Kilundu & 2 others v Office of the Sports Disputes Tribunal & 3 others (Judicial Review Application E050 of 2024) [2025] KEHC 1362 (KLR) (Judicial Review) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1362 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E050 OF 2024

JM CHIGITI, J

FEBRUARY 13, 2025

BETWEEN

DAVID KILUNDU .... 1ST APPLICANT

ROBSON ABONYO AKOTH .... 2ND APPLICANT

JOSEPH IRUNGU KIMEMIA .... 3RD APPLICANT

AND

OFFICE OF THE SPORTS DISPUTES TRIBUNAL .... 1ST RESPONDENT

CHARLES NYABERI .... 2ND RESPONDENT

KENYA VOLLEYBALL FEDERATION .... 3RD RESPONDENT

REGISTRAR OF SPORT .... 4TH RESPONDENT

RULING

1. The application before this court is the Applicants' Chamber Summons dated 8th May 2024 wherein the applicant is seeking the following orders;

    1. ...spent.

    2. That the Applicants herein David Kilundu, Robson Abonyo Akoth and Joseph Irungu Kimemia, be granted leave to apply for an order of:

        a. Certiorari of bringing into this court and quashing the decision of the 1st Respondent dated 27th February, 2024 dismissing an election petition filed by the Applicants.

b. Prohibition do issue barring the 2nd Respondent from attending the national executive committee meetings of the 3rd Respondent and receiving allowances pending the hearing and determination of this application.

3. That the leave granted in paragraph *2* above do operate as stay of execution in sports disputes tribunal case E024 of 2023 between David Kilundu & 2 Others Vs Charles Nyaberi & 2 Others.

4. That the cost of this Application be provided for.

3. The application is supported by Statement dated 8th March 2024 and verifying affidavit sworn on even dated by Robson Abonyo Okoth.

4. The Applicants filed a petition challenging the 2nd Respondent's election.

5. It is argued that the 1st Respondent abused its discretion, committed an error of law and failed to consider the substance of the petition including all material evidence of election malpractice and irregularities therefore arriving at an irrational decision of dismissing the petition based on a mere technicality.

6. It is also the Applicants case that the 1st Respondent's decision is tainted with gross unreasonableness and that no reasonable authority addressing itself to the facts and law before it would have made such a decision.

7. Further that the same is contrary to the rules of natural justice, as the 1st Respondent failed to consider the public implications of their decision and the effect of the said decision to the 3rd Respondent and the public at large.

8. In response, the 2nd and 3rd Respondents filed grounds of opposition dated 2nd July 2024 raising 4 grounds of opposition. In summary the 2nd and 3rd Respondents urge that the Applicants do not have an arguable case with reasonable chance of success as their case is trivial and/or without merits.

9 It is also contended that they have not met the threshold for grant of the prayer for leave to operate as stay.

10. According to the 2nd and 3rd Respondents the Application is frivolous and waste of judicial time. It is argued that the Application lacks any basis in law.

11. The Applicants, 2nd and 3rd Respondents filed written submissions.

11. The Applicants' submissions are dated 1st July 2024. Their submission is that for leave to be granted, the court must ascertain that the application discloses a prima facie case, the applicant has locus standi and also that the application is not time barred.

12. It is submitted that during its consideration on whether or not to grant leave the court does not only consider the existence of an arguable but also whether there is a reasonable chance or possibility of success on inter parties hearing. The Applicants rely on several cases to support this position.

13. On whether they have locus standi to institute judicial review proceedings the Applicants' submission is that they were the petitioners in E024 of 2023 Robson Abonyo Akoth & 2 others vs. Charles Nayberi & 2 others before the 1st Respondent and it is its decision that is the subject of the instant proceedings.

14. In support of this submission the Applicants rely on the case of Kihiu Mwiri Farmers Co Ltd vs. The Registrar General [2003] eKLR where the court is said to have observed that an applicant has to establish that he or she has sufficient interested or stake in the matter.

15. The Applicants further submit that as was held by the court in Raila Odinga & 6 others vs. Nairobi City Council Nairobi HCCC No.899 of 1993 and in Republic vs. Minister for Lands & another Ex parte Catherine Matete Musings [2021] eKLR their application was filed within the stipulated timelines as provided under the law.

16. According to them the 1st Respondent's ruling was delivered on 27th February,2024 and their application was filed on 8th March,2024.

17. The Applicants' submission is that unless the leave granted operates as stay of the implementation of the 1st Respondent's decision, the 2nd respondent will proceed with the implementation of the said decision whose legality is yet to be established.

18. In support of this position reliance is placed in the cases of *Taib A. Taib v The Minister for Local Government & Others Mombasa HCMISCA. No.158 of 2006* and Republic vs. County Government of Embu Ex parte Peterson Kamau Muto t/a Embu Medical and Dental Clinic & 6 others[2022] eKLR where the Courts observed that the rationale of allowing leave to operate as stay of proceedings is so as to prevent implementation of the said decision until its legality is established.

19. On costs they submit that the same is the discretion of the court and that costs follow the event.

20. The 2nd and 3rd Respondents in their submissions dated 27th January 2025 submit that judicial review is limited to process review and not merit as was held by the Court of Appeal in the case of Municipal Council of Mombasa v Republic & another (2002) eKLR.

21. The Respondents contend that the process leading up to the 1st Respondent's decision has not been challenged and further that if the Applicants seek to review the merits of the decision they ought to have lodged an appeal instead.

22. On the issue of stay it is submitted that there is nothing to stay as the 1st Respondent's decision only confirmed the election of the 2nd Respondent as the chairperson.

Analysis and Determination;

23. The following issues commend themselves for determination;

    i. Whether this court has jurisdiction to determine the instant application

    ii. Whether the Applicants have made a case for the grant of leave to file for judicial review orders

    iii. Whether if leave is granted it ought to operate as a stay of proceedings

    iv. Who is to bear costs

Whether this court has jurisdiction to determine the instant application

24. The issue of jurisdiction is central in the determination of any dispute. This is because without jurisdiction the decision of a court is rendered redundant. (see Owners of Motor Vessel Lilian "S" v Caltex Oil [1989] KLR).

25. Section 46(5) of The *Sports Act* has made it obligatory for sports organizations, including the 3rd Respondent, to submit a Constitution to the Registrar of Sports prior to registration which shall contain as a basic minimum, the provisions set out in the Second Schedule to the *Sports Act*.

26. The Second Schedule to The *Sports Act* list under (f) that:

> *The constitution* of a body seeking registration as a sports organization shall provide that—
>
> (f) subscription to Court of Arbitration for Sports policies and rules which conform with requirements set out in Sports Disputes Tribunal policy and rules for sports disputes resolution.

27. The 3rd Respondent through its Constitution therefore is expected to have internal dispute resolution mechanisms that merge into the national jurisdiction granted by the *Sports Act* to the Sports Disputes Tribunal to hear and determine disputes and which can then flow into the Court of Arbitration of Sports to hear and determine the matter through the international jurisdiction.

28. Section 9(2) of the *Fair Administrative Action Act*, No. 4 of 2015 provides in rather authoritative terms that "the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted".

29. It is trite that the existence of an alternative remedy is never enough to oust jurisdiction in judicial review (see Leech versus Deputy Governor of Parkhurst Prison (1988) AC 533 per Lord Bridge at 562D).

30. In R versus Inland Review Commissioners, ex p Preston (1985) AC 835 it was held that:

> " A remedy by way of judicial review is not to be made available where an alternative remedy exists...Judicial review is a collateral challenge: it is not an appeal. Where parliament has provided by statute appeal procedures, as in taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision..."

31. Addressing the same issue in R versus Peterkin, ex p Soni (1972) Imm AR 253 Lord Widgery CJ had this to say:

> " Where Parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the applicant complains this court should in my judgement as a rule allow the appellate machinery to take its course. The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere."

32. The Supreme Court in the case of United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others [2021] eKLR observed thus;

> " We also take judicial notice that the superior courts' findings on jurisdiction is in harmony with our finding in Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others; SC Petition No 3 of 2016, [2019] eKLR, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We

emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance."

33. Thus, both statute and precedent point to the conclusion that it is pertinent for an aggrieved party to embrace alternative remedies including appellate procedures before moving court for judicial review remedies.

34. The reviewing courts will always be conscious that in considering whether a public body may have abused its powers, they must not abuse their own by entertaining matters which they otherwise ought not to have entertained.

35. Having established as much a more fundamental question is whether, it would be open to the Applicants, in the first place, to invoke the judicial review jurisdiction of this Honourable Court instead of filing an appeal.

36. Rule 23(1) of The Sports Disputes Tribunal Rules, 2022 provides thus;

    1. Any party dissatisfied with a decision of the Tribunal may lodge an appeal to the Court of Arbitration for Sport if the rules or policies of the relevant International Federation or National Sports Organization so provide.

37. It has been observed by scholars that the founding purpose of the Court of Arbitration for Sport (CAS) was to take international sports disputes out of national courts and provide a highly specialized forum where those disputes could be heard and decided, quickly and inexpensively, according to a flexible procedure.

38. The grant of leave as sought will be of no consequence in the premises.

39. Having determined that this court lacks jurisdiction then I am unable to determine the other issues and I so hold.

Order;

The Applicants' application is struck out with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

J.M. CHIGITI (SC)

JUDGE