



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 286 OF 2009

GILBERT MOORE TITUS OTTIENO..... PLAINTIFF

VERSUS

**KHAMISI BAGHAZAL, JOEL NYANG'AU, LUVAHA LUVINDI (Bring
Chairman,**

**General Secretary and Treasury Respectively Of the Kenya Football Referees
Association) DEFENDANTS**

RULING

1. Before me is an application by way of Chamber Summons brought by the Applicant/Plaintiff dated 3rd June, 2006. The said application was brought under certificate of urgency, under the provisions of Order XXXIX Rule 2 Order 1, Rules 8(1) 2, 9 of the Civil Procedure Rules & S. 3A of the Civil Procedure Act. The application is seeking for injunctive Orders against the defendants who are elected officials of Kenya Football Referees Association, (herein after referred to as the Association) and declaration that Plaintiff/Applicant suspension/expulsion was null & void and for the said suspension/expulsion to be lifted. The application is supported by the affidavit of the Plaintiff/Applicant ***Gilber Moore Titus Ottieno***.
2. The defendants/Respondents vehemently opposed the applicant and filed a replying affidavit dated 15th June, 2009 sworn by the first defendant, ***Mr. Khamisi Bhagazal*** the Chairman of the Association.
3. The Plaintiff's/Applicant's contention is that having being suspended illegally by the defendant's /respondent he is shut out of participating in the elections of the Association. That he was not given a hearing at the meetings where he was initially suspended and eventually expelled all these were done contrary to the Constitution of the Association and principles of natural justice. The Plaintiff/Applicant contends further that he was suspended and expelled because he blew the whistle against officials of the Association and Kenya Football Federation who were involved in malpractices.
4. On their part the defendants in opposing the application contend that the Plaintiff/Applicant is not entitled to the orders being sought. That the said prayers in the application are seeking for final orders that cannot be given at an interlocutory stage. It is also the defence case that the association has a constitution that was followed in suspending and expelling the Plaintiff/Applicant that has channels of dealing with grievances which the applicant has failed to exhaust. That the plaintiff/applicant has not

proved any injury likely to be suffered neither a prime facie cases with probability of success, that the intention is to paralyze the ongoing elections of the association.

5. I have considered the lengthy affidavit by the parties, submissions both learned counsels and case law cited. The issue for consideration before the court is whether or not the Plaintiff/Applicant has made out a case for granting of the injunctive orders sought and the other relief.

6. The court is being asked to stop the on going branch and National Elections of Association, currently there is an interim orders against holding of Nairobi Branch elections. The Plaintiff is a member of the said Association and before his suspension/and eventually expulsion was the Secretary General of the Association. He was suspended from the Association on 18th November, 2006 and expelled on the 25th day of October, 2007.

7. The following facts are not disputed namely -

(1) That Association has a constitution

(2) That the said constitution has internal disciplinary mechanism including appeals

(3) That the Association wrote to the Plaintiff on 12th November, 2006 inviting him to a meeting of the national Governing council scheduled for 18th of November, 2006.

(4) That on the 16th of November, 2006 the Plaintiff sent an apology and expressed his views on the Agenda items for the said meeting of 18th November, 2006

(5) That the Plaintiff was suspended by the National Governing Council on 18th November, 2006. Disciplinary Committee at its meeting of the 22nd of November, 2006 recommended that the suspension should stay.

8. Court have held often times that society's must be left to run their own affairs and solve their disputes using internal mechanisms unless there is a violation of the Rule of natural justice. The constitution of the Association relied upon by both sides in the advancement of their points lays down mechanisms to decided in disciplinary of errant members. Act. 26 A lays down penalties to be applied Articles 26 lays the appeal mechanisms Article 31 Establishes a Disciplinary Sub-Committee of the Association the Articles provides –

“(a) All disciplinary matters concerning any referee or referees in the country shall be dealt with by K.F.R.A. disciplinary sub-committee and findings shall be reported to the National Executive Committee of the Association.

(b) The composition of the disciplinary sub-committee shall be -

(i) Three top officials or their assistants

(ii) One representative of the National Football body.

(iii) Three of the members present shall form a quorum.

The General Secretary of the Association or his assistant shall be the secretary of the sub-committee”

9. The evidence before the court is that the National Governing Council met on the 18th of November, 2006 at the Nyayo Stadium. This is the meeting where the Plaintiff/Applicant missed and sent a letter explaining his position on a number of issues on the Agenda. It is at this meeting where the

Plaintiff/Applicant's conduct as a General Secretary was discussed. It is to be noted that the conduct of the Plaintiff/Applicant was not part of the Agenda of the meeting as communicated member including the 1st Applicant were the notice dated on the 12th November, 2009.

10. At the said Governing Council Meeting the said council proposed that a probe be carried out by the disciplinary sub-committee of the allegations of corruptions by the Plaintiff/Applicant and a report be compiled. The Plaintiff was to appear alongside other people to provide information.

At the meeting of 18th November the National Governing Council endorsed the suspension of the Plaintiff/Applicant pending investigation. The disciplinary committee met on 22nd November, 2007 and made a report with recommendations that the suspension of the Plaintiff/Applicant stands.

11. From the above analysis it is clear that at no time was the Plaintiff/ Applicant formally invited by either the disciplinary committee or the National Governing Council to answer to charges of misconduct as alleged and given an opportunity to defend himself. The allegations *albeit* serious in my view were casually handled and indeed rules of natural justice violated as the Plaintiff/applicant although invited to attend the 2 meeting that purported to suspend him said letters or notices to him and others did not specify that his conduct was being investigated and/or being discussed at the meeting to enable him prepare his defence. He was definitely not accorded an opportunity to be heard which is a cardinal principle of the natural justice. In the case of **Prime salt works Ltd & Kenya Industrial Plastics Ltd Civil Appeal No. 186 of 2008.**

“Implicit in the concept of fair adjudication are two cardinal principles, namely that no man shall be a Judge in his own cause and that no man shall be condemned unheard.”

The same principle was explained in Espoused **Kennedy Stanley Njindo Matiba vs. The Honourable The Attorney General Civil Appeal No. 42 of 1994.**

12. Having formed the above opinion the question for consideration is whether with the above background the court should grant the prayers sought for

From the onset I agree with the counsel for the defendants/Respondents that prayers 5 and 6 are seeking for final orders indeed the same for prayer (c) & (d) of the plaint. The same being final orders it therefore follows that the same cannot be granted at an interlocutory stage.

13. In order to grant an injunction the court must consider whether the 3 principles of granting such an order have been established, namely, whether the applicant has established that he has a prima facie case with a likelihood of succeeding, that the applicant is likely suffered irreparable damage and that such damages cannot be compensated by way of costs and where the court is in doubt of will decide the application on balance of convenience. I will go further to consider public interest herein as the Association is a national body involved in the administration of refereeing in the country.

14. Having formed an impression that the Plaintiff/Applicant was not accorded a fair hearing however is this proper case for granting of an injunction? I find that although the Association has a constitution, the laid down mechanism procedure has not completely been exhausted. I also find that the injury likely to be suffered. By the applicant is such that he can be compensated by way of damages if I am wrong in my assessment on this score then considering the balance of convenience I am inclined to decline in that the Association involves a national games and with serious revivification if I were to stop the branch and National election on the basis of wrong or breach of Plaintiff/Applicants right.

15 I accordingly decline to grant the prayers sought for will at this stage make no orders as to case.

DATED and DELIVERED at Nairobi this 28th July, 2009.

ALI- ARONI

JUDGE