



**Ogari v Electoral Board & 4 others; Football Kenya Federation & 2 others (Interested Parties) (Petition E030 of 2024) [2024] KEHC 13820 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13820 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
PETITION E030 OF 2024**

**PN GICHOHI, J  
NOVEMBER 7, 2024**

**IN THE MATTER OF ARTICLES 2, 10, 19, 20, 21, 22(1) 23,27,36,38,47,81,94  
AND CHAPTER SIX OF THE OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF CONSTITUTION OF FOOTBALL KENYA FEDERATION**

**AND**

**IN THE MATTER OF SECTION 2,46 (5) AND PARAGRAPHS  
(A), (B), (C), (D), (G) OF THE SEOND SCHEDULE TO THE ACT**

**AND**

**IN THE MATTER OF ELECTORAL CODE OF FOOTBALL KENYA FEDERATION 2019/2020**

**BETWEEN**

**DICKSON OGAMBA OGARI ..... PETITIONER**

**AND**

**THE ELECTORAL BOARD ..... 1<sup>ST</sup> RESPONDENT**

**THE FKF NATIONAL EXECUTIVE COMMITTEE ..... 2<sup>ND</sup> RESPONDENT**

**THE FKF ELECTIVE NATIONAL ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT**

**THE SPORTS REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**AND**



**FOOTBALL KENYA FEDERATION ..... INTERESTED PARTY**  
**KEPHA NYABUTO ONDITI ..... INTERESTED PARTY**  
**ELIAKIM MBALIWA ..... INTERESTED PARTY**

## **RULING**

1. The background of this ruling is that under certificate of urgency, the petitioner's Notice of Motion and Petition dated 4/11/2024 were at the first instance and on the same day placed before this court differently constituted.
2. The matter was certified as urgent and for reasons that the said court had dealt with a similar matter in Nairobi, the court directed that the matter be handled by another Judge. At the same time, the court directed that the pleadings served by close of business on 5/11/2024.
3. The matter was therefore allocated to this court for hearing and determination and towards that end, it was directed that matter be mentioned on 6/11/2024 at 9.00 am for directions.
4. As at the time the matter came up yesterday for mention as scheduled, there was no appearance by the 4<sup>th</sup> and 5<sup>th</sup> Respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Party.
5. In opposition to the application and the petition, the 1<sup>st</sup> Respondent had filed and served Grounds of Opposition dated 6/11/2024 while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had filed their Notice of Preliminary Objection dated 5/11/2024. On his part, the 1<sup>st</sup> Interested party had filed a Replying Affidavit sworn on 6/11/2024 by Patrick Korir in his capacity as acting General Secretary/CEO of FKF.
6. It is then that Mr. Ouma for the Petitioner sought conservatory orders pending hearing and determination of this application and the petition. He specifically sought orders in terms of prayer No. 2 of the Application arguing that the Applicant will be prejudiced unless interim conservatory orders are issued.
7. He also sought to put in a Supplementary Affidavit in respect of Replying Affidavit and the pleadings filed by the parties herein. He told the court that unless interim conservatory orders are issued, the Applicant will be prejudiced. He therefore stated that once the order are granted as he had proposed, then his proposal was that they proceed by way of written submissions so as to expedite the matter.
8. The parties present immediately opposed granting of any conservatory orders in light of their pleadings filed as stated herein. Due to the urgency of the matter, this Court directed that the parties address the Court in regard to the prayer for conservatory order as sought by Counsel for the Petitioner.
9. The gist of opposition by the parties present was mainly that: -
  - i. The Applicant was indolent in filing this application and petition.
  - ii. The Applicant violated the doctrine of exhaustion.
  - iii. The Applicant lacks locus standi to file application and petition.
  - iv. The matter herein is res judicata.
  - v. This court lacks jurisdiction to hear and determine this matter.



10. On indolence, it was submitted that that considering the date time table was published, the if there were any constitutional issue as alleged, the Applicant should have raised them immediately not two days before elections questioning list of delegates in regard to Nakuru County.
11. On the doctrine of exhaustion, it was submitted that this matter is subject of FKF Appeals No. 11 of 2024 Kefa Onditi v FKF Electoral Board and he is accused of non- disclosure reason being he was a witness in the matter for the 2<sup>nd</sup> interested party.
12. On *locus standi*, it was submitted Applicant never pleaded anywhere that he was filing the petition on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties as they cannot file on their own and neither did the Applicant invoke Article 22 (2) of the on their own to file the application and the petition. Further it was submitted the Applicant refers to one Oliel but who he did not join to these proceedings.
13. On res judicata, it was submitted that the Appeals Committee No. 11 of 2024 gave a decision on 5<sup>th</sup> November 2024 affirming the decision being challenged by the Applicant herein. That in the circumstances, if aggrieved, the Applicant and the 2<sup>nd</sup> Interested party ought to Appeal to Sports Dispute Tribunal which is a specialize body on issues regrading Sports.
14. On jurisdiction to hear and determine this matter, it was submitted that any dispute arising from electoral process ought to be raised first before the FKF Elections Board, then move to FKF Appeals Committee and then to the Sports Dispute Tribunal. Arguing that there is no constitutional grievance raised here, this court was urged to allow the bodies that are obligated to deal with the issue do so.
15. Lastly, it was contended that 2<sup>nd</sup> Respondent does not exist at this juncture for reasons that as at 24/8/2024 when 1<sup>st</sup> Interested Party handled AGM, all office bearers vacated leaving only the President.
16. It was therefore contended that even if the 2<sup>nd</sup> Respondent was considered incompetent, then the President cannot do what the Applicant seeks in that prayer. That just because two people have been excluded does not call for electoral body to be reconstituted and therefore, that prayer is untenable.
17. In the circumstances, it was contended that the Petitioner herein failed to demonstrate that he has a prima facie case with likelihood of success and in support of that issue, reliance was placed on [Gatirau Peter Munya Munya v Dickson Mwenda Kitbinji & 2 others](#) application No. 5 of 2014 eKLR.
18. In response to the issue of indolence, the Petitioner submitted that it was being argued as though the Petitioner is challenging timelines by 1<sup>st</sup> Respondent in regard to these elections yet on the face of it, the final list was published by 1<sup>st</sup> Respondent on 2/11/2024 which was a Saturday and therefore, in filing this application before this court on 4/11/2024, then the Applicant was not indolent. It was argued that the timelines therein were set by 1<sup>st</sup> Respondent for it to achieve desired outcome in those elections.
19. It was his submissions that the issue of res judicata does not arise as the court has not been told that the Petitioner herein was a party to proceedings in the case 11 of 2024. That for this court to determine the issue of res judicata, it would need to call for proceedings in that case. It was therefore submitted that the Petitioner did not owe any party the duty of disclosure as he was not a party to that case.
20. On *locus standi*, the Petitioner submitted he has come here not here as a candidate in that election but as a public interest litigator and therefore he has specifically moved the court under Article 22 (2) (c) of the [Constitution](#) hence not bound by the provisions cited in that Preliminary Objection.
21. On doctrine of exhaustion, it was submitted that the Applicant did not have to submit himself to the jurisdiction of the Football Kenya Committee as he is not bound by it.



22. Lastly, it was submitted that at this stage, the Applicant has demonstrated that this is an issue concerning public interest as stated in *Munya case* (*Supra*) that by allowing elections to proceed, the Petitioner and general public will be highly prejudiced.
23. Wrapping up in brief rejoinder, the 1<sup>st</sup> Respondent contended there are allegations regarding Mr Oliel who is not a party. That the issue before this court is not the list but the prayers sought. That the board was inaugurated and in operations for over 2 months and therefore, the issue of indolence still applies.
24. On non-disclosure, it was argued that the Applicant ought to have stated that he was a witness there as it is not possible that he was unaware of the proceedings as he was a witness.
25. On res judicata, it was contended that the issue is not whether the Applicant was a party or not but that the subject before court had been decided and that it was a decision in rem, binding all regardless as to whether he was a party or not.
26. Lastly it was argued that the Applicant never cited Article 22 (2) (C) of the *Constitution*. Further, it was contended that the Applicant is not a public interest litigator as he was a delegate as per his own admission. That as a Member of FK, he should submit to the rules of that body.

### **Determination**

27. Having heard, the parties and noted their pleadings, it is apparent that the parties' arguments strayed to the main petition yet at the onset, the Applicant specifically sought interim conservatory orders in terms of prayer No. 2 of the application.
28. In the petition dated 4<sup>th</sup> November 2024, the Petitioner is seeking: -
  - a. A declaration that the 2<sup>nd</sup> Respondent as currently constituted is highly compromised, incompetent, and lacks integrity hence not fit to preside over and or conduct free, fair and credible FKF Nakuru County Elections scheduled for the 9<sup>th</sup> November 2024 and/or any other FKF elections.
  - b. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' decision to disqualify the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties was unconstitutional as it violated their rights under the provisions of Articles 27, 47, 50 and 81 of the *Constitution* of Kenya 2010 hence null and void ab initio.
  - c. A declaration that the actors of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' deliberately specifying a small church in a violent crime prone area of Rhoda Estate -Nakuru County as the polling station was illegal, irresponsible, a dereliction of duty, and in breach of Articles 81 of the *Constitution*, FKF Constitution and the Electoral Code of Conduct which emphasize that elections must be free from violence, intimidation, improper influence or corruption.
  - d. An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to suspend, call off and/or cancel the FKF Nakuru County Elections for the 9<sup>th</sup> November 2024 to pave way for the reconstitution of the 2<sup>nd</sup> Respondent.
  - e. An order directing the 1<sup>st</sup> Respondent to dissolve the 2<sup>nd</sup> Respondent and upon such dissolution, commence the process of its reconstitution before a new date for FKF Nakuru County Elections is set.
  - f. Any other order that this Honourable court may deem just and expedient to grant.
29. The record shows that the reliefs sought in that subject application were: -



1. Spent
  2. That pending hearing of this application inter-partes, this Honourable court be pleased to issue Conservatory orders suspending and/or restraining the Respondents either by themselves, their agents, servants, employees and/or persons acting under their authority or instructions from conducting, presiding over the FKF Nakuru County elections scheduled on 9<sup>th</sup> November, 2024 and or on any other date.
  3. That pending hearing and determination of this Petition, this Honourable court be pleased to issue Conservatory orders suspending and/or restraining the Respondents either by themselves, their agents, servants, employees and/or persons acting under their authority or instructions from conducting, presiding over the FKF Nakuru County elections scheduled on 9<sup>th</sup> November, 2024 and or on any other date.
  4. That that the costs of this application be provided for.
30. This court therefore focusses on the prayer No. 2 of the application bearing in mind that this was not a hearing but a mention for directions. The Applicant was even seeking leave to respond to the pleadings so far received. There were other parties who had not yet responded and the court was to give directions on the Application. In the circumstance's, this court will not go to merits, or otherwise, of this petition but rather, whether Applicant has satisfied the court that he is deserving of interim conservatory orders in terms of prayer 2 which is very specific.
  31. The threshold for the grant of conservatory orders was stated by the Supreme Court in [Gatirau Peter Munya](#) (supra) thus: -
    - “(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes...”
  32. There is an indication in the Applicant’s application and which is among the grounds of objection to the prayers sought that Applicant is a member of FKF and that he was a delegate in the elections.
  33. The Applicant is aggrieved by the decision to disqualify the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Party which he terms unconstitutional as it violated their rights under the provisions of Articles 27, 47, 50 and 81 of the [Constitution](#) of Kenya 2010.
  34. He is also aggrieved by the handling of a complaint by one Oliel who was a competitor/ candidate. These are not parties to the petition as at the moment. There is also an allegation that the subject matter was a dispute before another body and a decision made.
  35. It is clear that there are too many issues surrounding this application that militate against granting of conservatory orders at this stage. More prejudice would be caused by granting any orders to stop the elections scheduled for this Saturday. It is a fact that this court is not short of remedies should the elections proceed as scheduled.



36. In the upshot, this Court finds that the Applicant has not at this juncture met the threshold of granting any conservatory orders as sought. There will be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of**

Mr Ouma for Petitioner

N/A for Respondents

N/A for Interested Parties

Ruto Court- Assistant

