not in issues nor is there any evidence to show that the amendment sought will be prejudicial to the opposite party.

Order VIA rule 8 of the Civil Procedure Rules provided:-

“Applications under this Order shall be made by Summons but the court may nevertheless hear and determine on oral application made in court”

The rule clearly allows application such as the one before the court to be made orally.

The court is cognizant of the heat Football as a game and related matters generate among rank and file of football fans in the country. The subject matter of this suit goes to the heart of Football Administration, its impact on the development of football in Kenya and Kenya’s international Associations in relation to the game of football. The parties as admitted in their pleadings have or have had several cases regarding the administration of National Football in Kenya. It has been a thorny and involving matter. The wrangles have been going on for years.

Having considered the submissions by counsels, and case law, and all other relevant matters the court finds that that is no evidence to show that the amendments will be prejudicial or will cause any injustice to the defendants.

Having come to the conclusion above the court orders as follows:

1. That the Plaintiffs’ oral application to amendment the Chamber Summons dated 23<sup>rd</sup> March, 2009 be and is hereby allowed.
2. That the Preliminary Objection by the defendant is hereby disallowed.
3. That the application as amended be fixed for hearing.

4. Costs be in the cause.

Dated and delivered this 13<sup>th</sup> May, 2009.

**ABIDA ALI- ARONI**

**JUDGE**