



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

**Misc Appli 1723 of 2004**

**IN THE MATTER OF AN APPLICATION BY MAURICE OMONDI ODUMBE FOR  
LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE KENYA CRICKET ASSOCIATION**

**AND**

**IN THE MATTER OF KENYA CRICKET PLAYERS CONDUCT INVESTIGATION (MR.  
JUSTICE EBRAHIM (RETIRED))**

**INTO MAURICE OMONDI ODUMBE**

**AND**

**IN THE MATTER OF THE INTERNATIONAL CRICKET COUNCIL**

**AND**

**IN THE MATTER OF THE ICC CODE OF CONDUCT FOR PLAYERS AND TEAM  
OFFICIALS, THE ICC CODE OF CONDUCT COMMISSION TERMS OF REFERENCES, THE  
ICC ANTI CORRUPTION AND SECURITY UNIT (ACSU) TERMS OF REFERENCE, THE  
PRINCIPLES OF NATIONAL JUSTICE AND THE ICC**

**ARTICLES AND MEMORANDUM OF ASSOCIATION (“THE RELEVANT ICC**

**CONSTITUENT DOCUMENTS**

**AND**

**IN THE MATTER OF ORDER LIII, CIVIL PROCEDURE RULES, THE CIVIL PROCEDURE  
ACT (CAP 26), THE EVIDENCE ACT (CAP 80), THE PENAL CODE  
(CAP 63), THE CRIMINAL PROCEDURE CODE (CAP 75), THE CONSTITUTION OF KENYA  
AND ALL OTHER ENABLING PROVISIONS OF THE LAW.**

**REPUBLIC (through Maurice Omondi Odumbe .....APPLICANT**

## VERSES

**KENYA CRICKET ASSOCIATION..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE MR. JUSTICE AHMED EBRAHIM ..... 2<sup>ND</sup> RESPONDENT**

**INTERNATIONAL CRICKET COUNCIL ..... 3<sup>RD</sup> RESPONDENT**

## RULING

On 16<sup>th</sup> December 2004, Hon Justice Nyamu granted leave to the ex parte applicant, Maurice Omondi Odumbe Odhiambo leave to bring Judicial Review proceedings seeking orders of certiorari and prohibition against the Respondents, the Kenya Cricket Association (KCA 1<sup>st</sup> Respondent) the Hon. Mr. Justice Ahmed Ebrahim (2<sup>nd</sup> Respondent) and International Cricket Council (3<sup>rd</sup> Respondent ICC). The substantive motion was filed on 21.12.2004. The applicant specifically sought the following prayers.

1. An order of certiorari do issue to bring into the High Court of Kenya for purposes of quashing, the decision of the Kenya Crickets Association dated 17<sup>th</sup> August, 2004 and the decision and recommendation of the Kenya Cricket Association player conduct investigation into Maurice Odumbe dated 13<sup>th</sup> August, 2004.
2. An order of certiorari do issue to bring into the High Court of Kenya for purposes of quashing the decision of the Kenya Cricket Association and International Cricket Council dated 19<sup>th</sup> August, 2004 refusing the applicant the right of Appeal against the said decisions.
3. An order of Prohibition directed at the Kenya Cricket Association and International Cricket Council for suspension and/or barring the applicant from playing Cricket for 5 years or at all.
4. The costs of this application be in the cause.

The application was opposed and Malcolm speed, the Chief Executive of International Cricket Council swore a replying affidavit in opposition.

On 20<sup>th</sup> July 2005 the 1<sup>st</sup> & 3<sup>rd</sup> Respondents filed skeleton arguments in which they raised a preliminary objection on jurisdiction, which was urged before me on 4<sup>th</sup> April 2006. Mr. Kosgey appeared for the applicant whereas Mr. Munyu appeared to the Respondent. The case against the 2<sup>nd</sup> Respondent was withdrawn. Mr. Munyu argued that the Preliminary Objection was premised on three grounds namely.

- (1) The Respondents are private bodies and Judicial Review does not apply to private bodies.
- (2) That there is an alternative remedy which has already been invoked by the applicant
- (3) That the 1<sup>st</sup> Respondent cannot be sued as sued because it is an association.

On the 1<sup>st</sup> ground Mr. Munyu argued that International Cricket Council, the 3<sup>rd</sup> Respondent, is a Limited Liability Company, limited by guarantee with no share capital. It is incorporated in the British Virgin Islands. Kenyan Cricket Players subscribe to it through Kenya Cricket Association and has its rules of conduct and a code of conduct with rules on how to discipline its members.

By Kenya Cricket Association subscribing to International Cricket Council the in relationship is contractual and therefore of a private nature and are not susceptible to Judicial Review which deals with public rights. By the Kenya Crickets Association giving the applicant a 5 year ban, there was no public element involved but a private right which can not be challenged in Judicial Review and he should have come to court in the ordinary manner seeking an injunction or appeal against the decision. Counsel relied on the following authorities.

- (1) ***PATEL & OTHER v. DHANJI CA (1975) E.A 301***
- (2) ***LAW v. NATIONAL GREYHOUND RACING CLUB 1983 ALL E.R 300***
- (3) ***R. V. FOOTBALL ASSOCIATION ex parte FOOTBALL LEGAUE (1993) 2 ALL E.R 833***

In the above cases, the courts were reluctant to interfere in club affairs or domestic tribunals even if the decision involved the public. In the ***R. V. FOOTBALL ASSOCIATION CASE***, the court went further to find that, for a club's affairs to be available to Judicial Review, it had to be directly or indirectly underpinned to an organ or agency of the state or the state could interfere to create a public body to perform its functions.

In response to the above submissions Mr. Kosgey argued that International Cricket Council is an international body charged with overseeing administration of the sport of Cricket worldwide and its decisions and activities impact the general public at large and that its activities are of a public nature.

He further submitted that the tribunal set up to investigate the applicant is not a domestic or private entity as it exercised quasi Judicial functions headed by a Judge and followed due process and imposed punishment as that imposed by the ordinary courts.

He relied on the case of ***R. V. CRIMINAL INJURIES COMPENSATION BOARD ex-parte Lain (1967) 2 ALL E.R. 770*** in which the court held that provided a body exercises

Quasi-judicial functions, it was available to Judicial Review Counsel also relied on the case of ***R.V. PANEL ON TAKE OVERS & MERGERS ex-parte DATAFIN PIC & ANOTHER.***

1987 ALL E.R 564, where the court held that in determining whether the decisions of a particular body were subject of Judicial Review, the court was not confined to considering the source of that body's power and duties but could also look to their nature so that if the duty imposed was of a public nature, and the body was exercising public law functions then the court had jurisdiction to entertain an application for Judicial Review of the body's decision.

Mr. Kosgey distinguished this case with that of Patel so that whereas the case of ***PATEL*** dealt with local clubs, International Cricket Council is an international body and it set up the tribunal. He wonders whether the Kenya courts are the proper forum for dealing with the matter. In addition, counsel submitted that in the Judges ruling, he found that the matter related to Judicial Review and there was no right of appeal and this court's jurisdiction cannot therefore be questioned since J. Nyamu gave leave and if the Respondent were not satisfied, they should have sought setting aside of orders.

The other authorities relied upon by the applicant are

1. ***KADAMAS v. MUNICIPALITY OF KISUMU (1955) KLR 954***
2. ***R.V. KONZA RANCHING & FARMERS CO-OPERATIVE SOCIETY & ANOTHER 247/2001***

I have now considered the rival arguments on the issue of whether the Respondents are amenable to Judicial Review if they are private bodies. It is common ground that Kenya Cricket Association is a body that governs the game of Cricket in Kenya and is a member of International Cricket Council. It is not

denied that International Cricket Council is a private company limited by guarantee and Kenya Cricket Association subscribes to it and is an associate member. Kenya Cricket Association on the other hand is a society registered under the Societies Act Cap 108.

It is also common ground that the International Cricket Council has promulgated a code of conduct to which its members are subject i.e players and officials. The applicant was charged with acts of misconduct and Kenya Cricket Association & International Cricket Council set up a tribunal to hear and determine the matter and the tribunal found the applicant guilty and recommended a ban of five years that was implemented by Kenya Crickets Association on 17.8.2004. It is that decision that is challenged by this application for Judicial Review.

The 1<sup>st</sup> question to consider is whether the Kenya Cricket Association or International Cricket Council are public bodies because Judicial Review orders will only issue against public bodies or persons performing public functions. Halsbury's Laws of England 4<sup>th</sup> Edition volume 1 (1) paragraph 6 states

*“Broadly speaking a public authority may be described as a person or administrative body entrusted with functions to perform for the benefit of the public and not for private benefit. Not every such person or body is expressly defined as a public entity or body and the meaning of a public authority or body may vary according to the statutory context.*

***“The fact that a person or body exercises functions of public nature does not conclusively establish that such a person or body is a public entity – quashing or prohibiting orders will issue to a body only if its functions are of a public and not merely private nature.”***

The International Cricket Council is a Company Ltd by guarantee incorporated in the British Virgin Islands. This is disclosed in its Articles of Association. Its objects are to advance development, coordinate, regulate and promote the game of Cricket worldwide in co-operation with its members. It is also common ground that Kenya Cricket Association is a member of International Cricket Council and Kenya Cricket Associations' Objects are similar to those of International Cricket Council save that Kenya Cricket Association is a National club. Kenya Cricket Association is bound by International Cricket Council's constitution and code of conduct. In his ruling Justice Ibrahim at page 11 observed that the applicant, Mr. Odumbe a player from Kenya was bound by the terms of the agreement he made with Kenya Cricket Association clauses 3.1-10; 3.1-16 where he agreed to comply with all rules, bye laws, playing conditions and codes of behavior governing matches and subject to the code of conduct at all times. Having signed an agreement with Kenya Cricket Association, he was its member and that created a contractual relationship between them and by extension, International Cricket Council rules and regulations too, applied to him as a member of Kenya Cricket Association.

In the case of ***R.V. BBC ex parte LAVELLE 1983 I W LR 23***, the court held that order 53 could not be used to challenge decisions which were of purely private or domestic tribunals such as the disciplinary body of British Broadcasting Corporation whose powers derived from the contract between British Broadcasting Corporation and Lavelle. Lavelle an employee of British Broadcasting Corporation had challenged the termination of his employment with British Corporation by way of Judicial Review.

Mr. Kosgey urged that the court should not only look at the source of the Respondent's powers but also at the nature of its duties and its impact. In this case the source of the Respondent powers was the contract between the applicant and respondent. In the ***PATEL CASE***, the Court of Appeal observed that courts should be slow in interfering in the running of clubs affairs, the remedy being in the hands of the members. This was echoed in the case of ***R. V. DISCIPLINARY COMMITTEE OF THE JOCKEY CLUB EX PARTE AGHA KHAN 1993 I WLR 909***

Mr. Kosgey had relied on the case of ***R.V. PANEL ON TAKE OVERS AND MERGERS EX-PARTE DATAFIN PIC & ANOTHER 1987 ALL ER 564*** where the Panel on Take overs and Mergers was a self governing unincorporated Association which observed the take over and mergers of companies but was sustained by certain statutory powers and penalties which were introduced later. Lloyd LJ in making reference to the case of ***COUNCIL OF CIVIL SERVICE UNIONS V. MINISTER FOR CIVIL***

SERVICE 1985 AC 374, had this to say

***“I do not agree that the source of the power is the sole test whether a body is subject to Judicial Review nor do I so read Lord Diplocks’ speech. If the source of power is statute or subordinate legislation under statute then clearly the body in question will be subject to Judicial Review. If at the other end of the scale the source of power is contractual, as in the case of private arbitration then clearly the arbitration is not Subject to Judicial Review. See NATIONAL JOINT COUNCIL FOR THE CRAFT OF DENTAL TECHNICIANS (DISPUTES COMMITTEES EX-PARTE MEAT 1953 1 Q B 704.***

***But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions or if the exercise of its functions have public law consequences, then that may as counsel for the applicants submitted, be sufficient to bring the body within the reach of judicial review.”***

The court went on to hold that the Panel on Take Over and Mergers was exercising a public duty and was therefore subject to Judicial Review. The above case was also considered in the **AGHA KHAN CASE**. Though the above may be true of the case considered above yet the respondents herein in disciplining the applicant have not performed any duty of a public nature nor were the consequences of the performance of their duty of a public nature. The Respondent’s duty to the applicant was strictly within their terms and conditions of membership of the club and did not involve the public. Cricket is a sport and depends on individual interest. The respondents get their funding from their own activities i.e. tournaments, levies, competitions and sponsorship (see para 8 –5 of International Cricket Council Articles of Association). The respondent’s source of power, nature of duty and its impact do not amount to performance of public functions.

It was the applicants contention that the tribunal that conducted the enquiry was performing quasi-judicial functions and therefore amenable to Judicial Review. As considered above the International Cricket Council has set up a code of conduct that is applicable to all its members and team players. The applicant was subject to it. An enquiry is set up within the terms of reference promulgated by the respondents strictly for the carrying out of the investigation by the adjudicator. In the guidelines on the principles of natural justice of International Cricket Council in the 2<sup>nd</sup> paragraph it is observed that if a decision is reached and there is allegation of breach of principles of natural justice, the person charged may seek review of the hearing and decision in court. This is not a provision of the International Cricket Council Code or Articles of Association. It is part of the guidelines. It is framed persuasively using the word ‘**may**’ seek Judicial Review. It is not mandatory and I believe one can only seek Judicial Review if principles for seeking such a remedy are satisfied. This was a private arbitration within the rules governing membership of International Cricket Council and Kenya Cricket Association and would not be subject to Judicial Review. **In my considered view the tribunal set up in the investigation of the applicant’s conduct was a private arbitration, not subject to Judicial Review** (See **DATAFIN CASE**)

The 2<sup>nd</sup> limb of the respondent’s objection is that the applicant has already invoked an alternative remedy whereby at the behest of the applicant’s counsel an official enquiry was carried out and it rendered its decision on 15.10.2004 and the said decision was ratified by International Cricket Council Executive Board on 17.10.04. That enquiry upheld Justice Ibrahim’s decision to ban the applicant from the game for 5 years. (Enquiry – MS 10) Mr. Munyu argued further that Judicial Review is not available to one with an alternative remedy and that the applicant should have sought an injunction or any other private law remedy. Counsel relied on the decision of **REPUBLIC vs SECRETARY OF STATE EX PARTE SWATI (1986) 1 ALL ER 717**. The court held that when one has an alternative remedy, Judicial Review orders could not issue save for special circumstances.

In reply Mr. Kosgey urged that the issue of an alternative remedy should be raised at the hearing of the main motion and that in any case the adjudicator, Justice Ibrahim found that there was no right of appeal and that the applicant could seek Judicial Review and that his decision was not final as it was subject to appointment of an official enquiry and then ratification by International Cricket Council Executive Board. The question is whether the applicant has indeed got an alternative remedy and if so is it a bar to Judicial Review. **The position in Kenya is that the existence of an alternative remedy is not**

**a bar to grant of Judicial Review orders.** In the case of **DAVID MUGO t/a MANYATTA AUCTIONEERS vs REPUBLIC** C.A. 265/1997, Justice’s Chesoni, Omolo and Shah had this to say of a alternative remedy

*“The existence of an alternative remedy is not a bar of the granting of an order of certiorari”.*

The English case of **SWATI** held differently but I believe it is because Judicial Review in England has developed and its applicability widened unlike the Kenyan scenario where orders of Judicial Review are limited.

In the terms of reference, clause 4:10 provides that no appeal shall lie from the decision of the code of conduct commission or from any determination of the Executive Board. The judge also held that there was no fundamental right of appeal but one may seek Judicial Review orders. He went on to state that his decision was not final as it was subject to appointment of an official enquiry and ratification of the decision by the International Cricket Council Executive Board. The post-decision processes are meant to be checks and balances to ensure the affected parties’ rights are well protected. From the record of the applicant, he did appeal to the enquiry and a decision was subsequently rendered confirming a ban for 5 years. The applicant therefore exhausted his rights under the contract.

**Having submitted to the code of conduct and its rules the applicant is bound by these rules and the rules were sufficient to determine his case and it being a private right cannot be enforced under Public Law. Judicial Review is not available for the reasons given above but he can seek other private law remedies.** The restriction in the contract that the matter is not appealable is in my view invalid as the jurisdiction of the court cannot be totally ousted from an agreement. It would be against the public policy.

The 3<sup>rd</sup> limb of the objection is that the 1<sup>st</sup> respondent being a club cannot be sued in the club’s name because it is not a legal entity. The office bearers should have been sued. Mr. Kosgey never made a response to that submission. Parties to a suit is an issue of law and that has to be determined at a preliminary stage and I do agree that Kenya Cricket Association is wrongly sued and is hereby struck off as a party. Without the Kenya Cricket Association, the International Cricket Council cannot stand alone in these proceedings as a party.

Mr. Kosgey seemed to blow hot and cold at the same time. In his submission he wondered whether this court had jurisdiction in this matter as International Cricket Council is an international body. That submission is absurd because he is the one who filed this suit in this court. In any case by virtue of International Cricket Council’s operations in Kenya through Kenya Cricket Association they are subject to Kenyan law too in as far as Kenya subject will be affected.

In the end, I do find that the objection raised by the respondents has merit and I will accordingly uphold the objection and order the proceedings struck out. I believe the applicants remedy lies elsewhere. Costs to the Respondents.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of May 2006.**

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**R.V.P WENDOH**

**JUDGE**

**Mr. Kosgey for applicant**

**Mr. Sumuyu holding brief for Mr. Munyu for the 1<sup>st</sup> and 3<sup>rd</sup> respondents**

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