



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**MISC. CIVIL APPLICATION NO. 525 OF 2002**

IN THE MATTER OF: HIGH COURT MISCELLANEOUS CIVIL  
APPLICATION NO. 77 OF 2000

**REPUBLIC –VS- REGISTRAR OF SOCIETIES**

**EXPARTE: AWADH OSHAN AND OTHERS**

**IN THE MATTER OF: AN APPLICATION BY AWADH OSHAN & OTHERS**

**FOR LEAVE TO APPLY FOR ORDERS FOR**

**COMMITTAL OF THE REGISTRAR OF SOCIETIES**

**AND HUSSEIN SWALEH, SECRETARY GENERAL**

**K.F.F., KHALID HANTOOSH, MOHAMED**

**HANTOOSH, MOHAMED HATIMY, AL-HAD**

**MUHIDDIN, IN RESPECT OF THE ORDERS**

**ISSUED ON 6TH FEBRUARY, 2002.**

**-VERSUS-**

**1. ALI OSHAN**

**2. SOUD ABDALLAH**

**3. JAMES TOLE**

**4. MOHAMED ZEIN**

**5. ALI MBARAKJ ALI**

**6. VELENTINE MATSAKI**

**7. ALYAN MOHAMED**

**8. RACHEL KAZUNGU**

**9. SWALEH KHAMIS**

**10. SULEIMAN S. SUMRA.....APPLICANTS**

**-VERSUS-**

**1. THE REGISTRAR OF SOCIETIES**

**2. HUSSEIN SWALEH**

**3. KHALID HANTOOSH**

**4. MOHAMED M. HATIMY**

**5. AL-HAD MUHIDIN.....RESPONDENTS**

**R U L I N G**

By an amended Notice of Motion dated 16th May 2003 the ex-parte applicants sought to have the Respondents herein cited for contempt of this court and be committed to civil jail for defying a court order issued on 6th February 2002. When the aforesaid Notice of Motion came up for interpartes hearing, the Respondent's Advocate Mr. Gikandi raised a preliminary objection against the application and the entire suit. The learned Advocate put up four grounds in support of his preliminary objection namely:-

- (i) That leave to institute contempt proceedings was not obtained as required.
- (ii) That since the O.C.P.D. Urban Division has been mentioned negatively the ex-parte applicant should have joined that office as party.
- (iii) That these proceedings are not competently before court by virtue of Article XIX of the Kenya National Football Federation Constitution and that these proceedings should have been referred to Arbitration.

Mr. Khatib who appeared for the ex-parte applicants opposed the preliminary objection stating that leave was granted before the current Notice of Motion was instituted. I am in agreement with Mr. Khatib that leave was granted to the ex-pate applicants to commence these proceedings on 5th November 2002. Hence the Respondent's first preliminary point is overruled.

On the second limb of the Respondent's argument Mr. Khatib did not offer any argument against it. He was of the view that this court has wide discretion to issue orders to be executed by such offices without necessarily having them as parties to the suit. On this point I am also in agreement with Mr. Khatib. It is not necessary for the O.C.P.D. to be joined as a Party. The preliminary point is rejected.

The remaining preliminary objection was contested by the Respondents on the ground that the Respondents should have raised the issue earlier and not at this late stage. It is Mr. Khatib's view that even if the matter was to be referred to arbitration, the proceedings cannot be rendered bad in law but can be stayed under Section 6 of the Arbitration Act Chapter 46 of the Laws of Kenya. Article XIX (1) of the Kenya National Football Federation Constitution states:-

**“If any dispute arises between the Federation and or branches or any standing Committee of the Federation and the Clubs or between any of the clubs and their members on any matters relating to football, such disputes shall be referred to Arbitration of a person agreed between the parties, or failing such agreement, a person appointed by the Chairman of the Law Society of Kenya upon application of either of the parties. The decision of the Arbitrator shall be final.”**

It is obvious that the Kenya National Football Federation Constitution does not allow parties whose disputes fall within the definition of Article XIX(1) to commence proceedings in a court of law but to refer them to Arbitration. To me the dispute in these proceedings concerns the Federation and its Mombasa branch where the officials are wrangling over leadership positions. This dispute is therefore governed by the Kenya National Football Federation Constitution. The ex-parte applicants should not have filed these proceedings in this court. The proceedings are not competently before this court. It is trite law that a preliminary objection can be raised at any time when the action is still active. Hence Mr. Gikandi is perfectly right to raise the preliminary point at this stage. The parties have not invited me to refer the matter to Arbitration. Mr. Gikandi has urged this court to strike out the proceedings for being incompetently before this court. Mr. Khatib has casually referred to Section 6 of the Arbitration Act Chapter 49 of the Laws of Kenya in which the court has power to stay proceedings in such circumstances upon being moved to the effect. However the Arbitration Act, Chapter 49 of the Laws of Kenya was repealed by virtue of Section 42(1) of the Arbitration Act No.4 of 1995. However the relevant provision in the new Act is under Section 6(1) which provides:-

“A court before which proceedings are brought in a matter which is the subject of an Arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer parties to arbitration unless it finds:-

(a) That the Arbitration Agreement is null and void, inoperative or incapable of being performed or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to Arbitration.”

It would appear from the above provision, a party must make a substantive application to this court. In the case of **AGIP (K) LTD. =VS= KIBUTU 1981 K.L.R. P. 20**

It was held by the court of Appeal inter alia:-

(i) An order for stay of proceedings is an essential pre-requisite before a matter can be referred as set out in section 6(1) (b) of the Arbitration Act No., 49 (repealed) but equivalent to section 6(1) (b) of the Arbitration Act No. 4 of 1995. The application for stay must be made before any step is taken in the suit.

(ii) An application for stay of proceedings pending the enforcement of the Arbitration clause should be made by way of Notice of Motion supported by an affidavit and cannot be disguised as a point of law in a pleading.

(iii) An order for stay of proceedings cannot be implied from the pleadings or in a ruling, the judge must clearly make such an order and before an order can be granted, the applicant must satisfy the court that he will assist in all that is necessary for the proper conduct of the arbitration. Therefore even if the defence could be said to be an application the “applicant” had not satisfied the court accordingly.

I am bound and guided by these principles set by the Court of Appeal. It is clear that this court cannot refer a matter to Arbitration suo motto. The court must be moved and convinced. The Arbitration Act No. 4 of 1995 is also plain on this issue. I have stated that I have not been moved, but I have been urged to strike out an incompetent proceeding. Section 10 of the Arbitration Act No. 4 of 1995 provides:-

***“Except as provided in this Act, no court shall intervene in matters governed by this Act.”***

I have no jurisdiction to entertain the matter. Mr. Khatib for the exparte applicants and Mr. Gikandi for the Respondents (2-5) and in agreement that their dispute falls within the provisions of the Kenya National Football federation. I will therefore perform my duty to get rid of matters improperly before this

court by having them struck out. In the circumstances the parties should seek further advise from their Counsel to commence their dispute before the competent and proper Tribunal or Court for that matter. Consequently I uphold the preliminary objection and proceed to strike out the entire proceedings with costs being born by the ex-parte applicant.

**Read and Delivered this.....day of June, 2003.**

**In the presence of :-**

.....for the exparte applicants.

.....for the Respondents.

**J.K. SERGON**

**J U D G E**