Mghendi v Sports Disputes Tribunal; Oriku & 15 others (Interested Parties) (Judicial Review E001 of 2024) [2024] KEHC 3220 (KLR) (4 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3220 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW E001 OF 2024

OA SEWE, J

APRIL 4, 2024

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF DIRECTIONS & ORDERS OF THE SPORTS DISPUTES TRIBUNAL DATED 23RD JANUARY 2024 IN SDTSC NO. E006 OF 2021

AND

IN THE MATTER OF SECTION 58 OF THE SPORTS ACT, 2013

AND

IN THE MATTER OF THE JUDGMENT OF HON. JUSTICE NGAAH DATED 14TH JULY 2023 IN NAIROBI HCJR APPLICATION NO. 5 OF 2023

AND

IN THE MATTER OF SECTION 5 OF THE JUDICATURE ACT, CAP 8 OF THE LAWS OF KENYA

BETWEEN

GABRIEL MGHENDI.....APPLICANT

VERSUS

SPORTS DISPUTES TRIBUNAL.....RESPONDENT

AND

MILTON NYAKUNDI ORIKU.....1ST INTERESTED PARTY

THE SPORTS REGISTRAR.....2ND INTERESTED PARTY

CABINET SECRETARY FOR SPORTS.....3RD INTERESTED PARTY

HON. ATTORNEY GENERAL.....4TH INTERESTED PARTY

THE SPORTS FUND.....5TH INTERESTED PARTY

FKF ELECTORAL BOARD.....6TH INTERESTED PARTY

MOMBASA COUNTY FOOTBAL ASSOC.....7TH INTERESTED PARTY

KAKAMEGA COUNTY FOOTBALL ASSOC..8TH INTERESTED PARTY

MANDERA COUNTY FOOTBALL ASSOC....9TH INTERESTED PARTY

MIGORI COUNTY FOOTBALL ASSOC.....10TH INTERESTED PARTY

UASIN GISHU COUNTY FOOTBALL ASS....11TH INTERESTED PARTY

APS BOMET FC.....12TH INTERESTED PARTY

DIMBA PATRIOTS FC.....13TH INTERESTED PARTY

KONA RANGERS FC.....14TH INTERESTED PARTY

MAYENJE SANTOS FC.....15TH INTERESTED PARTY

FORTUNE SACCO FC.....16TH INTERESTED PARTY

BETWEEN

GABRIEL MGHENDI ..... APPLICANT

AND

SPORTS DISPUTES TRIBUNAL ..... RESPONDENT

AND

MILTON NYAKUNDI ORIKU ..... INTERESTED PARTY

THE SPORTS REGISTRAR ..... INTERESTED PARTY

CABINET SECRETARY FOR SPORTS ..... INTERESTED PARTY

HON. ATTORNEY GENERAL ..... INTERESTED PARTY

THE SPORTS FUND ..... INTERESTED PARTY

FKF ELECTORAL BOARD ..... INTERESTED PARTY

MOMBASA COUNTY FOOTBAL ASSOC ..... INTERESTED PARTY

MANDERA COUNTY FOOTBALL ASSOC ..... INTERESTED PARTY

MANDERA COUNTY FOOTBALL ASSOC ..... INTERESTED PARTY

MIGORI COUNTY FOOTBALL ASSOC ..... INTERESTED PARTY

UASIN GISHU COUNTY FOOTBALL ASS ..... INTERESTED PARTY

APS BOMET FC ..... INTERESTED PARTY

DIMBA PATRIOTS FC ..... INTERESTED PARTY

KONA RANGERS FC ..... INTERESTED PARTY

MAYENJE SANTOS FC ..... INTERESTED PARTY

FORTUNE SACCO FC ..... INTERESTED PARTY

RULING

[1] The applicant, Gabriel Mghendi, averred herein that he is an executive member of the Football Kenya Federation representing the Coastal Region. He filed the instant judicial review application on 1st March 2024 seeking leave to file a substantive judicial review application. The application was filed under a Certificate of Urgency and was therefore considered and determined ex parte on 1st March 2014. Upon leave being granted, the applicant filed his substantive judicial review application dated 2nd March 2024. Directions were then given that the application be served forthwith on the respondents for hearing on 12th March 2024, granted the sense of urgency expressed therein.

[2] Thereafter, the 11th interested party filed an application dated 11th March 2024, seeking that the ex parte orders issued on 1st March 2024 be stayed, varied or set aside on the grounds that there are in existence parallel proceeding before the High Court at Kiambu; being Kiambu HCJR/E003/2024: Doris Petra Mao & Others v Milton Nyakundi Oriku & Others. While the two applications were pending determination, the 2nd respondent, Milton Nyakundi Oriko, filed an application dated 13th March 2024 under a Certificate of Urgency seeking, inter alia that the intended Annual General Meeting of the Football Kenya Federation be stayed pending the hearing and determination of the substantive application. The application dated 13th March 2013 is the subject of this ruling. It was premised on the grounds that the 1st respondent made a decision on 19th July 2022 to the effect that the National Executive Committee members, including the applicant, had been duly removed from office and therefore lacked the capacity to transact business as officials of the Football Kenya Federation.

[3] The 2nd respondent further deposed that the aforementioned decision of the 1st respondent was never appealed, stayed or set aside; and is therefore in force. Thus, according to the 2nd respondent, the applicant and the entire National Executive Committee of the Football Kenya Federation lack the capacity to organize an Annual General Meeting or conduct the proposed elections. The 2nd respondent further deposed that unless the intended Annual General Meeting of the Football Kenya Federation is stayed, this suit and the decisions made in their favour by the 1st respondent, will be rendered nugatory. A copy of the decision was annexed to the 2nd respondent's Supporting Affidavit as Annexure MNO 1.

[4] The application was resisted by the applicant as well as the FKF, whose Electoral Board was cited herein as the 6th interested party. They relied on the Replying Affidavit sworn on 18th March 2024 by the applicant, wherein it was averred that the application dated 13th March 2024 is incompetent, misconceived and devoid of merits as the 2nd respondent is merely a busybody who does not have any locus standi to stop the FKF from holding its AGM, since he is not a member of FKF. It was further deposed that, in any case, the application is spent after the Court issued the orders of 15th March 2024.

[5] The applicant further averred that the application is incompetent for in so far as it was filed in the judicial review proceedings herein. The applicant posited that the 2nd respondent ought to have filed a fresh suit instead. He consequently took the posturing that, as it is the Court has travelled outside its jurisdiction as provided for by Order 53 of the Civil Procedure Rules by improperly entertaining the subject application to the detriment of the football fraternity.

[6] In respect of the Supporting Affidavit relied on by the 2nd respondent, the applicant deposed that the same is fatally defective for failure to conform with the requirements of Section 5 of the *Oaths and Statutory Declarations Act*; and is therefore for striking out. He further alleged violations of Articles 47 and 50 of the Constitution at paragraph 14 of the Replying Affidavit on the grounds that:

(a) the application has been brought by a person without locus standi;

(b) the application is not tenable;

(c) the application is brought in the wrong court;

(d) the orders were issued against FKF, a non-party;

(e) the application is irregular, incompetent and ripe for striking out in limine.

[7] The applicant also decried the inconvenience and loss occasioned to FKF by reason of the filing of the instant application and the orders of 15th March 2024. He annexed documents to his affidavit in support of his averments and urged for the dismissal of the said application without further ado.

[8] The application was urged orally by learned counsel. On behalf of FKF, Mr. Mutua, SC, raised three issues for consideration, namely, competence of the application, abuse of court process and jurisdiction of the Court. He submitted that the instant application has no nexus with the substantive judicial review application; granted that the judicial review application does not seek to challenge the capacity of the FKF to call for a General Meeting or manage football affairs in Kenya. It instead seeks to challenge the decision of the 1st respondent in terms of process and not the merits thereof.

[9] Mr. Mutua, SC, further submitted that the purpose of stay is to conserve the subject matter of a dispute in order for the court to be able to do justice when it finally determines the suit on merit; and therefore, since there is no Plaint, Petition or Originating Motion by the 2nd respondent, the application is an abuse of the court process. Senior Counsel likewise argued that since there is a special tribunal established under Section 58 of the *Sports Act*, this Court lacks the jurisdiction to entertain the application dated 13th March 2024. He consequently prayed for its dismissal with costs.

[10] Mr. Matata, counsel for the applicant, relied on the applicant's Replying Affidavit aforementioned. In his view, the 1st respondent is an interloper, and therefore has no business sparring with the FKF. He also highlighted the applicant's assertion that the Supporting Affidavit sworn by the 2nd respondent is fatally defective in so far as it was sworn in Nairobi at a time when the 2nd respondent was out of the country. He also adverted to the applicant's averment that the 2nd respondent was all along aware of the intended Annual General Meeting (AGM) but took no action until the eleventh hour; thereby causing the FKF to suffer huge losses in terms of expenses incurred in preparing for the botched AGM. He therefore prayed for the dismissal of the application with costs; and for the 2nd respondent to bear the expenses incurred by the FKF in preparing for the AGM, amounting to no less than Kshs. 20,000,000/=.

[11] On his part, counsel for the for the 1st respondent Mr. Makuto, made reference to Kiambu JR No. E003 of 2024 and the fact that, although a Notice of Withdrawal was filed therein, there is no formal order to demonstrate that the suit has, in fact, been withdrawn. He therefore submitted that this instant suit is sub-judice. I will however not dwell much on that argument since it forms part and parcel of a pending application and will therefore be dealt with in depth in due course. Mr. Odhiambo and Mr. Nyangena had nothing to say in respect of the instant application and expressed willingness to abide by the orders of the Court in that regard.

[12] In his response to the submissions by counsel for the applicant and FKF, the 1st respondent insisted that the key issue before the Court is inseparable from the intention by the FKF to hold its AGM. He pointed out that the decision of the 1st respondent, sought to be reviewed at the instance of the applicant, had everything to do with the capacity of the FKF officials to conduct the affairs of the sports body; and that, it was on that account that the decision was stayed pending the hearing of the substantive application. He therefore submitted that to proceed AGM during the pendency of this suit

would render otiose the previous decisions against the current office holders of FKF; and in particular the decision of the 1st respondent.

[13] The 2nd respondent relied on High Court Petition No. 311 of 2020 in which the question of jurisdiction was discussed and submitted that it is hollow for the FKF and the applicant to refer to him as a busy body, yet the body is funded by the tax payer. He concluded his submissions by stating that if anybody is to be condemned to pay costs and/or the expenses incurred by FKF in organizing for the AGM then it should be the officials of FKF, including the applicant, who have continued to hold office in disregard of the decision of the Court and the 1st respondent.

[14] I have perused and considered the application dated 13th March 2024, the Affidavits filed in respect thereof and the documents annexed thereto as well as the submissions made herein by learned counsel. The key issues for determination are:

(a) Whether the Court has jurisdiction to entertain the said application.

(b) Whether the 2nd respondent has the locus standi to file the instant application;

(c) Whether the orders prayed for by the 2nd respondent are warranted.

[15] I note that a technical point was taken against the 2nd respondent's Supporting Affidavit as to whether or not it is fatally defective for having been sworn virtually while the 2nd respondent was outside the country. The objection was premised on the provisions of Section 5 of the *Oaths and Statutory Declarations Act* which states:

> Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

[16] Looked as from that perspective, it cannot be said that the impugned affidavit is not compliant. Its jurat specifies the date when the deposition was made and the location of the Commissioner for Oaths as Nairobi. What appears to be the issue, if correctly understood, is whether the affiant could competently make a deposition before the Commissioner for Oaths in Nairobi while he was outside the country at the time; or put differently, whether an affidavit deposed to virtually is fatally defective.

[17] The general position has been that a deposition ought to be made in the physical presence of the Commissioner for Oaths/Notary Public. Hence, in Regina Munyiva Ndunge v Kenya Commercial Bank Limited [2005] eKLR, it was held:

> The second issue raised by the Applicant is that the application should be treated as unopposed because the replying affidavit is defective since it is not properly commissioned. Section 5 of the *Oaths and Statutory Declarations Act* provides that:
>
> 'Every Commissioner for Oaths before whom any oath or affidavit is taken or made ... shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.'
>
> ' ... The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbuthia, Commissioner for Oaths, on 13th October 2003 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, it should have been before a Commissioner for Oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for

> Oaths. It is likely that the stamp was just affixed. This court should have no alternative but strike off the replying affidavit as it is not properly commissioned and that the application would stand unopposed."

[18] However, in this instance, the affiant is purported to have made the deposition virtually before a Commissioner of Oaths who was then based in Nairobi. Whether this is permissible must be considered within the backdrop of recent technological advances and the uptake of technology in the administration of justice since the advent of the global Covid 19 pandemic. Accordingly, Section 27 of the *High Court (Organization and Administration) Act*, 2015, which explicitly provides for automation of court records and business processes as well as the promotion of the use of ICT.

[19] To that end, the Practice Directions to Standardize Practice and Procedures in the High Court, Gazette Notice No. 189 of 2022, set out the practice and procedures for virtual proceedings in paragraphs 28 to 32. It is therefore now common place for witnesses to testify virtually; entailing the administration of oath virtually. Additionally, we now have procedural rules governing service of court process via email embedded in Order 5 Rules 22B and 22C of the Civil Procedure Rules.

[20] In the circumstances, the question to pose is whether the fact that the affidavit was deposed to virtually is fatal to the application. In this regard, it is instructive to bear in mind that in certain instances, of which this is one, the use of the word "shall" is merely directory and not necessarily mandatory. Hence in Milimani HCCC 462 of 1997: Standard Chartered Bank Ltd v Luncton (K) Ltd, Hon. Ringera J. (as he then was) held:

> There appears to be a common belief that the use of the word "shall" in a statute makes the provision under construction a mandatory one in all circumstances. That belief is in my discernment of the law a fallacious one.
>
> As I understand the canons of statutory interpretation, the use of the word 'shall' in a statute only signifies that the matter is prima facie mandatory. The use of the word is not conclusive. It may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only. As long ago as 1861 in the case of Liverpool Borough Bank V Turner [1861] 30 L.J ch 379 pages 380-381 Lord Campbell had laid it down that:
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> > "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered. And from principles of statutory interpretation by Justice G.P Singh a former CJ Madhya Pradesh HC in India, the following instructive passage appears at page 242:
> >
> > "The use of the word "shall" raises a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by other consideration such object flowing from such construction. There are numerous cases where the word 'shall' has, therefore, been construed as merely directory."

[21] Moreover, Order 19 Rule 7 of the Civil Procedure Rules provides that:

> The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality."

[22] Indeed, Section 72 of the *Interpretation and General Provisions Act*, Chapter 2 of the Laws of Kenya states:

> Save as is otherwise expressly provided, whenever a form is prescribed by a written law on instatement or document which purports to be in that form shall not be void by reason of a deviation there from which does not affect the substance of the instrument or document or which is not calculated to mislead."

(23) It is in the light of the foregoing that I take the view that the mere fact that the 2nd respondent's Supporting Affidavit was sworn virtually does not necessarily render it defective; there being no proof that the document was calculated to mislead.

A. On jurisdiction

[24] Needless to say that the jurisdiction is everything and that a court or tribunal has no power proceed with a matter in which its jurisdiction is in question. In Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, it was held:

> ...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction..."

[25] Additionally, jurisdiction is donated either by *the Constitution* or Statute and is therefore not left to conjecture. The Supreme Court made this clear in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR, thus:

> ...A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law..."

[26] That this Court has the requisite jurisdiction to hear and determine the substantive judicial review application, and all the interlocutory applications filed therein is plain from a reading of Articles 23(3)(f), 47 and 165 of the Constitution. The *Fair Administrative Action Act* is also explicit in this regard in its Section 9; not to mention Sections 8 and 9 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya as read with Order 53 of the Civil Procedure Rules.

[27] What I discern to be the bone of contention, from the submissions made herein by learned counsel for the applicant and the FKF, is whether or not the 2nd respondent ought to have filed a separate

complaint before the 1st respondent against FKF to champion his own cause in view of the alternative dispute resolution mechanism provided for in Sections 55 to 61 of the *Sports Act*, No. 25 of 2013. It is, indeed, trite that where there is an alternative dispute resolution mechanism provided for in law, that mechanism must be strictly followed. This is explicit in the provisions of Section 9 of the *Fair Administrative Action Act*, at subsections (2) and (3) thus:

(2) 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.

(3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under subsection (1)."

[28] Thus, in Speaker of National Assembly v James Njenga Karume [1992] eKLR for instance, the Court of Appeal held that:

> ...where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed..."

[29] Likewise, in Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, the Court of Appeal restated its position thus:

> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

[30] It would however be fallacious to argue that the mere existence of an alternative dispute resolution mechanism amounts to complete ouster of jurisdiction of the Court. It simply means a postponement of court action in favour of exhaustion of the available alternative remedies. Accordingly, in William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others [2020] eKLR it was held that:

> The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*."

[31] Moreover, in the case of Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, the court held:

While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute (See The Speaker of National Assembly vs James Njenga Karume {1992} KLR 21), the exhaustion doctrine is only applicable where the

alternative forum is accessible, affordable, timely and effective. Thus, in the case of Dawda K. Jawara vs Gambia it was held that:

> "A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

[32] The same posturing was articulated in Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR, thus:

46. What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.

[33] In the instant situation, the 2nd respondent did not bring the action. He was sued by the applicant, not only as the 2nd respondent but also as the 1st interested party. The 2nd respondent availed a copy of the impugned decision of the 1st respondent as an annexure to his affidavit. It does confirm that the 2nd respondent was the applicant in SDTSC No. E006 of 2021; and that the interested parties herein, including the FKF and its Electoral Board were parties to that dispute. In fact, FKF was the 1st respondent in the dispute, while the FKF Electoral Board was the 1st interested party. The fact therefore that there was a dispute before the 1st respondent before the filing of this judicial review application demonstrates compliance with the alternative remedies provided for under the *Sports Act*; and to argue otherwise would be anomalous.

[34] The 2nd respondent's application, in my view, mere seeks to accentuate an aspect of the stay order granted to the applicant on 1st March 2024. It is to be noted that one of the orders of the 1st respondent was that the 2nd to 13th respondents in the dispute, who include the applicant herein by virtue of him being an official of FKF, were barred from making any correspondence, declarations, decision and/or announcements concerning the running of football affairs within the territory of the Republic of Kenya. It is therefore my finding that the application dated 13th March 2024 has been appropriately brought within the substantive judicial review application.

[35] Indeed, in Fleur Investments Limited v Commissioner of Domestic Taxes & Another [2018] eKLR it was held:

> ...The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

B. On Locus Standi

[36] As has been stated herein above, the substantive judicial review application was filed by the applicant, a member of the FKF executive committee. He cited the Sports Tribunal (the 1st respondent) and the 2nd respondent as the two respondents in this matter. He named the FKF Electoral Board as the 6th

interested party. It bears repeating that, in SDTSC No. E006 of 2021, the 2nd respondent was the applicant. FKF was the 1st respondent. It is therefore anomalous for the applicant and the FKF to refer to the 2nd respondent as a busy body. Moreover, one of the issues raised in the matter was the 2nd respondent's locus standi; and the Tribunal had the following to say:

> The challenge to the Petitioner's locus standi is, in the 1st to 13th Respondents' words, that the Petitoner "is not a member of FKF and...he has no interest in matters football. As a matter of fact he is not enaged in any football activity within the territory of Kenya...or anywhere else."
>
> This is an unfortunate tribute to the old regime on public interest litigation...The holy grail for individuals willing to stand up for group interests by instituting causes came in the form of *the Constitution* of Kenya 2010, Article 22...Since then, the courts have upheld the mantra "justice for all" ..."

[37] I need not belabor the point since I find no reason to differ with the Tribunal on the conclusion reached in that regard.

C. On the merits of the application dated 13th January 2024

[38] Upon filing the Chamber Summons dated 29th February 2024, the Court granted leave to the applicant to file a substantive application and ordered that the leave would operate as stay of the directions and orders of the 1st respondent dated 23rd January 2024 in SDTSC No. E006 of 2021: Milton Nyakundi Oriku v Football Kenya Federation & 16 Others. Those orders were in respect of consequential proceedings following the decision of the Tribunal dated 19th July 2022.

[39] Needless to mention that the object of stay in judicial review matters and the parameters therefor are not necessarily comparable with interlocutory injunctions or conservatory orders often granted pending a merit consideration of a disputation, as Senior Counsel purported to suggest. Indeed, the rationale for stay in judicial review matters was well explicated in Taib A. Taib v The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006 thus:

> ... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken..."

[40] In the predicate decision of the 1st respondent, made on 19th July 2022, final orders granted were as follows:

(a) A declaration is hereby issued that this suit was rightly filed before this Tribunal and is undefeated by preliminary questions of law inter alia jurisdiction and locus standi as raised by the 1st to 13th Respondents and Res Judicata as raised by the 1st Interested Party;

(b) A declaration is hereby issued that the FKF branches are legal entities in so far as they undertake administrative functions for the FKF;

(c) A declaration be and is hereby issued that the Articles 11 (e), 27(5) and 28(7) of the 1st Respondent's Constitution of 2017 are valid and in no way contradict the *Sports Act* and *the Constitution* of Kenya 2010.

(d) A declaration is hereby issued that the removal of the 2nd to 13th Respondents bars them from making any correspondence, declarations, decisions and/or announcements concerning the running of football affairs within the territory of the Republic of Kenya.

(e) Each party shall bear its own costs.

[41] As the successful litigant in that disputation, the 2nd respondent had moved the 1st respondent in contempt of court proceedings with a view of enforcing the decision of the tribunal; which is what provoked the filing of the instant judicial review application. It cannot therefore be validly argued that the organizing of an Annual General Meeting for FKF is an activity outside the reach of the 1st respondent's decision; particular order [d] above.

[42] I am therefore satisfied that the application dated 13th March 2024 is meritorious. The same is hereby allowed and orders granted as hereunder:

(a) An order be and is hereby granted staying the intended Annual General Meeting of the Football Kenya Federation pending the hearing and determination of the substantive judicial review application.

(b) Costs of the application to be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 4TH DAY OF APRIL 2024

OLGA SEWE

JUDGE