



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 58 OF 2004

SALIM H SUMRA

ISMAIL MOHAMMED

MOHAMMED OMAR – SUING AS CHAIRMAN, SECRETARY &

TREASURER OF K.F.F. COAST BRANCH PLAINTIFFS

VERSUS

HUSSEIN SWALEH

**MOHAMED M HATIMY – SUED AS NATIONAL OFFICIALS OF
KFF DEFENDANTS**

Coram: Before Hon. Justice Mwera

Khatib Advocate for Plaintiffs

Gikandi for Defendants

Court Clerk – Sango

R U L I N G

By the amended Notice of Motion dated 29.3.04 and brought by the plaintiffs under Section 3A, 63 CPA and O 39 r 6 CPR orders are sought mainly in the following manner:

- 1. That the Commissioner of Police be directed to execute warrants of arrest issued on 15.3.04 against the defendants/respondents and**
- 2. That the respondents be committed to a civil jail for persistent disobedience of the court' orders of 15.3.2004.**
- 3. That the respondents' properties be attached and sold at a public auction seemingly in execution of the said court orders.**
- 4. That the defendants/respondents be restrained from proceeding with the KFF National Elections scheduled for 3.4.04 which date during the hearing of this applications seems to have been changed to 10.4.04.**

The grounds on which the application is grounded include the plea that the dignity of this court was

being eroded by the respondents' continued acts of defiance of its orders in that they had gone ahead to put forth guidelines for KFF sub branch and branch elections despite this court's orders of 15.3.04 which stopped the respondents from acting on any subject discussed at a special annual general meeting of 28.2.04. That proceeding towards the intended national elections set for 3.4.04 (changed to 10.4.04) was similarly in disobedience of the said court orders and in any case futile because the branch and sub branch elections were based on the guidelines of 28.2.04 which this court had set aside.

The plaintiffs relied on affidavits sworn back and forth in this case as well as two or so other causes at Nairobi High Court which will be referred to as and when found necessary. There was also a plethora of orders in the files here and Nairobi which the parties relied on plus other annexures and exhibits. Similarly the respondents referred to the very affidavits and annexures besides their own replying affidavit, sworn by Mohammed Hatimy (3rd defendant) and filed on 5.4.04.

The whole matter is grounded in what may be termed football politics. And it is no overstatement to observe that battles in this area are and can be as intense and bruising as in political parties, co-operative societies, trade unions and other "organized" bodies in Kenya's civil society.

The general impression gathered here from the face of the pleadings, submissions, explanations and clarifications, is that the plaintiffs who sued as officials of Kenya Football Federation (KFF) (Coast) branch were not amused with the way the KFF national office, here symbolized by the three defendants/officials were going about the national elections that were coming. Seemingly the defendants fixed a special general meeting on 28.2.04 inter alia to amend the KFF constitution and also set the election machinery rolling by working out and circulating the 2004 election guidelines for the branches and sub branches. The climax of these arrangements were elections to elect the KFF national office bearers.

The court gathered that the plaintiffs, as noted, not being in agreement with the national office moves started off by seeking arbitration in accordance with Article XIX of the KFF constitution which is in operation and is dated November 1995. That they applied to the Law Society of Kenya (L.S.K) to appoint an arbitrator and that society appointed a Mr. Justus Munyithya on 20.2.04. That Mr. Munyithya accepted the role on 25.2.04 yet the agents declined to submit to him.

This was not denied during the arguments of this application. That accordingly the plaintiffs sought some protective orders from the court. To do so they filed this suit on 26.2.04 together with an injunction application (under O 39 rr1,2,3,9 CPR) mainly to restrain the defendants from holding the said special general meeting on 28.2.04.

Mr. Khatib for (the plaintiffs) told the court that orders were granted against the defendants as prayed and yet they went on to hold the meeting on 28.2.04 aforesaid. It was not disputed that although that injunction application sought ex parte orders the respondents had had wind of it. So Mr. Gikandi also appeared before Khaminwa J on 27.2.04 and the learned Judge heard both sides. She proceeded to give a ruling on the same day which said among other things that the defendants had been restrained from discussing the review of the KFF constitution and elections as notified on 13.2.04. That the defendants nonetheless did just that and KFF 2004 Election Guidelines were issued to the branches and sub branches. This prompted the plaintiffs to seek to commit the respondents to a civil jail for contempt of court (see the chamber summons dated 2.3.04).

That Khaminwa J heard this application and on 15.3.2004 and found the respondents guilty of contempt of court. They had refused or failed to comply with this court's orders of 27.2.2005 restraining them from discussing the review of the KFF constitution or making arrangements for elections. The defendants/respondents were jointly and severally fined Sh. 500,000/= in default to serve 3 months in a civil jail. The court added that the resolutions passed on 28.2.04 in defiance of the restraining orders had to be set aside i.e. anything to do with reviewing the constitution and arranging for elections.

On the same day 15.3.2004, the respondents sought stay orders to pay fine for contempt or be thrown in prison but that plea was refused. That the defendants became evasive and the court bailiff was unable

to trace and arrest them in order to get them to serve the civil jail term since they had refused to pay the fine. But instead they set a date for KFF elections on 3.4.04 (moved to 10.4.04). All that gave rise to this application with the prayers as set out at the beginning.

Mr. Gikandi told the court that his clients had always been up, about and handling their activities without hiding from any court official. He did not therefore see why the Commissioner's (of Police) assistance was being sought to arrest them. He saw it all as meant to harass and intimidate the respondents. The counsel would not discern either why his clients' property ought to be attached and sold by public auction. The respondent's view remained that considerable chaos has engulfed the national football administration on account of the plaintiffs who were not officials of any branch at all. That the greatest interest would be served if the expected elections went ahead on 10.4.04 so that the rest of the feuding individuals would either win or loss all in the open. That the Minister in charge of Sports had created more confusion in the whole thing by disbanding KFF - all against the world football federation (FIFA) mandate and direction, thereby inviting that body's ire which may include banning Kenya from International football participation.

That to avoid all this FIFA had dispatched officials, to Kenya to oversee KFF national elections on 10.4.04. That going ahead with the same would not cause any loss or damage to the plaintiff which loss or damage money cannot compensate. And that on the whole the balance dips in favour of elections whatever little errors that may have been committed.

While Mr. Khatib quoted Article V(A)(i) of the KFF constitution that the national officials' term in office is four years and that that time ran out on 24.3.04, thereby prompting the Minister to disband KFF, Mr. Gikandi held the view that under Article IX(B) the KFF annual general meeting shall not be held later than 30th April of each year to discuss matters including election of officer bearers if that is due. So while Mr. Khatib maintained that the present KFF officials including the respondents could not remain in office long after their term expired and that they ought to have arranged for elections before 24.3.2004, Mr. Gikandi's view is that they should nonetheless arrange those elections and before 30.4.2004. There was however no dispute that under Article XVIII (B)(3):

"3. Any activities and decisions of the National Executive and Legislative Bodies, Standing Committees and any other subsidiaries of the Federation shall be subject to strict observance of the Constitution, Regulations and Standing Orders of the Federation."

And the

"National Executive Committee" consists among others:

"(i) All national office bearer as per Article V(A) of the Constitution."

These needless to say are, the chairman, the second vice chairman, the first vice chairman, the second vice chairman, the secretary general, the deputy secretary general, the assistant secretary general, the assistant secretary general (women football), the treasurer and assistant treasurer. The three defendants were elected national officials on 25.3.2000 and that is not in doubt.

With all the above, only one main issue remained to be argued and decided in this application. This was after the court was satisfied that the respondents have as it were not gone underground and the police were not required to look for them, haul them to the surface and slap on them the warrant so that they either pay the fines imposed after they were found guilty of contempt or be thrown into civil jail for 3 months. At least Hatimy (3rd Plaintiff) was in court and the court was told that the other two defendants were in Nairobi.

The one question to settle remained: Should the defendants be restrained from proceeding with the KFF national elections due on 10.4.04? Mr. Gikandi told the court that the plaintiffs were pretenders and busybodies in the affairs of KFF in that there was no body called KFF (Coast) branch. That by 19.3.2004 the Registrar of Societies had certified people other than the plaintiffs as officials of that branch. The

court found it not easy to reconcile the absence of such a branch and that as at 19.3.2004 it had officials other than the plaintiffs. Which is which? To be non-existent yet to have officials? Puzzling. The court however was minded to adopt a position that a branch by the description adapted by the plaintiffs existed. Its minutes of the meeting of 1.2.2004 were exhibited and the returns were filed and paid for on 5.2.04 as per receipt No. 267287. There is no evidence that the Registrar rejected those returns or the money. If he did not update his records on 19.3.04 then that is another matter. Accordingly the plaintiffs had a right to sue and success or failure of their case does not arise now. In any case when they reported a dispute and the LSK even appointed an arbitrator, one can say that an issue to be resolved surely exists. This court on its own is also of the view that the plaintiffs had a prima facie case with probability of success. They were aggrieved by the intended review of the KFF constitution and at the same time to move to arrange the 2004 national elections.

Besides, they undertook to pay damages in case the case went against them and that cannot be considered frivolous at all.

The court also considers that damages may not adequately compensate the plaintiffs in case the KFF constitution is reviewed to their prejudice or disadvantage assuming that their right to membership, association and participation is affected. It was not said how much money in damages would or could compensate such a state of things. And if elections go on? It was said that the defendants time in office expired on 24.3.04. The KFF constitution says so (Article V (A)(I):

“(I) the Federation shall have the following office bearers at the Head Office who shall be elected to serve for a term of four (4) years: (1)
..... (10)
.....

This is stated in mandatory terms. If the term expires one has to leave office. The court was not shown any “saving” article in the KFF constitution or find any on its own. Yet the same constitution (see above) is also emphatic and mandatory that the officials, organs, etc of KFF shall strictly observe the constitution.

The defendants are part of the national executive who should see to this strict adherence. They with other officials of KFF whose term in office expired on 24.3.04 can but only go home. They cannot for any reason remain in office and arrange for elections, a thing they seem not to have thought of doing before their time ran out. Without seeming to say this for the Minister of Sports or the status and authority of FIFA, by its own constitution, the KFF officials whose term ended on 24.3.04 surely cannot continue in office and purport to appear to run its affairs including arranging for elections.

If they made errors or mistakes including failing to organize elections when they were still validly in office, this court is unable to agree with Mr. Gikandi that those were small mistakes the court should overlook and order that the defendants go ahead to organize the elections because that will serve a greater interest of football as a sport liked and enjoyed by many in Kenya.

The defendants have no capacity as per the governing KFF constitution to run its elections or do anything because their time in office has expired. There is no great fun or pride in having a constitution, whatever the body, that cannot be adhered to. Such conduct merely breeds chaos as now seen in KFF for whatever reason or motive. The culture of being governed by a group’s own rules and regulations as required and mandated must be seen and nurtured in any facet of a community’s activities.

In sum even had the court gone on to see, as it has done in whose favour balance of convenience should tip, it cannot tip in favour of the defendants whose time expired and so cannot do anything valid and lawful as regards running the affairs of KFF.

The next thing to address still on this injunction point is the law O 30 r 6 CPR. Clearly that provision of law does not provide for injunction orders. But the whole case taken in regard is to the effect that the defendants ought to be restrained from doing those acts that they were restrained from and even were

fined in contempt for disobeying those orders. One would ask why this court heard them inspite of the contempt and refusal to pay the fine imposed.

All this was made possible i.e. hearing the defendants when they accepted that Sh. 500,000/= deposited in a court in Nairobi be transferred here in this case. Mr. Khatib was agreeable. Accordingly it is directed that Sh. 500,000/= deposited by the defendants in Nairobi be transferred to Mombasa and the same be converted into fine that Khaminwa Judge imposed on 15.3.04. It was only on that account that the defendants were heard. Otherwise if they had not so conducted themselves, it would have been incumbent on this court to have them brought before it, ordered to begin serving the three months civil jail sentence in default of fine BEFORE hearing them on any aspect.

This court has not found it necessary to make reference to two or three miscellaneous causes filed in Nairobi by the defendants or other parties even if some aspects of the issues involved overlapped with matters in this cause because this was an earlier cause and a substantive one at that. During the arguments it became clear that the multiplicity of the causes not only cost money and time but that also some orders that the same High Court either at Mombasa or at Nairobi made fell in conflict e.g. that Khaminwa J ordered that the KFF elections should not be discussed or proceeded with while Ochieng Ag J ordered that such elections would go on if no court order barred them. All in all that state of things was/is undesirable and hence left where each party or parties in each cause fell and remained. They can sort themselves out from there.

For the order sought, to go on or not go on with elections on 10.4.04 the court answers the same in the negative. The defendants are hereby restrained from proceeding with the KFF national elections scheduled for 10th April 2004. The defendants cannot run them because they have no capacity as per the KFF constitution and besides the sub branch and branches cannot be expected to validly participate in such elections because they have conducted their own elections in accordance with the guidelines which the defendants caused to be worked out on 28.2.04 in disobedience and defiance of a court order. The same in fact were accordingly set aside on 15.3.04.

The prayer is granted with costs.

Delivered on 8th April 2004.

J.W. MWERA

JUDGE