



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

**Civil Case 609 of 2007**

**1. SAMSON KEENGU NYAMWEYA**

**2. TWAHA MBARAK**

**3. PETER OCHIEL**

**(Suing as officials of the Kenya Football Federation)..... PLAINTIFFS**

**VERSUS**

**1. MOHAMMED HATIMY**

**2. TITUS KASUVE**

**3. SAMMY OBINGO**

**4. JACOB KABANZE ODUNDO..... DEFENDANTS**

**RULING**

By plaint dated 28<sup>th</sup> and filed on 29<sup>th</sup> August, 2007 the Plaintiffs herein sought against the Defendants the main reliefs of injunction to restrain them from opening, operating or running any bank accounts in the name of or on behalf of the Kenya Football Federation (hereafter called KFF), or from receiving any kinds of funds from any person, organization or firm, on behalf of or in the name of KFF; from running the Kenya National Premier League and/or the Kenya National Team (Harambee Stars) for or on behalf of or in the name of KFF; and from opening, operating or maintaining offices of KFF or assuming the functions of such offices. The suit is based upon the plea that the Plaintiffs are the *bona fide* national chairman, senior vice-chairman and 3<sup>rd</sup> vice-chairman respectively of KFF duly registered by the Registrar of Societies. KFF itself is a society registered under the **Societies Act**.

It would appear that summons to enter appearance may not yet have been served upon the Defendants; at any rate, no defence has been filed. But by notice dated and filed on 11<sup>th</sup> September, 2007 the Defendants appointed counsel in this matter. They then applied by chamber summons dated 10<sup>th</sup> September, 2007 for the main order that all further proceedings in this suit be stayed pursuant to section 6(1) of the **Arbitration Act**, "**the Plaintiffs and the Defendants having agreed to refer to arbitration the matters in respect of which action is brought**". That application has not yet been prosecuted.

The Plaintiffs then applied by chamber summons dated 7<sup>th</sup> March, 2008 for orders of temporary injunction pending disposal of the suit to restrain the Defendants, in effect, from conducting themselves as the officials of KFF or handling its affairs. The application, just as the suit itself, was based upon the

premise that the Plaintiffs are the *bona fide* officials of KFF duly recognized by the Registrar of Societies. Evidence of such recognition was exhibited in a supporting affidavit. Though the Defendants filed legal grounds of opposition in response to the application (grounds of opposition dated 12<sup>th</sup> March, 2008), no replying affidavit was filed. The application was heard *inter partes* on 24<sup>th</sup> April, 2008. In a considered ruling dated 15<sup>th</sup> and delivered on 16<sup>th</sup> May, 2008 the court (Waweru, J) allowed the Plaintiffs' application.

The Defendants have now come to court by notice of motion dated 16<sup>th</sup> (and filed on 19<sup>th</sup>) May 2008 seeking orders to review and set aside the said ruling and orders of 16<sup>th</sup> May, 2008. The application is essentially brought under Order 44, rule 1 (1) of the Civil Procedure Rules (the Rules). It is premised upon the main ground that there are sufficient reasons to seek review. Those reasons are given on the face of the application as (but appropriately paraphrased by me):-

1. That the court's ruling of 16<sup>th</sup> May, 2008 was without the benefit of crucial material and evidence which was not placed before the court by way of a replying affidavit due to the inadvertent but grave error on the part of the Defendants' counsel.
2. That the crucial material and evidence was now contained in an affidavit sworn by one SAMMY JOEL OBINGO filed in support of this application, and it is extremely important that the court get "**the full picture in this matter**" in order to do justice.
3. That at any rate there was non-disclosure by the Plaintiffs of material evidence within their knowledge which the Defendants did not have at the time the application was heard.

There are two affidavits sworn in support of the application. The first one is by the Defendants' learned counsel, JULIE SOWETO

AULLO. It explains the lapses that resulted in failure to file a replying affidavit in response to the chamber summons dated 7<sup>th</sup> March, 2008. The second affidavit is by the aforesaid Sammy Joel Obingo. He has described himself as the Secretary-General of KFF. The affidavit contains the "**crucial material and evidence**" that the Defendants now wish to bring to the attention of the court.

The Plaintiffs have opposed the Defendants' application for review as set out in the replying affidavit sworn by the 1<sup>st</sup> Plaintiff and filed on 23<sup>rd</sup> May, 2008. The grounds of opposition emerging from the replying affidavit are:-

1. That review as sought does not lie as there is no deposition of discovery of new and important matter or evidence which, after exercise of due diligence, was not within the Defendants' knowledge or could not be produced by them at the time of hearing of the chamber summons dated 7<sup>th</sup> March, 2008.
2. That only appeal lies against the order of 16<sup>th</sup> May, 2008.
3. That the Defendants have given notice of appeal against the order of 16<sup>th</sup> May, 2008 and thus cannot seek review.
4. That in any event the Defendants are in contempt of the order of 16<sup>th</sup> May 2008 and should purge that contempt before they are heard upon their application.

This last ground was not pursued at the hearing.

In their turn the Plaintiffs filed chamber summons dated 20<sup>th</sup> May, 2008 seeking various injunctions under Order 39 of the Rules to restrain the Defendants from opening or operating any bank accounts for or on behalf of KFF; from receiving any kinds of funds whatsoever on behalf of KFF; from running,

organizing, managing or administering the Kenya National Premier League and/or the Kenya National Team (Harambee Stars) for or on behalf of KFF; from opening, operating, maintaining or administering any offices or functions or assets or properties of KFF; and from "**negotiating, selling, exploiting, infringing on, or receiving funds emanating from the legal rights accruing from competitions and other events**" organized by and for or in the name of KFF.

This application is premised upon the main grounds that the Plaintiffs are the *bona fide* officials of KFF duly registered, and that the Defendants have illegally constituted themselves as officials of KFF. The order of the court of 16<sup>th</sup> May, 2008 is alluded to in the supporting affidavit as a further basis for the application. That affidavit is sworn by the 1<sup>st</sup> Plaintiff.

This application by the Plaintiffs is opposed by the Defendants as set out in the replying affidavit sworn by Sammy Joel Obingo filed on 26<sup>th</sup> May, 2006. The grounds of opposition emanating therefrom are that the Defendants are the *bona fide* officials of KFF who have been in charge and full control of the affairs of KFF; that the Plaintiffs have not been in charge or control of the affairs of KFF despite their registration as officials of KFF, which registration has in any event been challenged; that the 1<sup>st</sup> Plaintiff's intention is to hamper or cripple the management and administration of football in Kenya and to personally benefit by gaining control of the finances of KFF; and that the Plaintiffs have not satisfied the relevant principles for grant of their application.

Both applications, that is, the notice of motion dated 16<sup>th</sup> May, 2008 and the chamber summons dated 20<sup>th</sup> May, 2008, were certified urgent by the Duty Judge. I heard them together on 27<sup>th</sup> May, 2008. They are both the subject of this ruling.

I have read all the affidavits filed in these two applications, some of them quite lengthy. I have also given due consideration to the submissions of the learned counsels appearing, including the cases cited. I will first deal with the issues of law raised by the Plaintiffs with regard to the Defendants' application. Indeed I will first consider that application. The decision upon it will no doubt impact upon the Plaintiffs' application.

Competence of the Defendants' application was challenged in the replying affidavit upon the technical ground that the formal order sought to be reviewed was not attached to the application. That defect was cured when the Defendants filed a supplementary affidavit exhibiting the formal order. The Plaintiffs' learned counsel therefore did not, quite correctly, pursue that ground in his submissions.

The other legal grounds raised by the Plaintiffs were that no review lies because there was no plea of new and important matter or evidence which, after exercise of due diligence, was not within the Defendants' knowledge or could not be produced by them at the hearing of the application that resulted in the order sought to be reviewed; that only appeal lies against the order; and that the Defendants having given notice of appeal against the order sought to be reviewed, they cannot seek review.

Regarding the first ground, it was held by the Court of Appeal in the case of **KIMITA –vs- WAKIBURI (1985) KLR 317** that

**” The third head under Order XLIV, rule 1(1) of the Civil Procedure Rules enabling a party to apply for review “for any other sufficient reason” is not necessarily confined to the kind of reasons stated in the two preceding heads in that sub-rule which do not form a genus or class of things analogous to that general head”.**

That is a sufficient answer to that ground. The Defendants are entitled to place before the court any sufficient reason independent of discovery of any new and important matter or evidence which, after due diligence, was not within their knowledge, or could not be produced by them at the hearing.

The second ground can be stated as follows. Is the availability of an appeal a bar to an application for review? The answer to this question is available from Order 44, rule 1(1)(a) which states:-

**” 1. (1) Any person considering himself aggrieved –**

**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) .....**

**..... may apply for a review .....**”

The availability of an appeal is no bar to an application for review so long as no appeal has been preferred. Where an appeal has been preferred, then review is not available.

This brings us to the third ground. It is the Plaintiffs’ case that the Defendants lodged appeal by filing notice of appeal against order of 16<sup>th</sup> May 2008, and that therefore review is not available to them. The Plaintiffs must have had in mind rule 4 (4) of Order 41 of the Rules which states –

**” For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when, under the rules of that Court, notice of appeal has been given”.**

Rule 4 of Order 41 deals with applications for stay of execution or proceedings pending appeal.

The Court of Appeal reiterated in the case of **YANI HARYANTO-vs- E.D. & F. MAN (SUGAR) LIMITED, CIVL APPEAL NO.122 OF 1992 (unreported)** that an appeal before the Court of Appeal is instituted only upon compliance with the requirements of Rule 81(1) of the Court of Appeal Rules; those requirements include the lodging of a record of appeal which must include a memorandum of appeal. The Court pointed out that sub-rule (4) of rule 4 of Order 41 of the Rules is merely an exception to the requirements of the aforesaid Rule 81(1) of the Court of Appeal Rules specifically limited to the purposes of the aforesaid rule 4.

In the present case, therefore, the Defendants did not lodge appeal by filing notice of appeal. There is no appeal, and they were entitled to bring the application for review.

I must therefore dispose of the application on its merits. The **“crucial material and evidence”** that the Defendants wish to bring to the attention of the court, and which they think constitute a sufficient reason to review the order of 16<sup>th</sup> May, 2008, are set out in the 2<sup>nd</sup> supporting affidavit sworn by Sammy Joel Obingo. They are:-

**1. The dispute as to who are the lawful and *bona fide* officials of KFF was, at the time that this present suit was filed, already before the High Court in a number of cases. These cases are:-**

**(i) Nairobi HC Misc. Application No. 687 of 2006;**

**(ii) Nairobi HC Misc. Application No. 14 of 2007; and**

**(iii) Nairobi HC Misc. Application No. 390 of 2007,**

**all being judicial review proceedings, and all pending before the Constitutional and Judicial Review Division of this Court.**

**2. By its own constitution, KFF is affiliated to the International Federation of Football Associations (FIFA), the Confederation of African Football (CAF) and the Council of East and Central African Football Associations (CECAFA).**

**3. The KFF constitution obliges its members to agree to be bound by and to comply fully with the decisions of FIFA, CAF and CECEFA.**

4. **KFF recognizes and is also governed and bound by FIFA statutes.**
5. **Under FIFA statutes no purported official of KFF can act in management and administration of KFF without the recognition or backing of FIFA.**
6. **FIFA recognizes the Defendants as the *bona fide* officials of KFF. It does not recognize the Plaintiffs.**
7. **At the time of his purported election as an official of KFF the 1<sup>st</sup> Plaintiff had already been expelled from KFF, a decision that was subsequently ratified by all relevant organs of KFF. He remains so expelled. He had no capacity to be elected an official of KFF.**
8. **Likewise, the 3<sup>rd</sup> Plaintiff had been suspended from KFF and was not eligible to be elected an official of KFF.**
9. **The 2<sup>nd</sup> Plaintiff has recently resigned as a purported official of KFF.**
10. **The 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs have not challenged their expulsion and suspension respectively from KFF under the FIFA statutes.**
11. **The Registrar of societies has become partisan in the dispute as to who are the *bona fide* officials of KFF, an attitude that has escalated the dispute.**
12. **The Defendants are infact the ones in control and management of KFF.**
13. **The Plaintiffs are not at all in control of or management of KFF.**
14. **Kenya is in grave danger of being banned by FIFA and other international organizations to which KFF is affiliated from participation in international football to the detriment of the country generally and to the damage of careers of players and business interests of third parties.**

I have carefully read the replying affidavit sworn by the 1<sup>st</sup> Plaintiff and filed on 23<sup>rd</sup> May, 2008 in light of these grave matters that the Defendants have placed before the court. I have also perused the constitution of KFF and the FIFA statutes, both of which are annexed to the 2<sup>nd</sup> supporting affidavit sworn by Sammy Joel Obingo. The Plaintiffs have not denied the expulsion of the 1<sup>st</sup> Plaintiff or the suspension of the 3<sup>rd</sup> Plaintiff from KFF pleaded by the Defendants. Nor have they denied that KFF is affiliated to FIFA and that by its own constitution it (KFF) and its members are bound by the FIFA statutes.

The KFF constitution provides an elaborate mechanism for resolution of disputes between members. Similarly the FIFA statutes (Articles 42 to 48 thereof) provide such mechanism resolution of disputes. Those statutes also specifically prohibit reference to court of such disputes.

The Plaintiffs have also not denied existence of previous suits, which are still pending, over the management of KFF. In the most recent of those previous suits, **HC Misc. Application No. 390 of 2007**, the registration of the Plaintiffs as the *bona fide* officials of KFF is specifically challenged.

Finally, the Plaintiffs have not denied that Kenya is in grave danger of being banned from international football to the detriment of the country generally and specifically to the detriment of the country's young men and women who have taken up potentially lucrative careers as football players. The commercial interests of third parties are also clearly at risk. These risks have been brought about by quarrels between men (there are no women here, not surprisingly) as to who should manage KFF. These quarrels over management of KFF have been a recurrent feature plaguing the sport of football in this country. One must wonder what there is in the management of KFF that provokes these bitter disputes over its management.

Two things are as clear to the court. One, there is already another case before another division of this Court over the issue of who are the *bona fide* officials of KFF. This is **Nairobi HC Misc. Application No.390 of 2007**. Registration of the Plaintiffs as the *bona fide* officials of KFF has been specifically challenged in that case. Good sense dictates that the said dispute be let to run its course without the danger of possibly prejudicial and/or conflicting orders in other proceedings, including the present suit.

Secondly, while the proceedings in **Nairobi HC Misc. Application No.390 of 2007** run their course, it is absolutely essential that the interests of Kenya and its young men and woman in football are not unnecessarily prejudiced. FIFA, for the time being, recognizes the Defendants and not the Plaintiffs as the *bona fide* officials of KFF. FIFA will not do business at all with the Plaintiffs. FIFA has threatened to ban Kenya from international football if the Defendants are hindered, contrary to the statutes of FIFA, from managing the affairs of KFF. By its own constitution KFF is affiliated to FIFA and is bound by the FIFA statutes. Its members are similarly bound.

The Defendants are, and have been for the past year or so, in actual control and management of the affairs of KFF. The Plaintiffs are not, and have not, been in control of the affairs of KFF despite their recognition by the Registrar of Societies. It is clear to me that the interests of Kenya and its young men and women in football will be best served, pending resolution of the dispute as to who are the *bona fide* officials of KFF, by letting the Defendants continue with the control and management of KFF.

Review of an order made after *inter partes* hearing in strongly contested proceedings must of necessity be rare. But I am satisfied, for all the reasons given above, and in the particular circumstances of this case, that the Defendants have clearly demonstrated sufficient reason for the order of review sought. I will in the circumstances allow the application by notice of motion dated 16<sup>th</sup> May, 2008 and set aside the order of 16<sup>th</sup> May, 2008 by which the Plaintiffs application by chamber summons dated 7<sup>th</sup> March, 2008 was allowed. The effect of this is that the said application dated 7<sup>th</sup> March, 2008 stands dismissed.

Having allowed the Defendants' application by notice of motion dated 16<sup>th</sup> May, 2008, I must, as a logical consequence, refuse the Plaintiffs' application by chamber summons dated 20<sup>th</sup> May 2008. It is hereby dismissed.

I must now consider the issue of costs. The present applications were rendered necessary by the failure of the Defendants to properly defend the application dated 7<sup>th</sup> March, 2008. That lapse is freely admitted by the Defendants' advocates. But it is obvious that the Plaintiffs were equally under a duty to bring to the attention of the court many of the matters that have influenced the decision of the court in this ruling. They did not disclose existence of previous pending and relevant legal proceedings. They did not disclose the 1<sup>st</sup> Plaintiff's expulsion and the 3<sup>rd</sup> Plaintiff's suspension from KFF. They did not disclose the affiliation of KFF to FIFA and its obligation (as well as its members) to be bound by FIFA statutes. All these were matters that were within their knowledge. They have been guilty of non-disclosure of material facts.

Both parties therefore have been at fault. As a result much judicial time has been wasted. The stakeholders in the sport of football in the country have been subjected to much anxiety that could have been avoided. The proper order that commends itself to me is that the parties shall bear their own costs of the chamber summons dated 7<sup>th</sup> March 2008, the notice of motion dated 16<sup>th</sup> May, 2008 and the chamber summons dated 20<sup>th</sup> May 2008.

**DATED AT NAIROBI THIS .....DAY OF JUNE 2008.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 6<sup>TH</sup> DAY OF JUNE 2008.**

