



**Tanui & 9 others v Athletics Kenya (Sued as an Organization and through its officials Lt Gen (Rtd) JK Tuwei, Paul Mutwiii & MT David Miano) & 4 others (Petition 499 of 2016) [2024] KEHC 2255 (KLR) (Constitutional and Human Rights) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2255 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 499 OF 2016**

**LN MUGAMBI, J**

**MARCH 7, 2024**

**BETWEEN**

**MOSES TANUI ..... 1<sup>ST</sup> PETITIONER  
JULIUS KORIR ..... 2<sup>ND</sup> PETITIONER  
JULIUS KARIUKI ..... 3<sup>RD</sup> PETITIONER  
CHRISTOPHER KOSGEI ..... 4<sup>TH</sup> PETITIONER  
WILSON BOIT ..... 5<sup>TH</sup> PETITIONER  
SUSAN SIRMA ..... 6<sup>TH</sup> PETITIONER  
LEAH MALOT ..... 7<sup>TH</sup> PETITIONER  
NIXON KIPROTICH ..... 8<sup>TH</sup> PETITIONER  
HOSEA KOGO ..... 9<sup>TH</sup> PETITIONER  
MARY CHEMWENO ..... 10<sup>TH</sup> PETITIONER**

**AND**

**ATHLETICS KENYA (SUED AS AN ORGANIZATION AND THROUGH ITS  
OFFICIALS LT GEN (RTD) JK TUWEI, PAUL MUTWIII & MT DAVID  
MIANO) ..... 1<sup>ST</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF SPORTS, CULTURE &  
ARTS ..... 2<sup>ND</sup> RESPONDENT  
REGISTRAR OF SPORTS ..... 3<sup>RD</sup> RESPONDENT  
REGISTRAR OF SOCIETIES ..... 4<sup>TH</sup> RESPONDENT**



## JUDGMENT

### Introduction

1. The petition dated 25<sup>th</sup> November 2016 was amended on 17<sup>th</sup> October 2017 and subsequently re – amended on 22<sup>nd</sup> June 2018. The petition is supported by the 1<sup>st</sup> petitioner’s affidavit dated 22<sup>nd</sup> June 2018.
2. The gravamen of the petition revolves around the process undertaken in revising the Athletics Kenya constitution. The Petitioner questions the Registrar of Sports decision to issue the 1<sup>st</sup> respondent with the Certificate of Registration as envisaged under Section 49(1) of the *Sports Act* alleging that the respondents violated Articles 10, 21, 27, 28, 35, 36, 47 and 50 of *the Constitution*.
3. The petitioners accordingly seek the following reliefs against the respondents:
  - a. A declaration that by dint of Article 36 of *the Constitution* as read with Section 46 of the *Sports Act*, all athletes including the petitioners are entitled to be members of the 1<sup>st</sup> respondent in their individual capacity.
  - b. A declaration that *the constitution* of Athletics Kenya envisaged under Section 46 of the *Sports Act* is subject to Article 6 of *the Constitution* in terms of regional representation/branches.
  - c. A declaration that *the constitution* of Athletics Kenya registered under the *Societies Act* lapsed on 1<sup>st</sup> August ,2014 upon the expiry of the one-year period prescribed by Section 49(1) of the *Sports Act*,2013.
  - d. A declaration that by dint of Articles 36 and 81 of *the Constitution* as read with Section 46 of the *Sports Act* and the Second Schedule thereof the 1<sup>st</sup> respondent is enjoined to consult all the stakeholders in drawing its constitution and have the same adopted and/or ratified through the direct voting of all members.
  - e. A declaration that by dint of Articles 36 and 81 of *the Constitution* as read with Sections 46 and 49 of the *Sports Act* and the Second Schedule thereof the current officials and Executive Committee of the 1<sup>st</sup> respondent are not lawfully in office.
  - f. A declaration that by dint of Articles 36 and 81 of *the Constitution* as read with Sections 46 and 49 of the *Sports Act* and the Second Schedule thereof the 1<sup>st</sup> respondent’s constitution made, adopted and/or ratified on 27<sup>th</sup> April 2016 is illegal, null and void ab initio.
  - g. An order of certiorari be issued to quash the 1<sup>st</sup> respondent’s constitution amended by members of its Annual General Meeting on 27<sup>th</sup> April,2016 purportedly to bring it in harmony with the *Sports Act*,2013.
  - h. An order of permanent injunction be issued to restrain the 2<sup>nd</sup> respondent from registering and issuing a registration certificate to the 1<sup>st</sup> respondent on the basis of the amended constitution adopted and approved during the Annual General meeting held on 27<sup>th</sup> April 2016.
  - i. An order of mandatory injunction be issued to compel the officials and Executive Committee Members of the 1<sup>st</sup> respondent to relinquish or otherwise vacate their respective offices by dint of Sections 46 and 49 of the *Sports Act*, read with Articles 36 and 81 of *the Constitution*.



- j. An order of mandatory injunction be issued to compel the 1<sup>st</sup> respondent to make a new constitution to be ratified by direct vote of all members that comply with the Second Schedule of the [Sports Act, 2013](#).
- k. A declaration that the constitutional review process undertaken by the 1<sup>st</sup> respondent pursuant to the directive referred to in the 1<sup>st</sup> respondent's advocate's letter dated 13<sup>th</sup> May 2016 has violated the petitioners' rights and freedom under Articles 27, 36 and 81 of [the Constitution](#).
- l. This Court be pleased to issue an order of certiorari to quash the Certificate of Registration issued on 18<sup>th</sup> December 2017 by the 3<sup>rd</sup> respondent to the 1<sup>st</sup> respondent registering it as a National Sports Organization.
- m. The petitioners be paid damages for compensation of violation of their rights under Articles 27, 28, 35, 36, 47 and 50 of [the Constitution](#).
- n. The costs of this petition be borne jointly and severally by the respondents.

### **The Petitioners' Case**

- 4. In November 2015, the 1<sup>st</sup> respondent commenced the process of reviewing its constitution so that its provisions can be compliant with [the Constitution](#) of Kenya and the [Sports Act](#). This process involved a number of meetings held to discuss the amendments to [the constitution](#). The main one was an Annual General Meeting (AGM) scheduled to take place on 27<sup>th</sup> April, 2016 which approved [the constitution](#) on that very day. The former constitution had been enacted under the [Societies Act](#) prior to the enactment of the [Sports Act, 2013](#).
- 5. It is the Petitioner's contention that the decision taken to amend the 1<sup>st</sup> respondent's constitution was null and void for it was in breach of [the Constitution](#) and the [Sports Act](#). The petitioners assert that for the 1<sup>st</sup> respondent's constitution to comply with these laws, amending it was not the solution, instead a new constitution ought to have been enacted and cited several factors.
- 6. Firstly, that its constitution having been enacted under the [Societies Act](#) could not be amended to bring into line with the [Sports Act](#). They asserted that under Sections 46 and 49 of the [Sports Act](#) as read with Articles 10, 36 and 81 of [the Constitution](#), the 1<sup>st</sup> respondent's members and leaders registered and elected under the [Societies Act](#), had no right or power to amend their constitution in line with Section 46 of the [Sports Act](#).
- 7. Further, in respect of clause 45 in the 1<sup>st</sup> respondent's constitution, the petitioners asserted that [the constitution](#) can only be altered by a special resolution passed at an AGM. This clause is deemed to be restrictive, narrow and not democratic. This is because the same does not include the views and concerns of other stakeholders in the industry, only views of persons who are members. The petitioners contend that this is in breach of the principle of involvement and consultation as provided in [the Constitution](#). Likewise, in breach of Articles 6 and 81 of Constitution because the 1<sup>st</sup> respondent's constitution should be amended by all members of the Federation as drawn from the 47 counties.
- 8. It is further contended that the 1<sup>st</sup> respondent by initiating this process violated the rights protected under Articles 10, 21, 27, 28, 35, 36, 47 and 50 of [the Constitution](#) having regard to Section 46(6) of the [Sports Act](#), which requires that all national sports organizations registered under the Act be open to the public in terms of leadership, activities and membership.



9. Moreover, that the 3<sup>rd</sup> to 5<sup>th</sup> respondents failed to comply with their duty under clause 21 that requires the rights of the stakeholders particularly the athletes are respected, protected and promoted in the establishment, management, operations and governing organs in the industry.
10. It is their case thus that the amendment of the repealed constitution was an illegal scheme by the 1<sup>st</sup> respondent to re – launch the repealed constitution and maintain the status quo. Considering the stated averments, the petitioners contend that the 1<sup>st</sup> respondent is not entitled to the registration and issuance of a Certificate of Registration certificate.
11. The petitioners additionally aver that despite the conservatory orders issued by this Court on 30<sup>th</sup> November 2016 and subsequently 27<sup>th</sup> April 2017, restraining the 1<sup>st</sup> respondent from undertaking the constitutional review process and adopting the amended constitution, the 3<sup>rd</sup> respondent in contempt of these orders proceeded to issue the 1<sup>st</sup> respondent the Certificate of Registration on 18<sup>th</sup> December 2017. For this reason, the petitioners assert the 1<sup>st</sup> and 3<sup>rd</sup> respondents’ actions are were intentionally geared towards disregarding the law and so an abuse of power.

### **1st Respondent’s Case**

12. In reply to the re-amended petition, the 1<sup>st</sup> respondent filed a replying affidavit by LT. Gen. (RTD) Jackson K. Tuwei sworn on 16<sup>th</sup> September 2020. He reiterated the contents of his affidavits dated 24<sup>th</sup> January 2017, 5<sup>th</sup> May 2017 and 28<sup>th</sup> February 2018 to the petition and amended petition.
13. He deposed that the 1<sup>st</sup> respondent was registered under the Societies Act as the governing body in Kenya for Athletics and is affiliated to the International Association of Athletics Association (IAAF). The affairs of the 1<sup>st</sup> respondent are regulated by its constitution. Upon enactment of the Sports Act, 2013, all sports organizations were required to registered under the Act and thereafter be issued with a Certificate of Registration. In compliance the 1<sup>st</sup> respondent lodged its application on 20<sup>th</sup> July 2014.
14. Following this, the 1<sup>st</sup> respondent embarked on the process of amending its constitution to be in line with the Constitution and the Sports Act. The 1<sup>st</sup> respondent’s Executive Committee appointed a constitutional review sub-committee on 11<sup>th</sup> November 2015 so as to receive the views and proposals on the intended amendments. In view of their stakeholders they issued notices to all branches to submit their views on the process of amendment. Secondly by an advertisement in the print media, the 1<sup>st</sup> respondent invited its members, athletes and stakeholders to submit their views and comments on the same. The final draft was prepared after all the views had been received and considered.
15. He stated that Clause 45.1 in the 1<sup>st</sup> respondent’s constitution provided for amendments to the constitution by a Special Resolution. Accordingly, by a Notice dated 6<sup>th</sup> April 2016, the 1<sup>st</sup> respondent convened the AGM on 27<sup>th</sup> April 2016 with one of the agendas being the intended amendment to the constitution. The amended constitution was passed on the same day to align it with the dictates of the Sports Act.
16. He stated that the Court Order dated 30<sup>th</sup> November 2016 restrained the 1<sup>st</sup> respondent from undertaking the constitutional review process and passing the new constitution when in fact the process had been already been completed and constitution adopted on 27<sup>th</sup> April 2016.
17. The 1<sup>st</sup> respondent further avers that the 3<sup>rd</sup> respondent on 18<sup>th</sup> December 2017 issued it with a Certificate of Registration. The 3<sup>rd</sup> respondent in addition outlined a number of conditions being: it complies with the Sports Act; reviews its constitution in line with the Constitution, the Sports Act and the international law; it holds an election within 90 days from the date of registration and it develops



strategic plans. The 1<sup>st</sup> respondent was able to comply with all the conditions save for carrying out the elections due to the existing court orders.

18. He asserted that according to the *Sports Act*, any person aggrieved by the decision of the 3<sup>rd</sup> respondent is required to lodge an appeal first with the 3<sup>rd</sup> respondent and if further dissatisfied, lodge an appeal with the Sports Disputes Tribunal. In light of this, the 1<sup>st</sup> respondent contends that the petitioners' prayers on this issue is a call for this court to usurp the 3<sup>rd</sup> respondent's mandate. Nevertheless, it is noted that contrary to the petitioner's allegation, no orders were issued by the Court against the 3<sup>rd</sup> respondent.
19. He further contends that the instant petition was filed in bad faith and geared towards sabotaging its affairs. This is because first none of the petitioners submitted or tried to submit their views and comments during the public participation process. Additionally, he avers that its membership is open to all Kenyans yet the petitioners who are former athletes have chosen not to register as its members.
20. According to the 1<sup>st</sup> respondent, the petitioners' underlying intention as seen under Prayers (e), (i) and (j) is the removal of the 1<sup>st</sup> respondent's Executive Committee members. He as well asserts that the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> petitioners' state that they were not aware of the existence of the instant petition. They as such seek to have their names struck out. It is their case therefore that the petition ought to be dismissed.

### **2nd, 3rd and 5th Respondent's Case**

21. In response the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents filed a replying affidavit to petition by Rose M.N. Wasike, the 3<sup>rd</sup> respondent, sworn on 17<sup>th</sup> July 2017. They did not file further affidavits to the amended and re-amended petition.
22. She states that all disputes relating to registrations of the sports organizations under Section 58 and 59 of the *Sports Act* are supposed to be adjudicated on by the Registrar of Sports and if a party is dissatisfied by the decision appeal to the Sports Disputes Tribunal.
23. She depones that, the 1<sup>st</sup> respondent in compliance with Section 49 and 50 of the *Sports Act*, submitted their application for registration and met the requirements. On the interim, the 1<sup>st</sup> respondent and other sports organizations were issued with transitional letters and not certificates. Subsequently, the 3<sup>rd</sup> respondent started issuing the Certificates of Registration, after the process of registration was gazetted in September 2016.
24. She avers that the 3<sup>rd</sup> respondent and the Commissioner for Sports were invited by the 1<sup>st</sup> respondent to participate in the process of amending their constitution. During the process, she guided the 1<sup>st</sup> respondent on the key principles that were to be adhered to in line with *the Constitution* and the *Sports Act*. She also notes that while participating in the process, she encountered the 1<sup>st</sup> petitioner who was also part of the team that discussed the amendment process.
25. She further informs that the 1<sup>st</sup> respondent being among the successfully transitioned sports organization, its officials at the time were also transitioned in the interim. In view of this, an election was expected to be done at the expiry of their term in line with the Second Schedule of the *Sports Act*. She deposed that the sports organizations whose transition was not successful under Section 50 of the Act were the only ones that were required to conduct fresh elections for their officials.
26. To this end, she affirms that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents upheld their mandate lawfully. She contended that the petition lacks merit and should be dismissed.



#### 4th Respondent's Case

27. In like manner the 4<sup>th</sup> respondent in reply, filed its replying affidavit to the petition by Anne Mwangi sworn on 20<sup>th</sup> January 2017. The 4<sup>th</sup> respondent did not file further responses to the amended and re-amended petition. The 4<sup>th</sup> respondent also did not file submissions.
28. She stated that the 1<sup>st</sup> respondent was registered on 3<sup>rd</sup> October 2008 and issued with a Certificate of Registration No.28657. The 4<sup>th</sup> respondent takes issue with its joinder in these proceedings as it no longer regulates registration of sports organization, sports federations and clubs.
29. This Registration is now undertaken under the *Sports Act*, 2013 and the Sports Registrar Regulations, 2016. She notes that the 3<sup>rd</sup> respondent vide a letter 15<sup>th</sup> September 2014, requested all the registered Sports Organizations Certificates, for the purpose of the transition and the fresh registration under the *Sports Act*, which she complied with.
30. For this reason, she states that the petitioners have failed to prove their case against the 4<sup>th</sup> respondent and prays that the Court dismiss the petitioners case against it and expunge its name from the Court record.

#### Parties' Submissions

##### Petitioners' Submissions

31. On 11<sup>th</sup> November 2020, Kinoti and Kibe Company Advocates filed submissions for the petitioners. Counsel sought to discuss a number of issues: First the legality of the transition and the repealed constitution; the constitutional review process; whether this Court should quash the Certificate of Registration issued by the 3<sup>rd</sup> respondent to the 1<sup>st</sup> respondent and finally, whether the petitioners are entitled to the relief sought.
32. On the first issue, Counsel submitted that the 1<sup>st</sup> respondent's constitution lapsed on 1<sup>st</sup> August 2014 when they were required have applied for Registration with the 3<sup>rd</sup> respondent as per Section 49(1) of the *Sports Act*. This is because *the constitution* having been enacted under the *Societies Act* could not be converted to a new constitution under the *Sports Act*. For this reason, Counsel stated that *the constitution* submitted during the registration process, was invalid and further incapable of being amended to conform with the *Sports Act*.
33. Moreover, Counsel relying on the averments in the petitioners' case submitted that the constitutional review process undertaken by the 1<sup>st</sup> respondent was not democratic. This is since it failed to uphold the principles of participation as envisaged under *the Constitution*. According to Counsel the 1<sup>st</sup> respondent's Committee shielded the process to ensure that only select delegates, 68 in number, participated in the AGM that amended and adopted the new constitution. It is their case thus that the delegates system adopted by the 1<sup>st</sup> respondent to amend its constitution was not in compliance with Article 36 of *the Constitution* as read with Section 46(6) and the Second Schedule of the *Sports Act*. Reliance was placed in Timothy M Njoya & 6 others v Attorney General & 3 others [2004]eKLR where it was held that:

“if the process of constitutional review is to be truly people driven, "Wanjiku" (the mythical common person) must give her seal of approval, her very imprimatur to the proposed Constitution. If it is to have her abiding loyalty and reverence, it must be ratified by her in a referendum.”



34. Turning to the second issue, Counsel submitted that the constitutional review process did not adhere to the public participation principle set out under Article 10 of *the Constitution*. This is because the process did not involve the relevant stakeholders and the public. Reliance was placed in *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others Ex Parle Council of County Governors & another* [2017]eKLR where it was held that:

“The forms of facilitating an appropriate degree of participation in the lawmaking process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.”

35. On the third issue, Counsel submitted that the 3<sup>rd</sup> respondent in issuing the Certificate of Registration and attendant conditions, acted in contempt of the court orders issued by this Court on 30<sup>th</sup> November 2016 and subsequently 28<sup>th</sup> April 2017. This is primarily on not carrying out the constitutional review process and the elections. The 3<sup>rd</sup> respondent’s action is thus argued to have been ultra vires. In support Counsel cited the case of *Ibrahim Haji Isaak v Kenya Meat Commission & Another* [2013] eKLR where it was held that:

“a court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It is therefore to be complied with and it is to the interest of every person that this remains the case. To see it any other way is to open the doors to chaos and anarchy and the court will not be the one to open that door. If one is dissatisfied with an Order of the court the avenues for challenging it are also set out in the Law. Defiance is not an option.”

36. Counsel concluded by stating that the petitioner is entitled to the relief sought as envisaged under Article 23 of *the Constitution*. First an order of certiorari to quash the 1<sup>st</sup> respondent’s constitution. This is because it was amended contrary to Section 46 of the *Sports Act* as read with Articles 10,36 and 81 of *the Constitution*. It is said that, as a result of the 1<sup>st</sup> respondent’s decision their freedom from discrimination and right to dignity under Article 27 and 28 of *the Constitution* was also violated.

37. Reliance was placed in *Kenya Human Rights Commission v Non-Governmental Organizations Co-ordination Board* [2016]eKLR where it was noted that:

“The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades.”

38. Additional reliance was placed in *Dr. Samson Gwer & 5 Others v Kenya Medical Research Institute & 3 Others* [2014] eKLR and *Republic vs Minister for Transport & Communication & 5 Others ex parte Waa Ship Garbage Collector & 15 Others* [2004] eKLR.



## 1st Respondent's Submissions

39. The 1<sup>st</sup> respondent through Ochieng, Onyango, Kibet and Ohaga Advocates filed submissions and a list of authorities dated 23<sup>rd</sup> June 2021. The highlighted issues were: whether the petitioners properly invoked this Court's jurisdiction against the 3<sup>rd</sup> respondent; whether the 1<sup>st</sup> respondent transitioned lawfully; and whether the 1<sup>st</sup> respondent's constitution review process was unlawful.
40. Counsel on the first issue submitted that the Sports Acts in view of the 3<sup>rd</sup> respondent's decisions provides two channels for review. First an appeal of the impugned registration decision to the 3<sup>rd</sup> respondent under Section 45(1) and further if dissatisfied an appeal to the Sports Tribunal under Section 55. Counsel as such argued that the petitioners prayer that this court, order a new constitution to be enacted and the orders sought against the 3<sup>rd</sup> respondent are tantamount to usurping the 3<sup>rd</sup> respondent's mandate as prescribed in the *Sports Act*.
41. Moreover, Counsel argued that, the petitioners aggrieved by the adoption of the new constitution ought to have moved the 3<sup>rd</sup> respondent to cancel its status. Counsel added further that the petitioners challenge to the 1<sup>st</sup> respondent's transitional registration, also ought to have been presented before the Sports Tribunal as provided under Sections 58 and 59 of the *Sports Act*, not directly to the court.
42. On whether the 3<sup>rd</sup> respondent exercised her power lawfully, Counsel submitted that the Certificate of Registration issued on 18<sup>th</sup> December 2017 was issued under the dictates of Section 47 of the *Sports Act*. A challenge to this decision as espoused in the Act ought to be appealed first before the 3<sup>rd</sup> respondent and if further aggrieved before the Sports Tribunal. Accordingly, Counsel asserted that the petitioners' case was unjustly geared towards curtailing the 3<sup>rd</sup> respondent's mandate.
43. Turning to the Second issue, Counsel recapping the facts of this case, submitted that the 1<sup>st</sup> respondent in compliance with the transitional requirements under Section 49 of the *Sports Act* filed its application with the 3<sup>rd</sup> respondent on 30<sup>th</sup> July 2014. Having satisfied the obligatory requirements, this application was consequently approved by the 3<sup>rd</sup> respondent who indicated that it would be registered as a sports organization. Counsel as such argued that the 1<sup>st</sup> respondent successfully transitioned in accordance with the law.
44. Reliance was placed in *Joshi Jerome & 2 Others v Kenya Swimming Federation & 10 Others* [2016] eKLR where it was held that:
- “Under Section 46 of the *Sports Act*, 2013 a sports organization is not to operate as a sports club, county or national sports organization unless registered under the Act.”
45. Counsel on the 3<sup>rd</sup> issue submitted that indeed the 1<sup>st</sup> respondent's constitutional review process was lawful as well detailed in the 1<sup>st</sup> respondent's replying affidavit. The affidavit in a nutshell makes known that the process was transparent and upheld the public participation principles. The participation exercise was further confirmed by the 3<sup>rd</sup> respondent in its affidavit.
46. Additionally, Counsel pointed out that the amended constitution would still be subjected to the scrutiny of the 3<sup>rd</sup> respondent once submitted and if found to be in breach of the *Sports Act*, the 3<sup>rd</sup> respondent has the power to order compliance. Consequently, it is counsel's argument that the petitioners have not proved how the amended constitution is in breach of the *Sports Act* and especially the mandatory provisions of the Second Schedule.



## 2nd, 3rd and 5th Respondents' Submissions

47. In the submissions dated 22<sup>nd</sup> July 2021 filed by the 5<sup>th</sup> respondent, Counsel submitted that chiefly the issues for determination are: whether the petitioners have made a case for grant of a permanent injunction against the 3<sup>rd</sup> respondent and whether their rights were indeed violated.
48. On the first issue, Counsel submitted that the sought injunction order cannot be granted in view of Section 16 of the [Government Proceedings Act](#). Reliance was placed in *Kariuki Muigua T/A Kariuki Muigai and Company Advocates v Commissioner of VAT and 2 others* [2012] eKLR where it was held that:
- “This court can issue orders whose effects would be to stop the respondents from carrying out their statutory obligations. The defendants must continue with their obligations.”
49. Furthermore, Counsel submitted that the petitioner had not established how the 3<sup>rd</sup> respondent acted outside its mandate. In support Counsel cited the case of *East African Industries v Trufoods* [1972] EA 420 where it was held that:
- “It is that first, the applicant must establish a prima facie case with a probability of success at the trial; secondly that an interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not adequately be compensated in damages and thirdly that if the court is in doubt, it will decide the application on the balance of convenience.”
50. Counsel submitted that the 3<sup>rd</sup> respondent in executing its mandate determined that the 1<sup>st</sup> respondent’s application had complied with the requirements under Section 49 and 50 of the [Sports Act](#) and hence was one of the sports organizations that successfully transitioned under the Act. As such it was argued that the petitioner had not proved otherwise. Counsel stressed that the court ought to allow statutory bodies to conduct their statutory mandate if the acts are within the confines of the law.
51. Moving to the second issue, Counsel submitted that the petitioners had failed the test set out in *Anarita Karimi Njeru v Republic* [1976 – 1980] 1 KLR 1272. Moreover, that the evidentiary burden to prove the alleged rights were violated rested on the petitioner as held in *Ndyanabo v Attorney General (Civil Appeal No.64 of 2001)* [2002] TZCA 2. Counsel asserted that the petitioners had failed to show which of the respondents’ actions violated the alleged constitutional rights. The petition was thus deemed to lack merit and hence eligible for dismissal.

## Analysis and determination

52. The petitioners’ case revolves around a number of issues. To begin with they challenge the status of the 1<sup>st</sup> respondent constitution in the light of the [Sports Act](#). According to the petitioners, the 1<sup>st</sup> respondent’s constitution could not be transitioned from the [Societies Act](#) to the [Sports Act](#). They contended that the valid action was enactment of a new constitution.
53. The gravamen of this Petition is based on the 3<sup>rd</sup> respondent’s statutory decision to regularize the 1<sup>st</sup> respondent under the [Sports Act](#). First by accepting and approving its application for registration under the [Sports Act](#).
54. The petitioners contended in undertaking the said action, the 3<sup>rd</sup> respondent was in breach of the court orders that were issued in the case.



55. Also, in contention was that the 1<sup>st</sup> respondent's constitutional amendment process. The Petitioner assailed the process on the basis that it was done in violation of Articles 10 and 36 of the Constitution by alleging that it was done without actively engaging the primary stakeholders, namely the athletes and the public. The Petitioners asserted that the respondents' actions as a whole violated their rights under Articles 27, 28, 35, 36, 47, 50 and 81 of the Constitution.
56. The respondents fervently opposed the petitioners' case. Essentially, the respondents' affirmed that the transitional process was executed lawfully as dictated by the Sports Act. Further that the 1<sup>st</sup> respondent was emphatic that the public participation was included as key component of the constitutional review process that was undertaken to amend its constitution. The 1<sup>st</sup> respondent faulted the Petitioners for instituting this dispute insisting that it premature as they did not comply with the dispute resolution process in the Sports Act.
57. The 3<sup>rd</sup> respondent averred that the petitioners want to restrict its mandate which it is empowered to perform by the Sports Act. The 3<sup>rd</sup> respondent stated that any grievance against its decision is supposed to be appealed before the Sports Tribunal. The 3<sup>rd</sup> respondent further contended that the petitioner's case does not meet the threshold set out in the Anarita Karimi Case (supra) as the petitioners did not show how they violated the cited rights.
58. It is my considered view that the issues that arise for determination in this matter are as follows:
- i. Whether method adopted by the 1<sup>st</sup> Respondent to transition to the Sports Act by regularizing its registration through amendment of its constitution made under the Societies Act instead of the making of a new constitution is legally tenable.
  - ii. Whether under the exhaustion doctrine, this Court has jurisdiction to entertain the instant Petition.
  - iii. Whether the 1<sup>st</sup> respondent's constitutional review process violated the public participation principle for failing to involve stakeholders thereby violating Article 10 of the Constitution.
  - iv. Whether the petitioners' rights under Articles 10, 27, 28, 36, 47, 50 and 81 of the Constitution were violated by the respondents.
  - v. Whether the petitioners are entitled to the relief sought.

**1. Whether path adopted by the 1<sup>st</sup> Respondent of transitioning to the Sports Act by regularizing its registration through amendment of its old constitution that was made under the Societies Act rather than the making a new constitution is legally tenable.**

59. On this issue, the Petitioners contended that the 1<sup>st</sup> Respondents Constitution which had been existence was made under the Societies Act and thus it effectively lapsed on 1<sup>st</sup> August, 2014. That amending it instead enacting another one did not comply with the requirements of Section 49 (1) of the Sports Act which required the 1<sup>st</sup> Respondent to apply for the new registration.
60. In response, the respondent unanimous response was that the constitution of the 1<sup>st</sup> Respondent was validly transitioned from the Societies Act to the Sports Act pursuant to section 49 and 50 of the Sports Act.
61. The procedure for transition of sports organizations from the Societies Act to the Sports Act is captured under Section 49 which provides as follows:

Transition of existing sports organizations



1. A sports organization, which was duly registered under the *Societies Act* (Cap. 108) and existing immediately before the commencement of this Act shall be required to apply for registration under this Act within one year after the commencement of this Act.
  2. A sports organization, which was duly registered under the *Societies Act* (Cap. 108) and existing immediately before the commencement of this Act shall not be deemed to be an unlawful sports organization before the period prescribed under subsection (1) has expired.
  3. An existing sports organization that does not apply for registration within the time prescribed in subsection (1), shall not be recognized as a sports organization for the purposes of this Act: Provided that an existing sports organization in respect of which—
    - a. an application for registration has been made by it under subsection (1) and has not been rejected; or
    - b. an appeal has been lawfully made under this Act and remains undetermined, shall continue to be recognized as a sports organization for the purposes of this Act.
62. This process is facilitated by the 3<sup>rd</sup> respondent whose mandate is spelt out under Section 45 reads as follows:
1. There shall be an office of the Sports Registrar which shall be an office within the Public Service.
  2. The Public Service Commission shall appoint the Sports Registrar who shall be—
    - a. in charge of the office of the Sports Registrar;
    - b. responsible for the registration and regulation of sports organizations and multi-sports bodies representing sports organizations at the national level, in accordance with the provisions of this Act;
    - c. responsible for the matters relating to the licensing of professional sports and professional sports persons in accordance with the provisions of this Act; and
    - d. responsible for the arbitration of registration disputes between sports organizations.
  3. The Registrar shall keep and maintain a register of the registered sports organizations and such other particulars relating to the registered sports organizations as may be prescribed.
  4. The Registrar shall issue licences for professional sports in accordance with the regulations and the requirements that the Cabinet Secretary may prescribe and any other relevant law.



63. The Court in *Christine Joshi Jerome & 2 others v Kenya Swimming Federation & 10 others* (2016) eKLR considered the implication of transition clause in the [Sports Act](#) and what was the implication of the same on the existing Sports Organizations. The Court held thus:

“... Under Section 46 of the [Sports Act](#) 2013, a sports organization is not to operate as a sports club, county or national sports organization unless registered under the Act. The application is to be made to the Sports registrar. Upon determination of the application, if successful a registration certificate would be issued. The application was to be made within one year of the commencement of the Act for the sports club or organization to be recognized under the Act, otherwise the sports club or organization would not be recognized under the Act. However, under Section 49 of the Act, once the application was made and not rejected or rejected and the appeal mechanisms had not been fully exhausted by the concerned organization then the recognition would still subsist.

It is relatively clear that a party will be deemed to have complied even if no certificate has been issued signaling registration so long as the application for registration had been made. The affidavit evidence before me reveals that the 1st Respondent has made an application to the Sports Registrar. The application was duly acknowledged. It is unclear when the application was made. It is however clear that the application is being analyzed and processed. It is being considered. It has not been rejected...”

64. The rationale behind transitional clauses in legislation is to obviate confusion and prevent the possibility of creating a vacuum that a new law might bring if not properly managed. Transitional clauses ensure such changes are introduced in a smooth and coordinated manner. In *Timothy Njoya & 17 Others v Attorney General & 4 Others* [2013] eKLR the Court underscored the importance of transitional clauses by stating thus:

“...Transitional provisions are included in legislation in order to facilitate a change from the old regime to a new regime, or from an old law to a new law. Transitional provisions contain special arrangements or structures that will apply, for a limited period of time, as the changes brought about in the new law are being implemented and appreciated...”

65. The fact that the 1<sup>st</sup> Respondent was an existing Sport Organization under the [Societies Act](#) Cap 108 before the commencement of [Sports Act](#) is not in dispute. In that regard, it qualified to transition to the new Act, (the [Sports Act](#)) by complying with the transitional provisions contained in Section 49 of the Act.

66. What was required of it was to make an application being an existing Sports Organization to the Sports Registrar within one year of coming into effect of the [Sports Act](#). The [Sports Act](#) No. 25 of 2013 shows its date of commencement was 1<sup>st</sup> August, 2013. According to the Replying Affidavit of Jackson Tuwei sworn on 24<sup>th</sup> January, 2017 on behalf of the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent duly complied with this requirement by writing a letter dated 30<sup>th</sup> July, 2014 to the 3<sup>rd</sup> Respondent (the letter is annexure ‘JKT 3’) The 3<sup>rd</sup> Respondent vide its letter dated 24<sup>th</sup> February, 2015- JKT 4 and titled: “Transition of Existing Sports Organizations: Section 49 of the [Sports Act](#) of 2013 (Revised Edition 2013” acknowledged it. Paragraph 2, the letter reads:

’ ...You are therefore deemed to have been registered as a Sports Organization under [Sports Act](#) and you will continue to operate as such until the organization is issued with a certificate of registration or denied registration after due process of registration has been completed...”



The 3<sup>rd</sup> paragraph is advisory, it reads:

‘...You are however requested to continue with registration process to enable our office analyze your adherence to the Sports Act before issuing you with a certificate of registration or cancel your transition for failure of compliance to international and national standards governing sports and your sports discipline...’

67. The Petitioners guns are more particularly trained on registration part. The Petitioners contend that it cannot be done by amending the 1<sup>st</sup> Respondent old Constitution and presenting to form the basis of that registration as was done by the 1<sup>st</sup> Respondent. In paragraph 16 of the amended petition, the Petitioners aver:

‘...The Petitioners aver that the Constitution under which AK is to be registered cannot be made through amendment of its existing constitution but the envisaged constitution must be completely new constitution embodying the principles and values of 2010 Constitution including Article 81 thereof...’

68. The Court is thus called upon to resolve the above controversy. Does the process of amending its constitution fulfil the registration requirements of Section 46 of the Sports Act? It is necessary that I set out Section 46 in its entirety.

#### Registration of sports organizations

1. A body shall not operate as a sports organization unless it is registered under this Act.
2. The Registrar shall register sports organizations as either—
  - (a) a sports club;
  - (b) a county sports association; or
  - (c) a national sports organization.
3. An application for registration of a national sport organization shall—
  - a. be submitted to the Registrar; and
  - b. be in the prescribed form and shall specify—
    - i. the name of the sports organization;
    - ii. the category under which it is to be registered;
    - iii. the office-bearers of the applicant;
    - iv. the head office and postal address of the applicant;
    - v. sources of funding of the applicant;
    - vi. national and international affiliation, if any; and
    - vii. such other information as the Cabinet Secretary may prescribe.
4. An application for registration under this section shall be accompanied by—
  - a. a certified copy of the constitution of the applicant; and
  - b. such fees as the Cabinet Secretary may prescribe.



5. A constitution submitted under subsection (3) shall contain, as a basic minimum, the provisions set out in the Second Schedule.
  6. All national sports organizations registered under this Act shall be open to the public in their leadership, activities and membership.
  7. A certificate of registration issued under this section—
    - a. shall be conclusive evidence of authority to operate throughout the country as may be specified in the certificate of registration; and
    - (b) may contain such terms and conditions as the Registrar may prescribe.
69. My reading of both Section 49 and 46 is that transition of the existing Organizations into the new Act was ambulatory. It was only meant to preserve them temporarily and give them time to meet the new licensing requirements that had been introduced by the *Sports Act*. Those that failed to meet the conditions were not to get the certificates of registration. The fact that the 1<sup>st</sup> Respondent was legally transitioned as an existing sports organization was not confer it with the registration status under the *Sports Act*. New registration had to be done and a certificate under section 47 issued after being ascertained that it had conformed with all the legal requirements of the new *Sports Act* which would lead to issuance of a certificate of registration under Section 47 of the Act.
70. One of those requirements was Section 46 (6) specifically focusing on the National Sports Organizations. It was required that they ‘be open to the public in their leadership, activities and membership.
71. Another requirement was the one demanded by Section 46 (5) which required that *the Constitution* to be submitted for purposes of registration must contain, as a basic minimum, provisions set out in the Second schedule to the Act. These are:
- a. elections of officials and athletes’ representatives at the national, branch and sub-branch levels shall be done directly by club members;
  - b. only citizens of Kenya shall be eligible for election as the Chairperson, secretary or treasurer of a body at the national level;
  - c. the elections contemplated in paragraph (a) above shall be held at regular intervals after a period of between two years and four years, and persons elected as officials thereof shall consequently hold office as follows—
    - i. the Chairperson shall hold office for a term not exceeding four years, but is eligible for re-election for one more term;
    - (ii) any other official shall hold office for a term not exceeding four years, but is eligible for re-election for one more term.;
  - d. elections shall be held in accordance with the general principles for the electoral system as stipulated in Article 81 of *the Constitution*;
  - e. subscription to anti-doping policies and rules which conform with the World Anti-Doping Agency Code and compliance with the requirements set out in an anti-doping policy and rules of the National Anti-Doping Organization; and



- (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.
  - (g) that the election of officials at national, branch and sub-branch levels shall be done directly and only registered club members are entitled to vote at those elections;
  - (h) that the selection of the Kenyan team and the technical personnel shall be done in good time and transparently using fair criteria;
  - (i) that the criteria for authorisation and registration of sportspersons and sportspersons' representatives shall be codified, transparent and fair.
72. The 1<sup>st</sup> Respondent embarked on a review of its existing Constitution in order to meet these conditions. The 1<sup>st</sup> Respondent appointed a Constitutional Review Sub-Committee to receive views and proposals for the amendment of its existing Constitution. It says the Committee gathered the views from multiple stakeholders. It held its AGM in accordance with clause 45.1 of its Old Constitution to adopt the amendments and passed the amended constitution on 27/4/2016.
73. I have carefully studied the 1<sup>st</sup> Respondent's replying affidavit. In that process the 1<sup>st</sup> Respondent sent out notices to the branches informing them about the constitutional review exercise and asking the branches to coordinate the gathering of views from members and stakeholders in the respective branches (annexure JKT 6), an advertisement in the newspaper of 20/4/2016 was placed which not only invited its members, athletes, and other stakeholders to give their proposals on possible changes and even directing them where the old Constitution of Athletics Kenya could be downloaded from and where the views were to be channeled to (annexure JKT 7). The conclusion of that process was the presentation of the draft to the 1<sup>st</sup> Respondents Annual General Meeting on 27<sup>th</sup> April, 2016 which passed the resolution that came up with the revised and/or amended Constitution 1<sup>st</sup> Respondent that was presented to the 3<sup>rd</sup> Respondent for purposes of registration.
74. The Petitioner faulted the process insisting that Stakeholders ought to have been allowed to vote for the document. They claimed that the 1<sup>st</sup> Respondent hijacked the process by handpicking 68 delegates to perpetuate the maintenance of status quo. The 1<sup>st</sup> Respondent insisted that the vote on the amendments to its constitution could not be done by non-members.
75. Was the making of a new Constitution as opposed to submitting a revised one a specific requirement for registration under Section 46 of the *Sports Act* for existing Sports Organizations? Could stakeholders who were non-members be involved in the process of amending the 1<sup>st</sup> Respondents Constitution for purposes of meeting the registration requirements?
76. It is not in dispute that the *sports Act* underlines some of the basic requirements that must be met by the Constitutions of Sports Organizations which required incorporating certain specified fundamental principles.
77. Further, 46(6) requires all national organizations be open to the public in their leadership, activities and membership.
78. The Act does not prescribe that for compliance, the existing Organizations must undertake the process of rewriting their Constitutions afresh. What is mandatory is inclusion of certain conditions which could be attained by the process of review as opposed to the making of a completely new constitution.



79. The other issue raised by the Petitioners was that stakeholders, and not necessarily the members of the 1<sup>st</sup> Respondent ought to have been allowed to vote for the amendments to *the constitution* of the 1<sup>st</sup> Respondent. My take on this is that it is the members who constitute an organization. Non-members cannot have voting rights unless allowed by *the Constitution* of the Organization. It is only the people with constituting rights (its members) that can legally alter its Constitution. There was, however, one condition, the *Sports Act* requires Sports Organizations, especially the National Sports Organizations to be open to the public in their leadership, activities and the membership. In my considered view, this gives the general public a direct stake in National Sports Organizations which neither the members nor leadership of the organizations could not take away as it is a prescription of the law. The Constitutional requirement through which the public engagement is observed in a matter is by way of public participation which gives members of public an opportunity to make their contributions for consideration during the decision-making process of any organization in which it has a stake.
80. Consequently, although stakeholders who are non-members had no voting rights in regard to the amendments that were adopted by the 1<sup>st</sup> Respondents delegates at the AGM, the delegates had a duty to consider the inputs made by the public which the 1<sup>st</sup> Respondent Sub-Committee had gathered. The concern of this Court therefore will be whether there is evidence that the 1<sup>st</sup> Respondents delegates at the AGM considered the public/stakeholder views while making amendments to its constitution. That was the right the public/stakeholders had and not the voting rights as suggested by the petitioner.

## **2. Jurisdiction question- Whether the Petition is barred by the doctrine of non-exhaustion of remedies.**

81. The principle of exhaustion of remedies affirms that the ‘primary’ forum that a Statute designates for dispute resolution should be the first port of call before the jurisdiction of the Court can be invoked. Black’s Law Dictionary, 10<sup>th</sup> Edition defines and explains the rationale underlying the ‘exhaustion of remedies doctrine’ as follows:“...the doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure the courts will not be overburdened by cases in which judicial relief is unnecessary...”
82. The 1<sup>st</sup> Respondent faulted the Petitioners for ignoring the provisions of the *Sports Act* on dispute settlement. It pointed out that under the Act, the Petitioners ought to have lodged their grievance against their registration by the 3<sup>rd</sup> Respondent to the Sports Dispute Tribunal since what the Petitioner was keen on was to have it denied registration certificate by the 3<sup>rd</sup> Respondent.
83. The Sports Disputes Tribunal is established under Section 55 of the *Sports Act*. Its jurisdiction is spelt out in Section 58 as follows:

The Tribunal shall determine—

- a. appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including —
  - i. appeals against disciplinary decisions;
  - ii. (ii) appeals against not being selected for a Kenyan team or squad;
- b. other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear; and



(c) appeals from decisions of the Registrar under this Act.

84. In my humble view, this is not a dispute that could be resolved by either the 3<sup>rd</sup> Respondent (Sports Registrar) or the Sports Disputes Tribunal. The present dispute goes beyond the above legal prescriptions, it is not a dispute on registration per se, it raises a fundamental constitutional question of whether in making the decisions complained of, the interest of the public was adequately considered by the 1<sup>st</sup> Respondent. The doctrine of exhaustion of remedies is thus inapposite.

**3. Whether the 1<sup>st</sup> respondent's constitutional review process violated the public participation principle for failing to involve stakeholders thereby violating Article 10 of *the Constitution*.**

85. The Petitioner contended that in reviewing its constitution, 1<sup>st</sup> Respondent did not abide by the principle of public participation required by *the Constitution*. That, the 1<sup>st</sup> Respondent Committee shielded this process by ensuring that only 68 delegates who are its members participated in the Annual General Meeting to adopt the amendments to *the Constitution*. The Petitioner argued that this was in violation of Article 10 of *the Constitution* Section 46 (6) and the second schedule of the *Sports Act*.

86. The 1<sup>st</sup> Respondent countered the allegation of non-involvement of the non-members in adopting the amendment to its constitution. It explained that it appointed the Constitutional Review Sub-Committee on 11<sup>th</sup> November, 2015 to receive views and proposals in regard to the intended amendments. The sub-committee issued notices to all the branches to submit their views on the process of amendment and further that an advertisement was put in the print media whereby the 1<sup>st</sup> respondent invited its members and stakeholders including the 1<sup>st</sup> Petitioner who participated to submit their views before the final draft was received and considered. In line with clause 4.5 of its constitution, it issued a notice of AGM which convened on 27<sup>th</sup> April, 2016 and passed the amendments.

87. The *Sports Act* provides as follows in Section 46 (6):

“All national Sports Organizations registered under this Act shall be open to the public in their leadership, activities and membership.”

88. By requiring that National Sports Organizations to be open to the public in their leadership, activities and membership, it means that they are not only open to the public in terms of those who may be desirous of joining them but also they should also integrate the concept of public participation, a key constitutional requirement in making key policy decisions.

89. In the present Petition, the Petitioner alleges there was opaqueness in the manner in which the 1<sup>st</sup> Respondent carried out the process of review of its Constitution that it submitted for registration under the *Sports Act*. The 1<sup>st</sup> Respondent countered this by detailing that the process was fully participatory and involved all the major stakeholders including the 1<sup>st</sup> Petitioner who was a participant during the said process.

90. The concept of Public participation was explained by the Court in Republic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR where it was held:

“... it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating



the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

91. The guiding principles in establishing whether this principle was upheld were set out by the Supreme Court in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019]eKLR as follows:

“Guiding Principles for public participation

- (i) As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
- (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- (v) Public participation is not an abstract notion; it must be purposive and meaningful.
- (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- (ix) Components of meaningful public participation include the following:
  - a. clarity of the subject matter for the public to understand;
  - b. structures and processes (medium of engagement) of participation that are clear and simple;
  - c. opportunity for balanced influence from the public in general;
  - d. commitment to the process;



- e. inclusive and effective representation;
- f. integrity and transparency of the process;
- g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.”

92. The 1<sup>st</sup> Respondent went to great length to demonstrate how it went about carrying the public participation exercise. Through the letter dated 20<sup>th</sup> January, 2016 (annexed in replying affidavit of the Jackson Tuwei dated 24<sup>th</sup> January, 2017-JKT 6); it wrote to all its regions, it communicated in part as follows:

“...It is the request of the sub-committee that all regions make their submission on the proposed amendments to the current AK constitution. In its mandate the sub-committee will be guided by the following documents AK Constitution 2013 [Sports Act](#), 2013 Constitution of Kenya IAAF Constitution

The soft copies of the above documents have been sent to you via email. Attached you will also find a template that you can fill in, which will assist in collating the proposals easily. The submission should reach the National Secretariat by 12<sup>th</sup> February, 2016...”

93. Another piece of evidence on public participation was the newspaper advert of 20<sup>th</sup> April, 2016 directed to all its members, athletes and stakeholders (annexure JKT 7). Further, the AGM of 27<sup>th</sup> April which considered and passed the amendments to align the 1<sup>st</sup> Respondent Constitution with the [Sports Act](#) (Annexure JKT 8).

94. Perusing through the 1<sup>st</sup> Respondent’s affidavit, it is evident that on 14<sup>th</sup> April, 2016, at Cicada Hotel Eldoret, the Constitutional Review Sub-Committee met with coaches who gave their views. The meeting was attended by 50 people and the agenda no. 2 and 3 was, Brief Report -Constitutional Review Process and Coaches views and presentations. Some of those captured as having given their views on that particular day were, Mr. Mwitiga, Mr. Mutwii, Mr. Tiren and Mr. Katam. There was also a meeting of the Sub-Committee on 11<sup>th</sup> April, 2016 where the sub-committee met athletes in which agenda number 3 of the meeting that day was ‘Athletes views.’ Under athletes views, some of those who made presentations that day included Mr. Wilfred Bungei, Mr. Mutai, Mr. Ndegwa, Mr. Wilson Kipsang, Mr. Korir, Mr. Chelanga, Mr. Ochieng, Ms. Justina, Mr. Collins Kosgei, Mr. Salat, Mr. Benjamin Limo, Mr. Ambrose Kirwa, Mr. Valentine Olare, Mr. Victor Kigen, Mr. Kahiga, Ms. Dinah Onyango, Mr. Ngovi, Mr. Wilson Kipsang, Mr. Gilbert Kiptom, Hon. Wesley Korir to mention but a few. Among the issues raised to the committee included eligibility and voting rights of athletes, the need to incorporate athletes into the management of Athletics Kenya, the need for retired athletes to be considered for membership, the need to make athletes representative a competitive position, proposal for the affiliates to be based at county level and not in regions so as to be consistent with devolution arrangement, the need to treat coaches as stakeholders and to give them voting rights during annual general meetings and so forth.

95. There is thus evidence that the stakeholders (members of public) heeded the 1<sup>st</sup> Respondents call and came out overwhelmingly to make their contributions. However, the question that comes to my mind is whether these views were given due consideration by the 1<sup>st</sup> Respondent while amending its constitution? How did the 1<sup>st</sup> Respondent treat the views it had collected from the public?

96. In principle, the 1<sup>st</sup> Respondent had no obligation to take or adopt each and every view or concern received from the stakeholders and members of the public. However, there a duty cast on the 1<sup>st</sup>



Respondent to demonstrate the extent to which the stakeholders' views influenced its decisions and if not, why it failed to consider the same. The 1<sup>st</sup> Respondent did not bother to highlight the changes, if any, that were attributable to stakeholders contributions. Might that mean all the stakeholders views given were irrelevant? This question is also difficult to answer as the 1<sup>st</sup> Respondent did not provide any reasons for the same.

97. The 1<sup>st</sup> Respondent chose to effect mainly the basic minimum conditions required to be included in its Constitution by the *Sports Act*. In *British American Tobacco PLC* (supra) the Supreme Court underscored the significance of public participation by stating as follows:

“...public participation must be real, not illusory. It is not a cosmetic or public relations act. It is not a mere formality to be undertaken as a matter of course just to fulfil a constitutional requirement...”

98. Despite demonstrating that it undertook public participation, the 1<sup>st</sup> Respondent does even attempt to credit a singular amendment as the product of the public participation process. It only effected the specific conditions mandatorily required by the *Sports Act* as a basic minimum.
99. The public participation process raised fundamental concerns of inclusivity, democratic representations of key sections in the athletic discipline and enhancing transparency in selection of athletes to mention but a few. These were some of the concerns made by the public and stakeholders.
100. Considering the enormous influence the 1<sup>st</sup> Respondent wields on the athletics (by registration, it acquires a monopoly status as the only National Sports Organization in athletic discipline by dint of section 47 (1) of the *Sports Act*); if such an Organization is allowed to glaringly ignore the concerns of the public, the benefit to the public envisaged by the transformative provisions of the *Sports Act* will never be realized as the Organization will forever remain beholden to serve the interests of a few.
101. A public participation process whose purpose ends at collection of the views is meaningless. That failure to accord due consideration to public views and concerns does not uphold the principle of openness to the public as advocated by Section 46 (6) of the *Sports Act*. It also violated the principal aim underlying the requirement for public participation under Article 10 (2) of *the Constitution*. The Petition succeeds on this ground.

## Reliefs

102. The remaining issue is whether the petitioners are entitled to the reliefs sought. Article 159 (2) (e) gives this Court authority to ensure that the purpose and principles of this Constitution are protected and promoted. Where the Court finds a violation of *the Constitution*, it has to ensure that it grants an appropriate relief that upholds the Constitutional rights or its principle is granted. In granting a constitutional relief, the Court is not confined or restricted to what the successful party prayed for, but has the liberty to consider a suitable remedy to redress a Constitutional violation. As was held in the South African case of *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17;

“(45) The determination of appropriate relief...calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right



infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case...”

103. Guided by the above authority, I grant the following reliefs:

- a. Given that the act of registration confers the 1<sup>st</sup> Respondent monopolistic status as the only registered National Sports Organization in the athletics discipline by dint of Section 47 (1) of the *Sports Act*, a declaration be and is hereby issued that the 1<sup>st</sup> Respondent has a duty to the public to conduct its affairs having due regard to public interest and is thus enjoined by Article 10 (2) of *the Constitution* and Section 46 (6) of the *Sports Act* to hold consultation with the public and demonstrably give due consideration to concerns raised by the public while formulating or reviewing its policy documents.
- b. An order be and is hereby issued directing the 1<sup>st</sup> respondent to carry out further review of its Constitution adopted and/or ratified on 27<sup>th</sup> April 2016 within the next 90 days of making of this order with a view to considering public views gathered during its last review for purposes of enhancing inclusivity, democratic representation of various players in the athletics discipline into the 1<sup>st</sup> Respondent’s top decision-making organ and to guarantee enhanced transparency in areas of concern raised by the public/stakeholders.
- c. An order be and is hereby issued that by dint Sections 46 and 49 of the *Sports Act* and the Second Schedule thereof, the officials and Executive Committee of the 1<sup>st</sup> respondent who have been in office for a cumulative period of 8 years since the coming into force of the *Sports Act* have served their terms in full and must forthwith vacate office. They shall be ineligible to contest for any position in the organization.
- d. Each Party to bear its own costs of this Petition.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2024.**

.....\*\*

**L N MUGAMBI**

**JUDGE**

