



**Kenya National Sports Council & 3 others v Njoki & another;
Ngugi & 3 others (Interested Parties) (Civil Appeal E929 of 2023)
[2024] KEHC 14498 (KLR) (Civ) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14498 (KLR)

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

CIVIL

CIVIL APPEAL E929 OF 2023

JK NG'ARNG'AR, J

NOVEMBER 21, 2024

BETWEEN

**THE KENYA NATIONAL SPORTS COUNCIL 1ST APPELLANT
NDERITU GIKARI 2ND APPELLANT
VANRAJ SARVAIYA 3RD APPELLANT
CHARLES NYABERI 4TH APPELLANT**

AND

**PURITY NJOKI 1ST RESPONDENT
MARY MURIUKI 2ND RESPONDENT**

AND

**DAVID NGUGI INTERESTED PARTY
MUDUDA WAWERU INTERESTED PARTY
IEBC INTERESTED PARTY
SPORTS REGISTRAR INTERESTED PARTY**

*(An appeal from the decision of the Sports Disputes Tribunal at
Nairobi (J. Njeri Onyango (chair); Mary Kimani and Bernard Wafula
Murunga) delivered on 15th August, 2023 in SDTCS No. E006 of 2023)*



JUDGMENT

1. This is a first appeal against the decision of the Sports Disputes Tribunal rendered on 15th August 2023. As a first appellate court, I am reminded of my primary role as to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. [See Abok James Odera t/a A.J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR].
2. In their statement of claim amended on 31st March, 2023, and filed in SDTCS No. E006 of 2023, the respondents cited the appellants for conducting unfair elections of the officials of the 1st appellant that took place on 15th December, 2022. In their view, the elections failed to meet the standards of democracy having violated Articles 10, 38 (2) & (3), 81 and 86 of *the Constitution* of Kenya, clauses 16 and 17 of the Kenya National Sports Council Constitution as well as article 1 (c) of the 2nd schedule to the *Sports Act*.
3. The 1st respondent is a concerned Kenyan citizen who lodged the dispute in the interest of the public. The 2nd respondent was a former official of the 1st appellant for the period 2018 to 2022. She also submitted her bid for re-election as an aspirant in the disputed elections and testified that while the election was peaceful, the same was marred with irregularities.
4. The 1st appellant is an umbrella body of several sports organizations. It was formerly registered under the *Societies Act* in 1966. Its membership constitutes duly registered sports organization. Following the enactment of the *Sports Act* in 2013, the 1st appellant was required to transition into the new Act. In the circumstances, and according to the appellants, for a member to remain eligible for any electoral office of the 1st appellant, that member was required to ensure that its constituent members were registered under the *Sports Act*.
5. A brief abridgement of the facts espoused by the respondents and giving rise to the dispute are that following their vacancies, the following positions invited prospective candidates for the governance of the 1st appellant: Chairperson, Vice Chairperson, Treasurer and two Committee Members. In light of this, the 1st appellant invited qualified and interested candidates to apply by submitting their nomination forms on or before 6th December, 2022. The respondents lamented that those forms were only made available on that day, that is the 6th of December, 2022 and issued on a request to request basis. In their view, though those forms were made available, interested candidates could not access them on that day since the offices of the 1st appellant's secretariat were closed.
6. The respondents further complained that the following persons namely: Nderitu Gikara, Vanraj Sarvaiya and Charles Nyabeti, the 2nd, 3rd and 4th appellants respectively, were cleared to run for those elective posts yet they were not eligible to contest or be elected as officials. They argued that since they had antecedently served for the two terms running from 2013 up to 2022, they were limited to run a third term since they had held the offices for the maximum terms as provided by the 1st appellant. The respondents propagated that their nomination and subsequent election was intended to lock out interested candidates so as to advance the 2nd, 3rd, and 4th appellants' own agenda for personal gain.
7. The respondents cited the appellants for violating sections 46 (2) (c) and 49 of the *Sports Act* for the reason that the 1st appellant was registered as a sports organization on 24th May 2018. They added that the 2nd, 3rd, and 4th respondents were holding offices from August 2014 to May 2018 and as such, their running operations were illegal, unconscionable, unprocedural and unconstitutional.



8. The 1st respondent wrote to the 1st appellant vide a letter dated 13th December, 2022 urging it to investigate the allegations raised herein and proceed to remove the 2nd, 3rd and 4th appellants as contestants in the run up to the elections. However, that letter was not acted upon.
9. The respondents also called Mr. Duncan Kiprop to the stand. He was a sports official and wanted to contents in the impugned elections. However, he did not make it to the ballot on account of insufficient time to obtain the clearance documents. Furthermore, he complained that he did not find the officers of the 1st appellant to receive his nomination papers.
10. In light of the above allegations, the respondents prayed for the following reliefs which are hereby reproduced verbatim:
 - a. A declaration be and is hereby issued declaring that the elections held on 15th December, 2022 were not conducted in accordance with Article 10, 38 (2) & (3), 81, 82 and 86 of *the Constitution* of Kenya 2010, article 1 (c) of the 2nd schedule to the *Sports Act*, Cap No. 25 of 2013, Laws of Kenya and clause 16 and clause 17 of *the Constitution* of the Kenya National Sports Council rendering the declared results invalid, null and void ab initio;
 - b. A declaration be and is hereby issued that the nomination, election and declaration of the 2nd, 3rd and 4th respondents namely Nderitu Gikari, Vanraj Sarvaiya and Charles Nyabeti, the Chairman, Vice Chairman and Treasurer of the Kenya National Sports Council respectively, is invalid, null and void;
 - c. A declaration be and is hereby issued that the 2nd, 3rd and 4th respondents are constitutionally and statutorily barred from contesting or being elected as officials of the Kenya National Sports Council as per the provisions of Article 10, 38 (2) & (3), 81, 82 and 86 of *the Constitution* of Kenya 2010, article 1 (c) of the 2nd schedule to the *Sports Act*, Cap No. 25 of 2013, Laws of Kenya and clause 16 and clause 17 of *the Constitution* of the Kenya National Sports Council;
 - d. A declaration be and is hereby issued that the 1st respondent was illegally running its operation as a sports organization from 1st August, 2014 to 24th May, 2018 as it failed to registered as a sports organization under section 46 and 49 of the *Sports Act* within the 1 year after the commencement of the *Sports Act* 2013;
 - e. A declaration be and is hereby issued that the 2nd, 3rd and 4th respondents herein are in office illegally and that the tribunal to issue orders of injunction to restrain those officials from conducting the responsibilities that come with being in office as the elections are characterized by procedural irregularities that undermine the entire selection;
 - f. An order be and is hereby issued directing the status quo ante prior to elections held on 15th December, 2022 to be maintained;
 - g. An order be and is hereby issued directing the 1st respondent to organize and conduct a fresh election in strict conformity with clause 16 and clause 17 of *the Constitution* of the Kenya National Sports Council, the *Sports Act* and *the Constitution* of Kenya within 30 days;
 - h. An order by and is hereby issued directing the IEBC to conduct a fresh election right from the nomination of candidates to the declaration of the winners for the sole purpose of conducting democratic elections for the 1st respondent within 30 days;
 - i. Cost of the suit and interest.



11. The appellants filed a reply to the statement of claim dated 13th March, 2023, a supplementary reply to the statement of claim dated 14th April, 2023 and a notice of preliminary objection dated 21st February, 2023. It opposed the claim in its entirety. The appellants' case is summarized as follows:
12. The 1st appellant was registered on 24th May, 2018 under certificate of registration number 34 in compliance with the *Sports Act* having transitioned from the *Societies Act*. According to the appellants, it was only after the 1st appellant's registration in 2018 that it attained recognition status as a sports organization. Consequently, the provisions of the *Sports Act* were only applicable from 2018. It also reviewed its Constitution to align with the novel law.
13. In transitioning to the new Act, the 1st appellant submitted that it could not register itself under the *Sports Act* without the prior registration of its members. Therefore, all its constituent members, including the 2nd, 3rd and 4th respondents had to register first to pave way for the registration of the 1st appellant body.
14. The appellants recalled that the transitional clauses set out in the *Sports Act* were operationalized at a snail's pace including the appointment of the Registrar. That there were no regulations in situ to govern the transitional processes. That in fact, the Sports Registration Regulations only came into force on 2nd September 2016 that spearheaded the registration process under the *Sports Act*. In light of this, the delays in registration were through no fault of the 1st appellant.
15. Subsequently, the 1st appellant conducted its Annual General Meeting on 24th February, 2018 and election of officials. The 2nd, 3rd, and 4th appellants were elected Chairperson, Vice Chairperson and Treasurer respectively. The 2nd respondent was elected as one of the two Committee Members. Those elections were not disputed. In their view thus, they argued that since the elective posts were only held for one term of four years, commencing 2018, the 2nd, 3rd and 4th appellants were eligible to run for a second term of four years. However, after that, and in accordance with *the Constitution* of the 1st appellant, they will not be eligible to run for office again.
16. Pursuant to a letter dated 18th December, 2021, the 1st appellant wrote to the sports Registrar seeking a list of compliant registered sports organizations that would participate in the elections scheduled to take place in 2022. The list was however not furnished in readiness for the 1st appellant's Annual General Meeting that was to take place in February 2022. Consequently, a subsequent letter was written on 1st March, 2022. The list was furnished in September paving way for the elections that took place in December, 2022.
17. According to the appellants, the 1st appellant's administrative office issued a notice dated 22nd November, 2022 calling prospective candidates to fill elective posts of the 1st appellant for the position of Chairperson, Vice Chairperson, Treasurer and two Committee members. In the notice, candidates were urged to pick nomination forms from the 1st appellant's secretariat at Riadha House room 19. Those forms were to be duly filled and submitted on or before 6th December, 2022. The notice was attached together with minutes of the previous meeting to the constituent members' emails on 25th November, 2022. According to the respondent, those emails were duly received as none of the respondents raised issue with this process.
18. The appellants advanced that the nomination forms were readily available and their secretariat offices remained open during the official business working days and hours of 8:00 a.m. and 5:00 p.m. That the notice attracted several prospective candidates including the 2nd, 3rd and 4th appellants. The appellants thus contended that it was untrue that the forms were not made readily available and that the offices were closed or unavailable. That in fact, the 1st appellant's administrative secretary was personally in the



- secretariat's offices during the period from 25th November, 2022 up to 28th November, 2022, when he traveled abroad for official duties for three days. He thereafter reported back to duty upon his return. However, during the intervening period, the offices remained open.
19. The elections were scheduled to take place on 15th December, 2022. In preparation, the 1st appellant wrote to the 3rd interested party requesting the office to conduct their elections and appoint a returning officer. A memorandum of understanding dated 15th December, 2022 was entered between the two parties concerning the order of elections. The 1st respondent submitted all the vacancies contested for together with a list of candidates and their credentials as requested in the notice of the elections. The elections took place by way of secret ballot.
 20. In exercising transparency, the 1st appellant invited the Registrar Sports in its letter dated 19th November, 2022 and the Director State Department of Sports in its letter dated 18th November, 2022 to attend as observers. A total of 62 sports organizations sent their delegates and participated in the elections. In their view, they were not required by law to furnish a delegation list at least 7 days before the elections for a scrutiny process.
 21. The appellants continued that during the electoral process, none of the members, the respondents included, complained that they failed to receive the nomination forms and were subsequently locked out resultantly. That some of the positions were unopposed and winners declared on the floor of the house. Ultimately, the Office of the Registrar and the Director for Sports were satisfied with the conduct of the elections. In their view thus, the appellant submitted that the elections were free and fair. Furthermore, no party in attendance raised issue with the conduct of elections.
 22. Concerning the eligibility or otherwise of the 2nd, 3rd 4th appellants to run for elective posts, the appellants submitted that in its former Constitution, hinged upon the Societies Act, did not furnish a term limit for its officials to hold office. That however changed with the advent of the new Constitution under the Sports Act. They further observed that upon the enactment of the Sports Act, the 1st appellant was required by law to apply for registration of the body within one year after commencement of the Act failing which it would cease to be recognized under the said Act.
 23. The appellants relied on the following witnesses to attest to the process: the 2nd appellant and Mr. James Akama. In view of the foregoing, the appellants unanimously urged the tribunal to dismiss the claim. Withal, they urged the tribunal to find that the dispute was time barred and that the 1st respondent lacked the locus standi to institute the claim. This is on account of the fact that she was not among the list of attendees.
 24. In its decision dated 15th August, 2023 the tribunal found merit in the respondents' claim. Consequently, the tribunal found that the process leading towards the elections of 15th December, 2022 failed to meet the standards of fairness necessary to affirm its integrity. For that reason, the tribunal found that the outcome of the election was void. In this regard, a fresh, open and transparent election was directed to be conducted within 60 days of the ruling in line with the Act and the Registrar's Regulations of 2016. The 1st appellant was urged to ensure the supervision of the election process from the nomination process to the elections by an independently body. Finally, the 2nd, 3rd and 4th appellants were found ineligible for re-election and directed to seek other seats within the 1st appellant.
 25. Aggrieved by those findings, the appellants filed their memorandum of appeal dated 11th September 2023. They raised 17 grounds disputing the findings of the tribunal. We have taken the liberty to summarize those grounds as follows: the claim violated rule 20 (7) of the Sports Registrar Regulations 2016 as it was filed outside the statutory 30-day limited period; the 1st respondent did not have locus standi to institute the claim before the tribunal as she was neither a member nor a candidate in the



1st appellant organization; the 2nd, 3rd and 4th appellants were improperly found to be ineligible for office yet they had only served one previous term in office; the tribunal failed to take into account that the 1st appellant was in existence upon registration on 24th May, 2018 and as such, the 2nd, 3rd and 4th respondents had only served a one term period during its existence under the *Sports Act*; the tribunal improperly applied the provisions of the *Sports Act* when it did not exist before 2013; the said Act was only applicable in 2018 when the 1st appellant acquired registration and recognition status; the tribunal erred in finding that the 1st appellant failed to register itself under the *Sports Act* within the transition period of 1 year notwithstanding that the Regulations for registration thereunder had not been enacted; the tribunal failed to appreciate that the 1st appellant could not register itself without prior registration of its umbrella sport organizations; the finding that the nomination exercise as unfair was not backed by any justification; the appellants' evidence was not considered; the respondents made not request of a list of delegates and the tribunal thus erred in finding that the appellants failed to furnish the list; there was no legal requirement imposing an obligation to the appellants to furnish the respondents with a list of delegates; and the tribunal erroneously found that the elections of 15th December 2022 were marred with illegalities and irregularities.

26. In view of the premised circumstances, the appellants urged this court to allow the appeal by setting aside the decision of the tribunal. In its stead, the claim by the respondents be dismissed in its entirety with costs. The appellants further prayed for costs of the appeal.
27. The appeal was canvassed by way of written submissions. The appellants' written submissions dated 31st May 2024 argued that by dint of rule 20 (7) of the Sports Registrar Regulations 2016, the claim was time barred for being filed outside the thirty-day stipulated period. Calculating, the appellants observed that though the elections were held on 15th December 2022, the respondents only lodged the claim on 15th February 2023. Furthermore, neither explanation had been advanced regarding this inordinate delay nor an application for extension of time lodged by the respondents. In this instance, they argued, Article 159 (2) (d) of *the Constitution* of Kenya, could not succor this procedural technicality.
28. As to whether the 1st respondent had the locus standi to institute the proceedings, the appellants argued in the negative. This is because the 1st respondent was neither a candidate for the disputed elections, nor a member of the 1st appellant or any sports organization for that matter. Regarding the eligibility of the 2nd, 3rd and 4th appellants to vie for office, the appellants submitted that under the old Constitution governed by the *Societies Act*, there were no term limits for office holders. They contended that since coming into operation of the *Sports Act*, the statute that repealed the *Societies Act*, the 1st appellant could not be governed by this new Act. This is because as at the time it was operationalized in 2013, the 1st appellant had not registered itself within one year of commencement of the Act. Consequently, by dint of section 49 of the *Sports Act*, it was not recognized as an organization and could not therefore be governed by the provisions of the said Act. It argued that it was only governed by the provisions of the Act from 24th May 2018 when it was issued with a certificate of registration. Extrapolating from those facts, the 2nd, 3rd and 4th appellants were eligible to vie for elections since they had only held one term as recognized by the *Sports Act*. the delay in registration, they added, could not be attributed to the appellants for a myriad of reasons as stipulated in its memorandum of appeal and pleadings before the tribunal.
29. Finally, the appellants submitted on the principle of free and fair nominations and elections. They summarized the facts leading up to the elections to argue that since the testimony of James Akama, the 1st appellant's administration officer was undisputed, his evidence was a verified representation of the facts. The respondents on the other hand failed to adduce evidence that the 1st appellant's offices were closed at all material times; the 2nd respondent admitted in evidence that she only received information



from a third party, who was not called to testify, that the offices were closed; the 2nd respondent did in fact represent her bid as she submitted her nomination forms in good time; the fact that there was triviality in the number of candidates was not on account of not obtaining nomination forms in good time; PW3, the only person locked out of the elections, was informed that it was done so on account of late submission and nothing else; the scrutiny process of the nomination forms was bereft of error; there was no legal requirement for inspection by the respondents at least seven days before the elections for the scrutiny process to take place; be that as it may, no such request had been presented to the appellants and was rejected; all the delegates that participated in the elections were credible; and any irregularities occasioned were not too grave as to nullify the elections.

30. The respondents opposed the appeal. In their written submissions dated 6th May 2024, they submitted that the tribunal was right to hold that it had jurisdiction to hear the appeal as the issues before it was intertwined. Thus, Article 159 was applicable thereby invoking the legality of the claim. On whether the 1st respondent had the standing to sue, the respondents argued that by dint of Article 22 of *the Constitution* of Kenya, she qualified herself as a litigant insofar as the dispute was concerned.
31. On the eligibility of the 2nd, 3rd and 4th respondents to run for office, the respondents cited article 1 (c) of the 2nd schedule to the *Sports Act* and clauses 16 and 17 of the 1st appellant's Constitution for the holding that they were not eligible as they had held offices since 2010. Though the 1st appellant had not registered within one year of the commencement of the *Sports Act*, an inference could be drawn that it was a recognized sports organization that fell within the ambit of the said statute. Consequently, the 2nd, 3rd and 4th respondents could not run for office. In their view, the non-registration was deliberate and calculated to advance material gain. For this reason, the elections were a nullity as the 2nd, 3rd and 4th respondents were cleared to run for office yet they were disqualified by law from running a third time. That the actions of the appellants were unfair and unconscionable and a total disregard to the interests of the public.
32. Lastly, on the fairness of the nomination process, the respondents pointed out that the offices of the 1st appellant remained ostensibly closed denying qualified candidates from accessing the nomination forms; the administrative secretary had traveled abroad during this crucial stage of the nomination process; that absence of the administrative secretary at the offices unilaterally was unfathomable and inexcusable; the fairness concept was apparent from the low turnout of nominees; the 10-day notice was insufficient for the candidate to submit their nomination forms; Resultantly, the elections were not free and fair. That these hurdles created unfairness and a plot to retain the 2nd, 3rd and 4th respondents in office.
33. Supplementing their earlier submissions, the respondents submitted on 4th June 2024 that the nominations and subsequent elections of the 1st appellant did not comply with election laws bearing in mind that there were no election by-laws governing the operations of the 1st appellant. The contents of its submissions were rehashed accordingly. That the 3rd interested party could not be determined as the governing body to determine the eligibility or otherwise of a candidate. Furthermore, the respondents were not furnished with the list of delegates and was not put for wide circulation. That having legislation without adherence created chaos. As such, the 2nd, 3rd and 4th respondents could not run for office.
34. Looking at the memorandum of appeal and the submissions argued before me, I postulate that the following issues fall for determination and the same shall be analyzed sequentially:



a. Whether the suit was statute barred?

35. The appellants contended that the suit offended the provisions of regulation 20 (7) of the Sports Registrar Regulations 2016 as it was filed outside the permutations of statutory 30-day limited period. The same provides that a person who is dissatisfied with the results of an election may appeal to the tribunal within thirty days of the election.
36. It is not denied that the elections took place on 15th December 2022. The claim was filed on 15th February 2023. I note that the suit was about 30 days late. The tribunal exercised its jurisdiction in conformity with Article 159 of *the Constitution*.
37. Taking cue from the above, I find that the tribunal invoked that Article in the interest of justice. In any event, no prejudice had been occasioned by the appellants who considerably filed their pleadings and substantively defended the suit. In this case, to dismiss the suit on this ground would militate against the dictates of justice. The suit was filed a few days after the expiry of the time limited period and I find that the same was excusable. To deny audience to the respondents on this issue would have amounted to a travesty of justice. While parties are imbued with the responsibility of complying with the law, I find that the scale of justice in this instance tilted towards a hearing of the dispute on its merits rather than a dismissal on technicalities. Accordingly, I therefore find that the appeal on this grounds must thus suffer its fate and it is hereby disregarded.

b. Whether the 1st respondent had locus standi?

38. The appellants contended that the 1st respondent lacked the locus standi to institute the proceedings on account of the fact that she was neither an aspirant in the disputed elections of 15th December 2022 nor a member of the affiliate organizations of the 1st appellant. Those facts are not disputed. The question however is whether irrespective, the 1st respondent had the standing to sue.
39. The court in Christopher Mutiembu Machimbo & 3 others vs. County Surveyor, Trans-Nzoia & 4 others [2022] eKLR defined locus standi as follows:
- “In the case of Law Society of Kenya vs. Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, as follows: “Locus Standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others vs. City Council of Nairobi [1982] KAR 229, the Court also held that: “the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”. Therefore, locus standi means the right to appear before and be heard in a court of law. Without it, even when a party has a meritorious case, he cannot be heard because of that. Locus standi is so important that in its absence, party has no basis to claim anything before the Court.”
40. Our Apex Court in the case of Mary Wambui Munene vs. Peter Gichuki Kingara and six others [2014] eKLR had this to say about locus standi: “the question of jurisdiction is a “pure question of law,” and should be resolved on a priority basis.”
41. Locus standi is an imperative cardinal principle. As stated by the court in the above case, where its absence is apparent, the party lacks any standing to sue and cannot therefore invoke the jurisdiction of the court or a tribunal. Regulation 20 (7) of the Sports Registrar Regulations 2016 speak to the fact that any person aggrieved with the decision of an election has the recourse to file a dispute before the tribunal. The definition of the word ‘person’ is not captured in the Regulations or the parent *Sports*



Act. However, Article 260 of the Constitution defines “person” to include: “a company, association or other body of persons whether incorporated or unincorporated.”

42. Following the promulgation of the Constitution, it has been widely interpreted that the concept of locus standi enjoys an expanded interpretation and application of it. By dint of Articles 22 and 260 of the Constitution, courts are encouraged to appreciate the purport and reasoning behind a party filing a dispute. Thus, a court will guard the institution of a suit regularly if it can be established that the suit was filed in good faith and not maliciously. Njoki Ndung’u SCJ well ruminated herself in her concurring opinion of the case of *Matemu vs. Trusted Society of Human Rights Alliance & 5 others* [2014] KESC 6 (KLR) as follows:

“Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution’s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis-a-vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret the Constitution in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance.”

43. This court takes the same approach. In the present case, the 1st respondent stated that she filed this suit as a concerned Kenyan citizen in the interest of the public. The merits or otherwise of the dispute is not relevant at this juncture. Consequently, I find that the 1st respondent was properly a party before the tribunal. I therefore see no reason to depart from the findings of the tribunal.

c. Whether the 2nd, 3rd and 4th respondents were eligible candidates for the 1st appellant elections?

44. At the heart of the embattlement is the question whether the 2nd, 3rd and 4th respondents had met the credibility test to stand for the posts that they had been nominated for and subsequently elected. The respondents’ contention was that the said appellants were not eligible by dint of having served under the Societies Act in the 1st appellant and later transitioned into the Sports Act. That since 2013, the appellants had served in the respective offices and were therefore barred to run for a third term. The appellants on their part argued that since the enactment of the Sports Act in 2013, time only started running when the 1st appellant was registered under the new statutory regime in 2018. Consequently, they were eligible to run for another term computed as their second term.
45. It is not gainsaid that the 1st appellant was previously registered under the Societies Act. However, in 2013, the Sports Act was enacted rendering the Societies Act inoperative. The appellants argued that since the 1st appellant did not register within one year after the promulgation of the Sports Act, it was not recognizable. As such, the tenure of office of the 2nd, 3rd and 4th appellants suffered the same fate up until the 1st appellant was registered in 2018. In the circumstances, the appellants argued that the 2nd, 3rd and 4th appellants only ran for one term and were thus eligible to run for a second term.
46. It must be borne in mind that both parties have a consensus to the extent that the terms of office under the 1st appellant are only limited to two terms. That is not contested. What is to be ascertained thus is whether the said appellants had reached their limits and thus barred from running for office for another term. Put differently, had the appellants served the 1st appellant as officials for or two terms?



Our analysis begins with the consideration of section 49 of the *Sports Act* which governed the transition of existing sports organization. It provides as follows:

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.”

47. The language in the above section couched the registration of an organization in mandatory terms within the one-year period. Under clause (3), if the relevant organization is not registered within the time prescribed, it shall not be recognized as a sports organization for the purposes of the Act. The question we need to ask ourselves is what is the import of not being recognized as a sports organization for the purposes of the Act? What was the intention of the drafters of this particular provision of the law?

48. In interpreting the provisions of a statute, I find useful guidance in the pronouncements of the Court of Appeal in the case of Centre for Rights Education and Awareness and another vs. John Harun Mwau and 6 others [2012] eKLR that held as follows regarding the interpretation of *the Constitution*:

- a) It should be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance as provided by Article 259.
- b) The spirit and tenor of *the Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.
- c) *The Constitution* must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.
- d) The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).”

Justice E.M. Githinji, JA stated as follows:

“These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd



result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise... The court as an independent arbiter of *the Constitution* has fidelity to *the Constitution* and has to be guided by the letter and spirit of *the Constitution*.”

49. I do not think that the enactment of the *Sports Act* holistically was intended to create a vacuum. This robust piece of statute was intended to enhance legislation insofar as sports and affiliated organizations are concerned. So that where an organization is not recognized for want of registration, I do not think Parliament intended that it ceased to run its operations in the eyes of the law. Certainly, consequences were there but it is not clear as to the nature of such consequences. I do not think the public good and interest would be served if that was the case. I also do not think that the operationalization of the said statute was intended to envisage a vacuum in the flow of legislation as this would be inimical to the very drafting and enactment of the said piece of legislation.
50. What was the meaning, effect and tenor of “not recognized as a sports organization for the purposes of the Act” upon an organization not registering within one year following the commencement of the *Sports Act*? What is the resultant effect of the 1st appellant’s failure to be registered within one year? It is not denied that the 1st appellant was registered in 2018. In the intervening period however, the 1st appellant continued to have its day to day business operations running. It conducted itself in the normal business manner and did not shut down its offices. It is why the 2nd, 3rd and 4th appellants continued to remain in the elective posts; the enactment of the new law notwithstanding. Should the court disregard the elective term held by the 2nd, 3rd and 4th appellants between 2014 (giving a one-year grace period from when the relevant statute was operationalized in 2013) and 2018 under the lens of *the Constitution* and the law as was pitted out by the appellants? They argued that this period ought not to be taken into consideration bearing in mind that it did not comply with the law. The tribunal in making its analytic conclusion on this particular issue held a follows:

“The gravamen of the argument of the respondents seems to be that the term that was served between 2014 and 2018 ought not to be recognized because the registrar of sports does not consider it as such. This argument has to be dissected within the prism of law and where there is an obvious conflict between what the law states and what the person or office which has cardinal responsibility to enforce such law abdicate on their authority then the law shall prevail. To that extent, it would be a narrow interpretation to find that the official recognized term as per *the Constitution* of the sporting body commenced in 2018 after the first election was held that year.

Nevertheless, it appears anachronistic to the intention of the Kenyan Parliament to institute term limits for a sporting organization, which then in complete awareness of the consequences of failure to register/transition, chooses to violate the law to enjoy illegitimate rights and attempt to hold office for more than the envisaged term limit duration (8 years). The upshot of the foregoing is that while the 1st respondent’s constitution only recognizes one term; it is not in harmony with statute which is superior of the two.”



51. This court finds that analysis sound and takes the same approach. As long as the 1st appellant remained operational as confirmed during the hearing of the dispute, the appellants cannot be heard to say that the 2nd, 3rd and 4th appellants were not in office during the period 2014 and 2018 as that would amount to an absurdity. This court cannot overlook that they continued to hold the elective posts that were transitioned into the new regime upon the 1st appellant's registration in 2018.
52. The appellants argued that the absence of registration was not attributable to their inaction but several limitations across the board. For instance, it was their contention that there were no Sports Registrar Regulations which were only implemented in 2016. That the Registrar was only appointed much later rendering any registration prior to this year superfluous. Furthermore, as an umbrella, the 1st appellant could only register upon the compliance of its affiliate registration bodies. If that were the case, I opine that a floodgate and multitude of litigious disputes would have shaken hands with the corridors of justice. Regardless of the purported challenges set out by the appellants, other sports organizations, as rightly observed by the tribunal, complied with the provisions of the Act.
53. In my view, the appellants were shrewd in their conduct for they contemplated that since the 1st appellant would not be recognized, then their terms of office would similarly be non-recognizable. I think the appellants were well aware of their intentions behind this craft but I do not think those would be repercussions for failing to register an organization as set out in Section 49. It is apparent that the 2nd, 3rd and 4th appellants wanted to have a second bite at the cherry and use the interpretations of those provisions to benefit from an unjust act. That is an abuse of the process of the court. I find that the 2nd, 3rd, and 4th appellants held two terms between 2014 and 2018 and between 2018 and 2022. Accordingly, I do not hesitate to find and hold that the 2nd, 3rd and 4th appellants were not eligible to run for office as that would have amounted to running for a third term in blatant violation of the 1st appellant's Constitution as well as the *Sports Act*.

d. Whether the election process was free and fair?

54. A long latitude of authorities adopts the nomenclature that an election is a process and not an event. The Supreme Court in *John Harun Mwaui & 2 others vs. Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR explicated that the nomination process is deeply rooted in *the Constitution*, which recognizes that an electoral contest must be preceded by the nomination of candidates to vie for elective positions. It then went on to pronounce itself as follows:

“...Nomination, therefore, is not just a formality, or an exercise in futility, nor can it be dispensed with, save for lawful cause... In summary, therefore, at a general level, nomination is depicted as a process through which candidates are identified for participation in an election, subject to them being properly qualified under the law, for the elective seat that they seek. It is a critical component of an electoral process, without which there would be no election.”
55. The nomination process remains instrumental in an election. They cannot be autonomous to each other as the nomination process is a run up to the elections. In order to ascertain the credibility or otherwise of an election, it is therefore necessary to dissect the events leading up to the elections as cardinal to the principal of democracy as envisaged in Article 81 of our Constitution. In this instance particularly, the court must be guided by the cornerstone principles set out in *the Constitution* and case law to determine whether the elections were free, fair and legal compliant taking into account that the 1st respondent had no legislation in place governing its elections. In this regard, the elections held on 15th December, 2022 must be seen from the nomination process until the declaration of the results.



56. A summary of the facts leading up to the elections is that pursuant to a letter dated 18th December, 2021, the 1st appellant wrote to the Sports Registrar seeking a list of compliant registered sports organizations that would participate in the elections scheduled to take place in 2022. The list was however not furnished in readiness for the 1st appellant's Annual General Meeting that was to take place in February 2022. Consequently, a subsequent letter was written on 1st March, 2022. The list was eventually furnished in September of that year.
57. Following their vacancies, the following positions invited prospective candidates for the governance of the 1st appellant: Chairperson, Vice Chairperson, Treasurer and two Committee Members. The 1st appellant invited qualified and interested candidates to apply for those positions by submitting their nomination forms vide its notice dated 22nd November, 2022. The notice was attached together with minutes of the previous meeting to the constituent members' emails on 25th November, 2022. The salient features of the notice captured the following requirements: "All Sports Organizations are requested to send one representative who will have the voting right. Nomination forms for anyone interested in any of the elective positions to be picked from the KNSC secretariat at Riadha House room 19 and the duly filled form to be submitted on or before 6th December, 2022 by close of business. Only those Sports Organizations who have registered with the office of the Sports Registrar and fully paid their affiliation fee will be allowed to participate. Kindly acknowledge receipt of this letter and send the name and identity card or passport number of the delegate who will represent your federation during the AGM latest 6th December, 2022 for logistical planning purposes. The appointment letter of your delegate must be signed by the Chairman/President of your organization. Please note all the delegates to carry their identification documents to be allowed to participate."
58. The notice attracted the interest of several persons including the 2nd, 3rd and 4th appellants as well as the 2nd respondent and the respondents' witness Mr. Duncan Kiprop. The elections were scheduled to take place on 15th December, 2022. In preparation, the 1st appellant wrote to the 3rd interested party requesting the office to conduct their elections and appoint a returning officer. A memorandum of understanding dated 15th December, 2022 was entered between the two parties concerning the order of elections. The 1st respondent submitted all the vacancies contested for, together with a list of candidates and their credentials as requested in the notice of the elections paving way for the elections that took place by way of secret ballot.
59. The 1st appellant invited the Registrar Sports in its letter dated 19th November, 2022 and the Director State Department of Sports in its letter dated 18th November, 2022 to attend as observers. A total of 62 sports organizations sent their delegates and participated in the elections. On the election day, some of the positions were unopposed and winners declared on the floor of the house. Ultimately, the Office of the Registrar and the Director for Sports were satisfied with the conduct of the elections.
60. The respondents raised several issues affecting the integrity of the election process. Firstly, the forms were only made available on the last day and issued on a request basis. Secondly interested candidates could not access the forms since the offices of the 1st appellant remained closed. Mr. Duncan Kiprop, an aspirant in the elections testified that he did not make it to the ballot on account of insufficient time to obtain the clearance documents. Furthermore, he complained that he did not find the officers of the 1st appellant to receive his nomination papers. Thirdly, the respondents requested for a delegation list that was not furnished.
61. In response to those allegations, the appellants submitted that the elections were free and fair. Furthermore, no party in attendance raised issue with the conduct of elections during the AGM. Secondly, they were not required by law to furnish a delegation list at least 7 days before the elections



for a scrutiny process. In any event, those emails dispatching the notices were duly received as none of the respondents raised issue with this process. Thirdly, the appellants advanced that the nomination forms were readily available and their secretariat offices remained open during the official business working days and hours of 8:00 a.m. and 5:00 p.m. In fact, the 1st appellant's administrative secretary was personally available in the secretariat's offices during the period from 25th November, 2022 up to 28th November, 2022, when he traveled abroad for official duties for three days. He thereafter reported back to duty upon his return. However, during the intervening period, the offices remained open.

62. The tribunal noted with grave concern the low turnout of received nomination forms. The tribunal further could not ignore the fact that the 2nd, 3rd, 4th appellants, as officials during this time, had leverage over the process. In its view, this cast doubt on the credibility and effectiveness of the election process. It made the following observations:

“We note with regret that it is unclear how the elective positions attracted such few candidates; 4 contestants for 3 executive positions, raising doubt as to the effectiveness and integrity of the nomination process. Interestingly, the incumbents were the mainly the only nominees despite the 1st Respondent's large membership of up to at least 62 active Federation members from which 37 were eligible to present candidates to vie for available positions and to vote. Subsequently, the 2nd, 3rd and 4th Respondents are on record to have been mired in a nexus of proposing and seconding each other as candidates. For instance, the 4th Respondent and 2nd Respondent were the proposer and seconder respectively of the 1st Interested Party. The said Respondents then scrutinized the forms of each candidate after which the 2nd Respondent declared those who had been successful in the nomination. Further, in their defence they opine that this was not an issue as they complied with Chapter 6 of *the Constitution* of Kenya neither did the law bar them from the exercise. If it were as they claim, there would have been no dispute and the Tribunal exerts itself to determine the strength of each allegation raised...

...The evidence availed by the Respondents and the Claimants demonstrates that the Respondents did not handle the election process with the diligence it deserves. The Administrative Secretary's left the country during the nomination process and though it was indicated that there were other members of Staff at the secretariat who would have handled the process, the issue of delegation of duties of the Returning Officer who accepts the nomination forms came up as his office was the one charged with the mandate to issue nomination papers does not help the situation. The Tribunal does not wish to interrogate the urgency of the travelling decision but takes into account in these days of advanced technology, information should have gone out to the membership on who was clearly mandated to issue and receive nomination forms. In fact, simpler methods such as having nomination forms downloaded on the 1st Respondents website or some other platform that was freely accessible, or remitted together with the Notice convening the electoral AGM, would have allayed the allegations now raised by the Applicants.”

63. The tribunal analyzed the evidence on record and was able to observe the demeanor of the witnesses to the stand. I have also taken into account that the tribunal carefully scrutinized the documents on record. I find myself with nothing useful to add in light of the careful analysis of the tribunal as set out herein. This court takes the same approach and agrees with the tribunal to the extent that the period of presentation of the nomination forms was too scanty as to present all requirements in line with the notice. Withal, some of the requirements would have taken a long period of time and consequently locked out potential candidates.



64. The tribunal also made a significant observation in the provision of the delegate list. It held as follows in paragraphs 94 - 98 of the judgment:

“It was the Respondents assertion that there was no legal requirement to provide the list and alleged that it was not requested. Based on a balance of probabilities as in *Miller v Minister of Pensions*, it is the Respondents who would have benefited from the secrecy of the process. Thus, from the Memorandum of Understanding with the 3rd Interested Party, a request for the list to be made public was not mandatory since it was incumbent for the Respondents to provide it. In particular, this was to be done after settling of disputes. Taking a leaf from National Elections, it is of extreme importance that the list of voters be readily available for scrutiny and where necessary use by all candidates to canvass for votes. The hallmark of transparency is to avert suspicion of foul play and irregularities in such contests whether real or imagined. It is therefore procedurally prudent to ensure that a voters list be accessible or where requested it be availed.

Considering that each sport association was to only send one delegate to represent them, it was unclear to know the voters to be able to conduct a successful campaign. The Election Guidelines had indicated that the delegates list would be closed on 6th December 2022 for logistical planning purposes – which the Tribunal presumes would have included availing of the delegates list to the IEBC for the circulation to the membership or directly to the membership. This hoarding of the list on one hand disproportionately favoured the Respondents who were aware of the relevant persons to sell their agenda while prejudicing the other contestants and their own membership on the other hand. The Sports Registrar Regulations, 2016 on Election regulations demand for an open, free and fair environment. The Tribunal resists the temptation to declare an election as open, free and fair if the delegates’ list is only accessed by one side of the divide participating in the process. If a neutral party withheld the list from publicization, then the impact on the process would not have been as adverse as in this situation.

Further scuttling the process on the election date was the decision to have two members present in the AGM and only one possessing the rights to vote. The whole election process raised questions as some competitors were by virtue of information held put at an advantage, which can reasonably be deemed as a means to a skewed outcome.

From the attendance register, it can be clearly seen that there are delegates whose names were added to the list of attendees in handwritten form. The Tribunal ponders as to why this is so when a complete list was already forwarded to the 3rd Interested Party who was to manage the voting exercise. These additions have not been explained to the panel’s satisfaction, it is a peculiar action that needs thorough interrogation. The affirmative answer is that the process was either deliberately or by default shrouded in mystery to allow for such changes.

For this reason, the Tribunal considers that the voting and tallying on the date the elections were conducted was largely regular and without any proven illegalities and irregularities on the actual voting day.”

65. The above findings are mirror adopted and the court finds the reasoning sound. This court shall not depart from those findings. It is also noteworthy and this court takes consternation with the conduct of the 2nd, 3rd and 4th appellants. It is observed from the record that they were proposing and seconding each other leaving a lot to be desired.



66. As stated earlier, an election is a process and not an event. To establish fairness, one needs not to engage in a splitting hairs expedition or fastidiously unearth the evidence before it in order to arrive at a conclusion. I am not saying that the evidence need not be analyzed carefully. In establishing fairness, the same ought to be plain, simple and obvious to the naked eye. In this case, even after analyzing those documents, the anomalies became grave, apparent and obvious. They were not a reflection of a free and fair process as couched in our Constitution. I therefore find that the election process was marred with irregularities thereby failing to meet the fairness transparency and reasonable test for the following reasons: accepting and clearing the nomination application forms of the 2nd, 3rd and 4th appellants as candidates, providing a paucity of a period of submission of nomination forms, failing to furnish the respondents with a delegates list, the unavailability of the relevant personnel to distribute the nomination forms to the candidates and the conduct and manner of the 2nd, 3rd and 4th respondents seen not as a reflection of a fair process. The upshot of the foregoing is that the present appeal is devoid of merit. It is hereby dismissed but with no costs since it is a public interest matter.

It is so ordered.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF NOVEMBER, 2024.

.....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Barasa for Appellants present

Nambande for the Respondents

Court Assistant – Mr. Samuel Shitemi

