



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Suit 14 of 2005**

**IN THE MATTER OF: THE KENYA FOOTBALL FEDERATION**

**IN THE MATTER OF: THE SOCIETIES ACT (CAP 108)**

**BETWEEN**

**1. GABRIEL MGHENDI**

**2. SAYYID MRERA**

**3. MOHAMED OMAR.....APPLICANTS**

**VERSUS**

**THE REGISTRAR OF SOCIETIES.....RESPONDENTS**

**RULING**

In this Originating Summons (OS) brought under Section 20(1) of the Societies Act and Order 36 of the Civil Procedure Rules, the Applicants seek the following orders:

**“1) That the KFF Constitution purportedly adopted on**

**10<sup>th</sup> December 2004 be declared a nullity in law.**

**2) That the KFF National elections held on 29<sup>th</sup>**

**December 2004 be nullified.**

**3) That the 1<sup>st</sup> Respondent in consultation with the**

**Kenya National Sports Council be ordered to**

**Convene Elections of the KFF National Office in**

**Accordance with the KFF constitution 1995.”**

The Originating Summons is based on the grounds that:

- “1. That the K.F.F. Constitution purportedly adopted on 10<sup>th</sup> December 2004 was not validly enacted.**
- 2. The interim committee which was in office had no Mandate to amend the KFF constitution.**
- 3. The Registrar of Societies as the custodian of the Law failed to act in accordance with the law and in Particular the Societies Act (Cap 108).**
- 4. The Registrar of Societies acted in breach of the Societies Act in registering the constitution and Allowing elections to proceed on the basis of the new Constitution.”**

and is supported by the affidavit of Sayyid Mrera, the Secretary of the Kenya Football Federation Mombasa sub-branch. In that affidavit Mr. Mrera deponed that upon the former KFF National office bearers led by Mr. Maina Kariuki being removed from the office by a High Court ruling on 8<sup>th</sup> April 2004 the Registrar of Societies constituted the Normalisation Interim Committee. That Committee without any legal authority and without consulting all the clubs and the KFF sub-branches amended the KFF Constitution. He therefore prayed that that new constitution be declared a nullity in law.

When the Originating Summons came up for hearing on the 4<sup>th</sup> May 2006 the second, third and Interested Parties who had been joined in these proceedings raised a preliminary objection notice of which they had filed and served.

Mr. Mwakisha, counsel for the second, third and Interested Parties submitted that the issues raised in this Originating Summons do not fall within the ambit of Order 36 of the Civil Procedure Rules and should have been brought by way of a plaint and not by Originating Summons. He said the issues cannot be resolved by affidavit evidence. Even though the court has ordered that *viva voce* evidence be given, that does not change the position. In support of this argument he cited the cases of **Kenya Commercial Bank Limited – Vs Osebe (1982 – 88) 1 KAR 48**, **James Njoro Kibutiri – Vs – Eliud Njau Kibutiri (1982 – 88) 1 KAR 60**, **Bhari – Vs – Khan [1965] EA 94** and **Kulumbai – Vs – Abdulhussein [1957] EA 699**.

Mr. Mwakisha further submitted that the Registrar of Societies having registered the new constitution the same can only be challenged under Order 53 of the Civil Procedure Rules. He also contended that the documents being relied on not being certified as required by Section 68 of the Evidence Act they are not properly before court. He urged me to strike out the entire Originating Summons with costs to the Interested Parties.

Mr. Mutungi for the Respondent while associating himself with the submissions of Mr. Mwakisha submitted that the Registrar of Societies has no legal capacity to sue or be sued. These proceedings should have been brought against the Attorney General as provided by Section 12 of the Government Proceedings Act. He further submitted that the prayer against the Registrar of Societies is for a mandatory injunction which by dint of Section 16 of the Government Proceedings Act cannot be granted. He also urged me to strike out this Originating Summons with costs.

Mr. Khatib, counsel for the Applicants, in response submitted that this Preliminary Objection being raised after directions have been taken by consent is totally untenable and should be overruled. He said the consent order having not been reviewed or set aside the Respondents and Interested Parties are estopped from raising this Preliminary Objection. He said the matter which is before court in this Originating Summons is the interpretation of the Registrar General's letter dated 19<sup>th</sup> October 2004 **Ex. 3** as to whether or not the Normalisation Interim Committee had jurisdiction to amend the KFF Constitution and the Amended Constitution itself. That interpretation, he said, falls under Order 36 Rule 5 of the Civil Procedure Rules.

The other issue for determination, Mr. Khatib added, is who are the bona fide officials of KFF.

These issues according to Mr. Khatib are not complex but simple and straight forward and can be decided in an Originating Summons. He therefore found this Preliminary Objection as a misconceived side show intended to delay the expeditious disposal of this matter. He urged me to overrule it with costs to the Applicants.

In his riposte Mr. Mwakisha said that these proceedings are about the validity of a process and not the interpretation of documents as submitted by Mr. Khatib. He said this court has no jurisdiction to determine the issues herein in an Originating Summons and the consent order on directions does not give it jurisdiction. In any case, he said, the directions were taken prematurely as the Respondents and Interested Parties had not filed their replies.

As long ago as 1953 if not earlier the courts in Kenya decided on the scope and general purpose of the procedure by way of originating summons. It is a limited scope. Sir Ralph Windham, CJ stated it in **Mohamed – Vs – Saldanha, Kenya Supreme Court (Mombasa) Civil Case No. 253 of 1953 (unreported)** in the following terms:

**“such procedure is primarily designed for the summary and ‘ad hoc’ determination of points of law or construction or of certain questions of fact, or for the obtaining of specific directions of the court, such as trustees, administrators, or (as here) the courts’ own executive officers. That despatch is an object of the proceedings is shown by Order 36 which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge into court.”**

Sir Windham followed that ruling in his later decision in **Kulsumbhai – Vs – Abdulhusein [1957] EA 699** where he stated at page 701: -

**“It was pointed out in *Res Giles (1890)*, 43 Ch.D. 39 that such procedure ‘was intended, so far as we can judge, to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve serious question.’”**

These decisions have been followed in numerous subsequent cases. Spry, J.A. dealing with a similar issue in **Bhari – Vs – Khan [1965] EA 94** stated at page 101 that:

**“... it is, to my mind, quite clear that the whole object of Order 36 is to provide a simple procedure by which certain minor matters can be disposed of without the formality or expense of an ordinary suit.”**

Newbold, Ag V.-P. stated in the same case also on page 101 that:

**“An originating summons is a form of legal proceeding designed to give, in certain specified circumstances, a quick, summary and inexpensive remedy.”**

Though not specified in the originating summons itself in the course of his submissions Mr. Khatib said that the issue for determination in this matter is the interpretation of the Registrar General's letter dated the 19<sup>th</sup> October 2004 a copy of which is annexed to the affidavit in support of the originating summons

and marked (**Ex. 3**) as to whether or not the Normalisation Interim Committee had jurisdiction to amend the KFF Constitution and the amended Constitution itself and also who are the bona fide officials of the KFF. That is not correct. I have at the beginning of this ruling set out verbatim the prayers sought in this originating summons and the grounds upon which they are sought.

Reading through them it is quite clear to me that the issues for determination are the validity of both the amended Constitution purportedly adopted the 10<sup>th</sup> December 2004 and the elections held on the 29<sup>th</sup> December 2004 pursuant to that amended Constitution. Those are not simple issues which can be disposed of in an ‘ad hoc’ manner on affidavit evidence. Even if the hearing is adjourned to open court and *viva voce* evidence given they are still not simple matters of simple interpretation of documents which can be agitated in an originating summons under Order 36 Rules as claimed. These are complex matters which will require a long hearing. As already stated one of the issues is the determination of the bona fide officials of the KFF. That is a disputed fact the determination of which will affect the entire football fraternity in this country. Such matter with far reaching consequences as was in the case of **Kulsumbhai – Vs – Abdulhussein (supra)** does not fall within the ambit of the originating summons procedure. As was stated in the case of **Kenya Commercial Bank Limited – Vs – Osebe (1982 – 88) 1 KAR 48 at Page 51** “... the originating summons procedure is not for the purpose of obtaining decisions on disputed questions of fact.”

The court has no jurisdiction to hear such complex matters when brought by way of originating summons – see **Bhari – Vs – Khan (supra) at page 100 paragraph F**. I agree with Mr. Mwakisha and Mr. Mutungi that this matter should have been brought by way of a regular suit or by judicial review application under Order 53 of the Civil Procedure Rules. As was stated in **James Njoro Kibutiri – Vs Elius Njau Kibutiri (1982 – 88) 1 KAR 60 at page 61** “When it becomes obvious that the issues raise complex and contentious questions of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit.” This application is therefore for dismissing.

Mr. Mutungi for the Registrar of Societies also raised two issues which I need to say something about. He submitted that this originating summons brought against the Registrar of Societies and seeking *inter alia* an order of mandatory injunction is incompetent. I agree with him. Suits against Government officials, unless they are brought by Judicial Review applications under Order 53 of the Civil Procedure Rules or where the officials are sued in their personal capacities, should be brought against the Attorney General. Section 16 of the Government Proceedings Act makes that quite clear. Section 12 of the same Act also makes it clear that injunctions or orders analogous to injunctions cannot issue against the Government or Government officers.

So apart from the fact that the bringing of this matter by way of originating summons is irregular and fatally defective, it is also for striking out for fouling the above mentioned sections of the Government Proceedings Act. It is accordingly hereby struck out with costs to the Respondent and the Interested Parties.

DATED and delivered this 22nd day of May 2006.

**D. K. MARAGA**

**JUDGE**