



**Republic v Sports Disputes Tribunal; Football Kenya Federation & 2 others  
(Exparte); FKF National Executive Committee & 50 others (Interested Parties)  
(Application 5 of 2022) [2023] KEHC 20326 (KLR) (Crim) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20326 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**APPLICATION 5 OF 2022**

**J NGAAH, J**

**JULY 14, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**SPORTS DISPUTES TRIBUNAL ..... RESPONDENT**

**AND**

**FOOTBALL KENYA FEDERATION ..... EXPARTE**

**NICHOLAS MWENDWA KITHUKU ..... EXPARTE**

**BARRY OTIENO ..... EXPARTE**

**AND**

**FKF NATIONAL EXECUTIVE COMMITTEE ..... INTERESTED PARTY**

**FKF LEAGUES AND COMPETITIONS COMMITTEE ..... INTERESTED PARTY**

**DORIS PETRA MAO ..... INTERESTED PARTY**

**GORDON DAVIS CHEGE ..... INTERESTED PARTY**

**MICHAEL OUMA MAJUA ..... INTERESTED PARTY**

**JOSEPH OWUOR ANDERE ..... INTERESTED PARTY**

**TIMOTHY MURITHI NABEA ..... INTERESTED PARTY**

**AHMEDQADAR MOHAMED DABAR ..... INTERESTED PARTY**

**BISHOP TONY KWEA ..... INTERESTED PARTY**

**GABRIEL MGHENDI ..... INTERESTED PARTY**



**BENARD KORIR LAGAT ..... INTERESTED PARTY**  
**DAVID KIPKORIR BUNEI ..... INTERESTED PARTY**  
**MARGARET ANYANGO OMONDI ..... INTERESTED PARTY**  
**CHRIS AMIMO ..... INTERESTED PARTY**  
**DIMBA PATRIOTS FOOTBALL CLUB ..... INTERESTED PARTY**  
**MAYENJE SANTOS FOOTBALL CLUB ..... INTERESTED PARTY**  
**KIBERA SOCCER WOMEN FC ..... INTERESTED PARTY**  
**CABINET SECRETARY FOR SPORTS AND YOUTH AFFAIRS .... INTERESTED PARTY**  
**SAMSON CHEROP ..... INTERESTED PARTY**  
**MURANG'A SEALS FOOTBALL CLUB ..... INTERESTED PARTY**  
**VIHIGA BULLETS ..... INTERESTED PARTY**  
**MATHARE UNITED FC ..... INTERESTED PARTY**  
**GUSII FC ..... INTERESTED PARTY**  
**FORTNUE SACCO FC ..... INTERESTED PARTY**  
**NAIROBI COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**  
**BARINGO COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**  
**TAITA TAVETA COUNTY FOOTBALL ASSOCIATION .. INTERESTED PARTY**  
**MACHAKOS COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**  
**VIHIGA COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**  
**TANA RIVER COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**  
**BUSIA COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**  
**ELGEYO MARAKWET COUNTY FOOTBALL ASSOCIATION .... INTERESTED PARTY**  
**LAIKIPIA COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**  
**EMBU COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**  
**KIRINYAGA COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**  
**KITUI COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**  
**MAKUENI COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**  
**THARAKA NITHI COUNTY FOOTBALL ASSOCIATION .... INTERESTED PARTY**  
**NANDI COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**  
**BUNGOMA COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**  
**KAKAMEGA COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**  
**MANDERA COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY**



KISUMU COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY  
SIAYA COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY  
TURKANA COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY  
NYAMIRA COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY  
NAKURU COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY  
KISII COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY  
TRANSNZOIA COUNTY FOOTBALL ASSOCIATION ... INTERESTED PARTY  
NYERI COUNTY FOOTBALL ASSOCIATION ..... INTERESTED PARTY  
. UASIN GISHU COUNTY FOOTBALL ASSOCIATION ... INTERESTED PARTY

## JUDGMENT

1. The motion before court is dated December 19, 2022. The applicants have moved this Honourable Court for an order of judicial review whose prayer is couched as follows:
  1. Order of *certiorari* do issue removing to the High Court for purposes of quashing the entire decision of the respondent dated December 6, 2022 in SDTSC No E036 of 2022 as consolidated with SDTSC No E038 of 2022 & E039 of 2022.”
2. The applicants have also asked for costs of the motion.
3. The application is brought under section 1A, 1B and 3A of the *Civil Procedure Act*; section 8 and 9 of the *Law Reform Act* and Order 53 Rule 1(1) (2) (3) and (4) of the *Civil Procedure Rules*. It is based on an affidavit sworn on December 8, 2022 verifying the facts relied upon and a statutory statement of even date. The affidavit is sworn by Barry Otieno, who has introduced himself as the general secretary and chief executive officer of Football Kenya Federation (which I will henceforth refer to as “the Federation”).
4. The origin of the dispute before this Honourable Court is a press statement issued on November 9, 2022 by Football Kenya Federation. The statement was signed by the Federation’s secretary and stated as follows:

Fkf National Executive Committee Resolutions On The 2021/2022 League Season

1. That the 2021/2022 FKF premier league, national super league, women premier league, men’s division one and women’s division one leagues will not be recognised and have been declared null and void.
2. That there will be no promotion or relegation in the FKF premier league, national super league and women premier league.
3. That the FKF division one and FKF women’s division one leagues will neither promote nor relegate.
4. That the 2021/2022 FK division two, regional and county leagues run by FKF branches, in accordance with the FKF statutes and the FKF rules and regulations (2019) governing Kenyan football shall be recognised and their decisions upheld.



5. That the 2021/2022 FKF division two, regional and county leagues will promote and relegate clubs in their respective tiers.
6. That the men's and women's division one leagues will be expanded for the season 2022/2023 to include teams promoted from the FKF div two and women regional leagues respectively.
7. That the FKF women Div one and FKF men's division one leagues will be regularised in the 2023/2024 league season.
8. That kick off dates for the FKF Premier league be November 19, 2022 and national super league be November 26, 2022.
9. That in the kick off dates for the FKF women premier league, women div league and men's division one league be December 3, 2022.

The resolution by the FKF national executive committee has been guided by the FKF statutes, FIFA statutes, FKF rules and regulations (2019) and the sports disputes tribunal rulings on a number of cases filed at the tribunal, regarding the 2021/2022 league season.”

5. A section of the Federation membership was aggrieved by this decision and so they lodged petitions before the respondent challenging the decision. According to the applicants, these petitions were registered as SDTC E036, E038 and E029 of 2022.
6. The respondent assumed jurisdiction and nullified the decision. In its pertinent part, the decision rendered on December 6, 2022 and which is the subject of these proceedings, read as follows:
  148. Having stated the foregoing, it will be evident by now that we have come to the conclusion that the decision of the national executive committee has no legal foundation, is a nullity and cannot be sustained. It is accordingly quashed.”
7. According to the applicants, this decision is ultra vires the powers granted to the respondent by section 58 of the *Sports Act* 2013.
8. The applicant's case is that all decisions of the Federation and the National Executive Committee are appealable within the internal dispute resolution mechanisms as outlined in the Federation's constitution. Again, rules 10.3.1 and 10.3.5 of the Federation's Rules and Regulations Governing Kenya football (2019), members have the right to appeal against any decision made by Federation or any of its national committees to the Federation's appeals committee.
9. According to the applicants, the jurisdiction granted to the respondent by the *Sports Act*, 2013 is appellate in nature except for the only one instance in section 58(b) where the respondent has jurisdiction to hear other sports-related disputes that all parties to the dispute agree to refer to the respondent and the respondent agrees to hear them.
10. The applicants contend that in entertaining the dispute before it, the respondent arrogated itself jurisdiction which it does not have. And in doing so, the respondent disregarded the doctrine of exhaustion of internal dispute resolution mechanisms as enunciated by the Court of Appeal in *Geoffrey Muthinja Kabiru & 2 Others versus Samuel Munga Henry & 1756 Others* (2015) eKLR where it is said to have been held that where a dispute resolution mechanism exists outside courts, the same must be exhausted before the jurisdiction of the court is invoked and that courts ought to be approached as a last resort and not as the first port of call when a storm brews.
11. The respondent did not file any response to application.



12. Dick Arudo filed a replying affidavit on behalf of the 15<sup>th</sup> interested party opposing the application. He does not dispute that the respondent made the impugned decision but urges that it had the requisite jurisdiction to entertain the dispute out of which the decision arose.
13. He has also sworn that the 2<sup>nd</sup> and 3<sup>rd</sup> applicants were removed from office on July 19, 2022 in SDTSC No 006 of 2022, Milton Nyakundi Oriku versus FKF & 17 Others and that in *Football Kenya Federation & 2 Others versus Cabinet Secretary for Sports, Culture and Heritage & 5 Others; Kariobangi Sharks Football Club & 7 Others* (2021) eKLR the court held that the removal from office of the 2<sup>nd</sup> and 3<sup>rd</sup> applicants was lawful.
14. Contrary to the orders of the court, the 2<sup>nd</sup> and 3<sup>rd</sup> applicants together with the 3<sup>rd</sup> to 14<sup>th</sup> interested parties convened an executive committee meeting and issued the resolution of November 9, 2022 which, among other things, nullified the whole of 2021/2022 football season.
15. Arudo admitted, though, that rule 10.3.1 and 10.3.5 of the Rules and Regulations Governing Football in Kenya (2019) require that parties to a dispute to first lodge an appeal to the appeals committee. He, however, contended that the resolution of 9 November 2022 was not envisaged and, in any event, the persons who purported to make the resolution were not legally in office.
16. He further swore that his club, Dimba Patriots F.C. had participated in the 2021/2022 division one league and was due for promotion to the national super league before the Federation's national executive committee nullified the 2021/2022 season.
17. The only other replying affidavit in this matter was sworn by Robert Kenneth Wanyoike Macharia on behalf of Murang'a Seal Football Club, named as the 20<sup>th</sup> interested party in the application before court. Like Derick Arudo, Macharia has sworn that the 2<sup>nd</sup> and 3<sup>rd</sup> applicants were invalidly in office by dint of a gazette notice number 12374 of November 11, 2021 according to which the cabinet secretary for sports disbanded the national executive committee of the federation. The ousting of the applicants, it is urged, was upheld by Ong'udi, J in constitutional petition no E473 of 2021. The applicants are also said to have been removed from office in a decision by the respondent in case no E006 of 2021.
18. The applicants' application, the responses filed thereto and the submissions made in respect of the positions parties have adopted in supporting or opposing the motion boil down to the question whether the respondent had jurisdiction to determine the dispute that led to the impugned decision. This, in my humble view, is the overarching question the determination of which should resolve the dispute before me, one way or the other. In considering the answer to this question, the provisions of the *Sports Act*, 2013 and *the constitution* of the Federation come to the fore.
19. Section 58 of the *Sports Act* is relevant because that is where the jurisdiction of the respondent is prescribed. This section reads as follows:

58. Jurisdiction of the Tribunal

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) 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.

20. The Federation is one such national sports organisation contemplated under section 58 of the Act. This is apparent from article 1(1) of its constitution 1(1) Football Kenya Federation is an organisation of an associative nature registered in Kenya in compliance with the Sport Act. No. 25 of 2013 as a national sports organisation. It is formed for an unlimited period.

21. The dispute resolution mechanism in the Federation is set out in articles 69 and 70 of the Federation's Constitution. Article 69 reads as follows:

69(1) Disputes in the association or disputes affecting leagues, members of leagues, clubs, members of clubs, players, officials and other association officials shall not be submitted to ordinary courts, unless the FIFA regulations, this constitution or binding legal provisions specifically provide for or stipulate recourse to ordinary courts.

- (2) the entities mentioned in par 1 above shall give priority to arbitration as a means of dispute resolution.
- (3) the disputes as specified in article 1 shall be taken to an independent arbitration tribunal recognised by FKF or CAF or to the Court of Arbitration for Sports in Lausanne, Switzerland.
- (4) the decisions made by the FKF standing committees and the judicial bodies are final and the FKF and members are prohibited from taking such matters to ordinary courts. Any member found in violation of the same shall be subjected to disciplinary measures as stipulated in the disciplinary code of FKF and FIFA.
- (5) if any of the parties is dissatisfied by decisions and rulings made by any standing committees and judicial committees, such a party is at liberty to lodge an appeal with the appeals committee whose decision shall be final unless stipulated elsewhere in this constitution.
- (6) the first body for electoral disputes shall be the independent electoral board. Any member unsatisfied with the decisions of the board may appeal to the FKF appeals committee.

Article 70, on the other hand, states:

- 1. Recourse may only be made to an arbitration tribunal in accordance with article 68 once all internal channels of FKF have been exhausted.
- 2. FKF shall have jurisdiction on internal national disputes, i.e. disputes between parties belonging to FKF.



3. FIFA shall have jurisdiction when international disputes, i.e. disputes between parties belonging to different associations and/or confederations.
22. While the Federation’s constitution emphasises in paragraph 2 of article 69 that arbitration as a means of dispute resolution should be given priority, paragraph 1 of article 70 is clear that recourse may only be made to an arbitral tribunal in accordance with article 68 once all internal channels of the Federation have been exhausted.
23. Paragraph 5 of article 9 gives a glimpse of what these “internal channels” are as far as the dispute out of which the impugned decision arose is concerned. That paragraph is to the effect that if any of the parties to a dispute in the Federation is dissatisfied with the decisions or rulings made by any of the standing committees and judicial committees, such a party is at liberty to lodge an appeal with the appeals committee whose decision shall be final unless stipulated otherwise in the Federation’s constitution.
24. For the avoidance of doubt, article 67 paragraph 2 of the FKF constitution states unambiguously that:
  2. The appeals committee is responsible for hearing all appeals against all decisions determined by all committees.
25. The appeals committee is itself established as one of the three judicial bodies in article 64 of the Federation’s constitution.
26. Although article 69 paragraph (5) intimates that the decisions made by the standing committees and judicial committees are final, I read ‘finality’ here to mean that parties to a dispute are precluded from invoking the jurisdiction of courts before exhausting the internal dispute resolution mechanisms prescribed by the Federation’s constitution.
27. This is made clearer in article 67 paragraph 3 of the constitution which discounts any notion that the decision of the appeals committee cannot be challenged. This paragraph reads as follows:
  3. Decisions pronounced by the appeals committee may be appealed to the Court of Arbitration for sports in Lausanne Switzerland or a national, independent arbitration tribunal recognised by FAF, as specified in this constitution.”
28. The respondent is a national independent arbitration tribunal recognised by Federation and to which appeals from the appeals committee would lie.
29. The impugned decision that is the subject of these proceedings ought to be dissected through the prism of the foregoing provisions of the *Sports Act* and the Federation’s constitution.
30. The caveat is that this court is not concerned about the merits or lack thereof of the decision. It is only concerned about the process by which the decision was arrived at. In that regard, the proceedings before the respondent and the ultimate decision it reached has to be weighed against the grounds of judicial review upon which the application has been made.
31. It is, of course, trite that courts may intervene to review a power conferred by statute on the ground of unfairness but only if the unfairness in the purported exercise of the power be such as to amount to an abuse of the power. See *Preston v IRC* [1985] 2 All ER 327, [1985] AC 835, per Lord Templeman.
32. And in *Chief Constable of the North West Police vs Evans* (1982) 3 ALL ER 141 at 154 it was held that:
 

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.”



33. It was held further in this case that:

The remedy by way of judicial review under RSC..., vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and ...administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner...and not to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law.” (Per Lord Hailsham at 1160E-H).

34. It has already been demonstrated that the genesis of the dispute that eventually landed at the desk of the respondent is the Federation’s national executive committee’s resolution contained in a press statement released by its secretary or chief executive officer on November 9, 2022.

35. It has also been demonstrated that when the dispute concerning this resolution was submitted to the respondent for resolution it assumed jurisdiction and nullified the decision.

36. After considering the provisions of section 58 of the *Sports Act* on the extent of the respondent’s jurisdiction and the internal dispute resolution mechanisms in the Federation’s constitution, to which reference has been, I am persuaded that in assuming jurisdiction and eventually nullifying the Federation’s national executive’s decision, the respondent exceeded its jurisdiction by determining a dispute that ought to have been disposed of by the appeals committee.

37. As has been noted earlier, according to article 69(5) of the Federation’s constitution, decisions by any committee which, in my humble view, would include the national executive committee of the Federation, are appealed to the appeals committee and that recourse may only be made to the sports disputes tribunal once all internal channels have been exhausted.

38. In the English decision of *R versus Peterkin, ex p Soni* (1972) Imm AR 253 Lord Widgery CJ had this to say on the need to exhaust appellate avenues before moving to court:

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

39. Our very own Court of Appeal has held in the *Speaker of the National Assembly v. Karume*, Civil Application No. NAI 92 of 1992 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.



40. And section 9(2) of the *Fair Administrative Action Act* No. 4 of 2015 is also clear that this court should not entertain disputes whose resolution has been provided for elsewhere by an Act of Parliament. It states as follows:

9.

(2) Procedure for judicial review.

41. 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.

42. I am minded that the respondent is not a court as contemplated in these decisions and provision of the law but the need to exhaust internal dispute resolutions mechanisms would apply to tribunals such as the respondent as much as it applies to the courts.

43. To the extent that the internal channels had not been exhausted, the respondent's decision would fall for exceeding its jurisdiction. It would fall on the judicial review ground of illegality.

44. This ground, among other grounds for judicial review, was defined Lord Diplock in *Council of Civil Service Unions versus Minister for the Civil Service* (1985) A.C. 374,410. The learned judge said:

45. By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

46. The respondent, by assuming jurisdiction which it did not have, can properly be said to have misapprehended the provisions of section 58 of the *Sports Act* and the provisions in the Federation's constitution relating to internal dispute resolution mechanisms. It can also be said that the respondent failed to give effect to these provisions.

47. Accordingly, an order of *certiorari* is hereby issued quashing the respondent's decision dated December 6, 2022 in SDTSC No 36/2022 as consolidated with STDC No E038 of 2022 and STDC No E038 of 2022 and SDTC No E039 of 2022.

48. Before I conclude, there were two other applications dated January 20, 2020 by two of the interested parties. They sought, amongst other reliefs, interim reliefs. The substantive motion having been determined, the applications serve no useful purpose. Except for the prayers in those applications that have been granted, the rest of the prayers are declined. Parties will bear their respective costs. Orders accordingly.

**SIGNED, DATED AND DELIVERED ON 14 JULY 2023**

**NGAAH JAIRUS**

**JUDGE**

