



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 65 of 2008

- 1. SAID MOHAMED ABDALLA**
- 2. FUAD MOHAMD RAWEH**
- 3. ABDUSALAM BIN SAID Suing as officials**

(Chairman, Secretary and Treasurer respectively)

of COAST STARS FOOTBALL CLUB.....PLAINTIFFS

VERSUS

- 1. MOHAMED HATIMY**
 - 2. ERASTUS OKUL**
 - 3. AZIZ MOHAMED Sued as National Officials (Chairman,
Secretary and Executive Committee Member respectively)**
- of KENYA FOOTBALL FEDERATION (K.F.F.)**

4. KENYAN PREMIER LEAGUE LTD.....DEFENDANTS

RULING

In a plaint filed on 25th March 2008, the plaintiffs plead, *inter alia*, that Coast Stars Football Club (hereinafter "Coast Stars") was and still is a member of the Kenya Football Federation (hereinafter referred to as "K.F.F.") which is charged with the control and regulation of football matches and tournaments in Kenya. Coast Stars in 2007 participated in the tournaments (hereinafter "the premier league") organized by the 4th defendant (hereinafter "K.P.L.") in consultation with and approval of K.F.F. At the end of the 2007 league season, Coast Stars were awarded 28 points and were placed in position 16 which meant that they would not participate in KPL season of 2008 as only 14 teams were to participate in the year's league. Coast Stars appealed the decision to be so positioned. Their appeal related to two matches (i.e. Coast Stars – v – Sony Sugar Football Club and Coast Stars – v – World Hope Football Club). Their appeal was finally allowed by the Independent Disciplinary Appeals Tribunal (hereinafter "I.D.A.T") which effectively improved their league position to No. 13 thereby entitling them to participate in the 2008 premier league.

The plaintiffs further plead that, notwithstanding the above decision of I.D.A.T. the defendants have unlawfully refused to admit Coast Stars into the 2008 premier league or refer the matter to arbitration as provided by the K.F.F. constitution and hence the suit.

The suit seeks primarily two orders expressed as follows:-

(a) A declaration that the defendants' actions of organizing and continuing with the Kenya Premier League (2008) season without including Coast Stars Football Club is unlawful, null and void and of no legal consequence.

(b) A mandatory injunction directing the defendants to

(i) comply with the Independent Disciplinary and

Appeals Tribunal (I.D.A.T.) rulings in respect of Coast Stars – v – Sony Sugar Football Club and Coast Stars – v – World Hope Football Club by awarding Coast Stars six (6) points and thirteenth (13th) position in the Kenya Premier League (2007) season and subsequently admitting into and allowing Coast Stars to participate in the Kenya Premier League (2008) season.

OR:-

(ii) If aggrieved by the rulings aforementioned, apply for arbitration as provided by the K.F.F. constitution within (10) days from the date of the order and the arbitral award therein be filed in this court within 10 days after pronouncement failing which prayer (b) (i) above to take effect forthwith upon expiry of the period or any of them."

Simultaneously with the plaint the plaintiffs took out a chamber summons seeking against the defendants a temporary injunction to restrain the defendants from conducting, continuing, organizing and/or approving any matches in the 2008 premier league season pending the hearing and determination of the summons in Chambers and a mandatory injunction directing the defendants to admit into and allow Coast Stars to participate in the said league pending hearing and determination of the suit. In the alternative the plaintiffs sought a mandatory injunction to either direct the defendants to comply with the said Appeal's decision or if aggrieved refer the matter to arbitration.

The application was based on the same grounds given in the plaint and was supported by an affidavit sworn by the 1st plaintiff which once more restated the same grounds and buttressed the same with several annexures.

On the same day i.e. the 25th March 2008, the plaintiffs appeared ex-parte before Hon. Serگون J who certified the chamber summons urgent and fixed the same for hearing inter partes on 31st March 2008. The Learned Judge did not grant any interim orders on the application. Come the 31st March 2008, the application could not be heard because each side sought leave to file further affidavits.

In his replying affidavit the 3rd defendant who also swore the affidavit with the authority of 1st and 2nd co defendants, deponed *inter alia*, that once the dispute involving Coast Stars had been resolved by K.F.F.'S I.D.A.T. any aggrieved party could refer the matter to arbitration and eventually to the Court of Arbitration for sports in Switzerland. He also deponed that the other competing clubs i.e. Sony Sugar FC and World Hope FC chose not to contest the decision of IDAT and it was left to the 4th defendant to implement the decision of IDAT. In the premises the 3rd defendant swore that the 1st – 3rd defendants had been wrongly sued.

The 4th defendant on its part opposed the application and filed a replying affidavit through its Managing Director, Jack Oguda. He denied the plaintiffs' competence to bring this action. He deponed that all affairs involving football in Kenya are governed by the K.F.F. Constitution, the constitution of the Confederation of African Football (CAF) and the constitution, rules, rulings and decisions of the Federation Internationale de Football (FIFA). Mr. Oguda further swore that under the KFF constitution Coast Stars are bound to obey all the decisions of KFF, CAF and FIFA and in that regard they are debarred from referring disputes to the courts. Accordingly, the filing of this suit constitutes a blatant violation of the KFF constitution and FIFA statutes. Mr. Oguda while admitting that the effect of the decisions of IDAT was to award Coast Stars points that would have enabled them to remain in the 2008 league, their appeal was lodged late and the IDAT decisions were flawed prompting the 4th defendant to seek direction and/or review from FIFA who opined that IDAT had erred and their decisions were invalid. In the premises Coast Stars remained relegated and cannot participate in the 2008 league. Mr. Oguda further deponed that at the time of swearing his affidavit, about 40 league matches had been played and it was not possible to incorporate Coast Stars without distorting the competition, unfairly relegating another legitimately qualified club and undermining the integrity and reputation of the league.

Mr. Oguda further swore that the plaintiffs came to court late thereby allowing league matches to be planned and played at great expense and a reversal of that position would occasion the 4th defendant and its members great loss in addition to prejudicing even international competitions and a sponsorship programme in place to televise selected league matches.

Mr. Oguda also swore that in failing to disclose the FIFA decision to the court the plaintiffs are guilty of material non-disclosure and are not entitled to the orders of injunction sought. On the alternative relief of arbitration sought by the plaintiffs, Mr. Oguda deponed that that option was no longer available in view of the opinion of FIFA aforesaid. In the premises, it was the 4th defendant's view that the plaintiffs are not entitled to any of the reliefs sought.

The plaintiffs responded to the 4th defendant's replying affidavit by filing a supplementary affidavit which was sworn by the 1st plaintiff. To the said affidavit was annexed a copy of the Registrar's record as at 27th March 2008 showing that the plaintiffs are indeed officials of Coast Stars. In the premises the 1st plaintiff deponed that the plaintiffs are competent to bring this action. He also swore that the 4th defendant organizes league matches for KFF and is not a member of KFF. It should therefore not disobey KFF. He further deponed that the only decisions of KFF, CAF and FIFA which would bind Coast Stars would be those decisions that have been made subsequent to proper and lawful procedure having been followed. In the plaintiffs' view, having succeeded in their appeals to IDAT, Coast Stars could not refer the dispute to arbitration and since they continued to be kept out of the 2008 league, they had no choice but come to court. The 1st plaintiff further deponed that their appeals were lodged in time and the complaints raised by the 4th defendant could only be made if reference had been made to arbitration against IDAT's decisions. The 4th defendant's decision to seek directions from FIFA was contrary to the constitution of KFF since the option of arbitration had not been taken.

With regard to the time of instituting these proceedings, the 1st plaintiff deponed that there was no delay whatsoever as the same was brought when the 4th defendant despite demand, failed to include Coast Stars in the 2008 league.

With regard to the alleged loss to be suffered the plaintiffs state that the 4th defendant has itself to blame as it failed to act on the IDAT decision.

The 4th defendant delivered its defence on 16th April 2008. In that defence the 4th defendant avers, *inter alia*, that it is an affiliate of KFF and contends that the relegation of Coast Stars was

proper. The 4th defendant challenges the decisions of IDAT which appeared flawed prompting the 4th defendant to refer the same to FIFA. It is further averred that FIFA considered the matter and agreed with the 4th defendant and the relegation of Coast Stars was maintained. The 4th defendant denies refusing to implement the decisions of IDAT and contends that the plaintiffs' suit is an invitation to the court to micro-manage the affairs of the defendants and of football in Kenya which contravene the provisions of K.F.F., CAF and FIFA constitutions.

The pleadings and the plaintiffs' chamber summons were in the above state when the application came before me for hearing on 16th April 2008 and 21st May 2008. Counsel restated the positions taken by their clients in their respective affidavits aforesaid. I have carefully considered the said pleadings, application, affidavits and the annexures thereto. I have also given due consideration to the very able submissions of counsel. Having done so, I take the following view of the matter. The primary facts in this dispute are really not in dispute. They are as follows:-

1. That the defendants organized the Kenya Premier League (2007) season comprising several football clubs including Coast Stars.
2. That to qualify for the 2008 league season a team had to earn 30 points and above (each game won earning 3 points).
3. That initially at the end of the 2007 league season, Coast Stars were awarded 28 points which earned them position 16.
4. That only 14 teams were to participate in the 2008 league and Coast Stars were therefore disqualified for the 2008 league having been placed at the 16th position.
5. That Coast Stars disputed the award of 28 points and position 16 and appealed matches i.e Coast Stars – v – Sony Sugar Football Club and Coast Stars – v – World Hope Football Club.
6. That Coast Stars Appeals to the Independent Disciplinary and Appeals Committee (IDAC) and subsequently to the Independent Disciplinary and Appeals Tribunal (I.D.A.T.) were successful and Coast Stars points were increased by 6 and their position came up to 13 thereby making them eligible to participate in the 2008 league.

The 4th defendant discredited the decision of IDAT. It was the foundation of this dispute. The 1st, 2nd and 3rd defendants who are officials of KFF accepted the decision of IDAT and expected the 4th defendant to implement the same. KFF took that position because those who would be aggrieved by IDAT's decision i.e. Sony Sugar Football Club and World Hope Football Club did not refer IDAT's decision to arbitration.

The 4th defendant discredits the decisions of IDAT on the procedural complaint that Coast Stars did not lodge their appeal in time and on the further ground that IDAT was not properly constituted when it made the decisions in favour of Coast Stars. FIFA's direction was therefore sought and when it was revealed, it declared IDAT's decisions null and void. That emboldened the 4th defendant to keep Coast Stars in relegation.

Article 45 (IX) of the K.F.F. constitution reads as follows:-

**“(IX) Any person or party aggrieved by the decision of the IDAT
or if no decision taken by the IDAT after 21 days may**

within 14 days from the date of notification of the decision

apply for arbitration as provided for in Article 54 of the

Constitution.”

Under that Article, it is an aggrieved party that may within 14 days of the decision of IDAT apply for arbitration. Coast Stars could not have been aggrieved by the decisions of IDAT of 23rd January 2008 and so could not have been expected to make the reference to arbitration. I have perused the IDAT decisions of 23rd January 2008. The dispute involved Coast Stars and Sony Sugar Football Club and Coast Stars and World Hope Football Club.

It is plain that the parties who could have been aggrieved with IDAT's decisions were Sony Sugar Football Club and World Hope Football Club. The two clubs made no reference to arbitration which implied that they were satisfied with the decisions of IDAT against them. It is therefore not surprising that the 1st, 2nd and 3rd defendants as officials of K.F.F. deponed that they expected IDAT's decisions to be implemented. Indeed KFF could not be expected to defy the decisions of a body created under its constitution.

The 4th defendant instead of implementing the decisions of IDAT and without any reference to them by any of the parties to arbitrate or take up the fight on their behalf, resolved to engage KFF and seek FIFA direction. Indeed even before the direction was received from FIFA the 4th defendant's Senior Management Committee had decided on 26th January 2008 that Coast Stars remained relegated. The joint KFF/KPL coordinating committee decision of 9th February 2008 that they would abide by FIFA advice in my view was a belated attempt to give legitimacy to the decision already made by the 4th defendant to defy the decisions of IDAT.

The body that challenged IDAT's decisions is not provided for in the KFF constitution. The reference it made to FIFA had no foundation in the constitution. So both the decision to defy IDAT and the subsequent reference to FIFA were made without jurisdiction. They were in any event made without any representation for Coast Stars which was the party to be affected by that decision and reference.

The 4th defendant has made a scathing attack on the decisions of IDAT predicated upon the way IDAT was constituted and the time Coast Star's appeals were filed. The 4th defendant's complaints could only be made by parties to the decisions of IDAT and could only be addressed at the next level of dispute resolution provided for under KFF's constitution i.e. Arbitration.

I have read the provisions of Articles 46, 47 and 48 of the constitution of KFF. I see nothing in them that ousts the jurisdiction of this court where provisions of the same constitution are flouted. Indeed if such provisions existed, they would clearly be unconstitutional as nobody can be denied access to this court where the domestic or local constitution is not followed.

The plaintiffs are officials of Coast Stars Football club. In proof of their status, they have exhibited SMAI addressed to them by the Registrar of Societies. The Registrar of Societies confirmed the plaintiffs as Chairman, Secretary and Treasurer respectively of Coast Stars Football Club. Being the recognized officials of Coast Stars, they had capacity to institute these proceedings. The 4th defendant's challenge of the plaintiffs' locus or authority is therefore absolutely without merit and is dismissed.

Coast Stars pursued their rights strictly in compliance with the K.F.F. constitution. They were vindicated by the decisions of IDAT. As the successful party, they could not have moved to the next level of dispute resolution i.e. Arbitration under the constitution. Yet they remained relegated because the 4th defendant took up the fight for Sony Sugar FC and World Hope FC.

In doing so the 4th defendant acted outside the KFF constitution. I find and hold that the plaintiffs were perfectly entitled to institute their proceedings against the defendants. It does not surprise any one, except may be the 4th defendant, that the 1st, 2nd and 3rd defendants expected IDATS decisions to be implemented.

I therefore find that the plaintiffs have established a prima facie case with a probability of success at the trial that Coast Stars should have been included in the Premier League for 2008. Having satisfied the 1st condition for the grant of an interim injunction the second consideration is whether unless the injunction sought is granted, the plaintiffs might otherwise suffer irreparable injury. The issue is now academic because the plaintiffs sought a temporary injunction pending the hearing and determination of their application. No prohibitory injunction was sought pending the hearing of the suit.

The plaintiffs have however, also sought a mandatory injunction directing the defendants to admit into and allow Coast Stars Football Club to participate in the Kenya Premier League 2008 Season pending the hearing and determination of this suit. The principles that govern the grant of a temporary mandatory injunction are now settled. In Locabail international Finance Ltd –VS- Agro-export and Others (1986) ALL ER 901, it was held that:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing..... If the defendant attempted to steal a match on the plaintiff.....”

The standard of proof required before an interlocutory mandatory injunction will be granted is however higher than that required for an interlocutory prohibitory injunction. That distinction was clearly set out in the Locabail’s case. The court expressed itself as follows:

“Moreover before granting a mandatory interlocutory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

The same court also held as follows:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied.....”

Those principles have been applied by our courts whenever an interlocutory mandatory injunction is under consideration. See the case of Kamau Mukuha –V - The Ripples (Civil Application No. 186 of 1992 (NAI 77/92 UR) and Dickson Mwangi – v – Braeburn Limited (Civil Appeal No. 12 of 2004) (UR).

The plaintiffs in this case have shown that the 4th defendant has, acted contrary to the KFF’s Constitution and that had it (the 4th defendant) obeyed the decision of IDAT, a Tribunal established under the said constitution, Coast Stars would be participating in this year’s premier league Season. The 4th defendant therefore has literally stolen a match from the plaintiffs. That is clear beyond peradventure. But should I therefore grant the mandatory injunction sought and direct the 4th defendant to now admit Coast Stars into the 2008 league and allow them to participate? It is not disputed that by the time this suit and application were filed about 40 competitive league matches had been played. That was on 25th March 2008. It is now three months down the line. It cannot be gainsaid that by now more matches have been played. The league is probably half way through in this season. The league involves other clubs that were not parties to the dispute between Coast Stars and Sony Sugar Football Club and World Hope Football Club. It is not disputed that by dint of a sponsorship package between the 4th

defendant and other parties not before the court, some league matches are now televised on National Television in Kenya and Africa.

I have found no formula that would be used to now incorporate Coast Stars in this year's premier league without seriously disrupting the same. So, whereas I have found that the plaintiffs have not only established a prima facie case with a probability of success and that the 4th defendant has stolen a match from them, yet this is not a simple and summary matter which can be decided at once and can be remedied summarily.

In the end, although I have found for the plaintiffs on their complaints against the defendants, I find that at this stage interlocutory mandatory injunctions are not appropriate in the circumstances as they are not directed at a simple and summary act. The alternative prayer is also for an interlocutory mandatory injunction. It meets the same fate. The application is declined.

On the issue of costs, I find that the order that commends itself to me in view of my above findings is that the 4th defendant should be condemned in the costs of this application. It defied the decisions of IDAT a body created under the K.F.F. Constitution and adopted a novel course of action that left the plaintiffs with no option but to seek the intervention of the court. In the result Coast Stars are unlikely to participate in this years league because of no fault of their own. I therefore order that the 4th defendant pays the costs of this application.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF JUNE 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Bosire for the Applicants/Plaintiffs and Onyango Holding brief for Mwangi for the 4th Defendant.

F. AZANGALALA

JUDGE

25TH JUNE 2008