



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 221 OF 2018

DAVID OBUYA.....1ST PLAINTIFF

TARIQ IQBAL.....2ND PLAINTIFF

KENNEDY OTIENO.....3RD PLAINTIFF

EDWARD ODUMBE.....4TH PLAINTIFF

EDMOND MWAKIO.....5TH PLAINTIFF

FRANCIS ONYANGO.....6TH PLAINTIFF

-VERSUS-

CRICKET KENYA.....1ST DEFENDANT

ZEHRABANU JANMOHAMMED.....2ND DEFENDANT

HARPAL SINGH.....3RD DEFENDANT

RAVI KAUL.....4TH DEFENDANT

RAJESH PATEL.....5TH DEFENDANT

SAILESH SHETH.....6TH DEFENDANT

JAYESH SHAH.....7TH DEFENDANT

SANJAY PATEL.....8TH DEFENDANT

UPESH PATEL.....9TH DEFENDANT

TOM TIKOLO.....10TH DEFENDANT

RAJA SARKAR.....11TH DEFENDANT

AND

SPORTS REGISTRAR.....1ST INTERESTED PARTY

CABINET SECRETARY FOR SPORTS AND HERITAGE.....2ND INTERESTED PARTY

RULING

1) The subject matter of this ruling is the motion dated 26th October 2020, taken out by the 1st, 3rd, 5th and 6th plaintiffs/applicants whereof they seek for the following orders:

i. This application be hereby certified urgent and the same be heard ex-parte in the first instance.

ii. This honourable court hereby reinstate the interim injunction issued on 2nd November 2018 varied on 21st November and extended on 1st April 2019 to the extent that the respondents are barred from representing themselves as executive committee or counsel members of Cricket Kenya, and in particular without prejudice to the foregoing, conducting any elections under the Constitution of Cricket Kenya dated 3rd June 2007, accessing and utilizing any money from any accounts held by Cricket Kenya and any other actions on behalf of Cricket Kenya, pending the hearing and determination of the application hereto.

iii. The consent dated 6th May, 2019 and recorded as an order of this honourable court on 22nd May 2019 be hereby varied to maintain the following person who constituted the members of the Interim Executive Board for a further period of ninety (90) days for purposes limited to adopting the Constitution of Cricket Kenya shared with the Interim Executive Board on 6th May 2020 and calling for elections:

a) Harpal Singh Sehmi

b) Pearlyne Omamo

c) Kennedy Obuya

d) Kalpesh Solanki

e) Omole Asiko

f) Mutarza Tajbhai

iv. In the alternative to paragraph 3 herein above, this honourable court be hereby pleased to set aside in its entirety the consent dated 6th May 2019 and recorded as an order of this court on grounds that certain conditions therein remain unfulfilled due to the lapse of the term of the Interim Executive Board on 10th May 2020.

v. Pursuant to granting paragraph 4 herein above, the respondents and interested parties be hereby directed to file their respective responses to the applicants application filed on 11th September 2018, within fourteen (14) days of the orders hereof.

vi. Costs of the application be awarded to the 1st, 3rd, 5th and 6th applicants.

2) The motion is supported by the affidavit and the further affidavit sworn by John Obuya. Zehrabanu Janmohamed the 2nd defendant filed a replying affidavit she swore to oppose the same. The 5th and 10th defendants opposed the motion by relying on the dispositions made by 2nd defendant.

3) When the motion came up for interpartes hearing learned counsels recorded a consent order to have the application disposed of by written submissions. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further considered the rival written submissions.

4) The undisputed facts in this matter is that on 22nd May 2019, parties filed a consent letter dated 6/5/2019 and successfully urged Lady Justice Kamau to have it adopted as the order of this court. The learned Judge adopted the consent letter as the order of this court. The consent order is to the effect that:

(a) That an election of Cricket Kenya, the 1st defendant herein was held on 11th May 2019 whereof the following were elected:

i. Chairperson – Z. Janmohamed

ii. Vice chairperson – Harpal Singh

iii. Treasurer – Kennedy Obuya

iv. Development Director – Tom Tikolo

(b) This matter was also marked as fully settled.

5) The applicants have argued that the 2nd to 10th defendants have willfully and unlawfully failed to comply with the terms of the consent

orders and that they have purported to conduct an election under the defunct constitution of Cricket Kenya dated 3rd July 2007 thus precipitating the applicants to file the current motion.

6) The applicants aver that this court has jurisdiction to entertain the application under Article 165 of the Constitution and Section 58B of the Sports Act.

7) It is further argued that since the parties did not consent to have the dispute referred to the Sports Tribunal, then the same does not fall within the ambit of Section 58 of the Sports Act.

8) The applicants have submitted that the parties voluntarily entered into the consent to facilitate the smooth running of Cricket Kenya affairs but unfortunately that has been frustrated by acts and or omissions by the respondents with the ripple effect being frustrating the operationalization of Cricket Kenya through its management. It is said that the consent is marred by flagrant disobedience and non-compliance.

9) The 2nd defendant whose submissions were adopted and relied upon by the 5th and 10th defendants, opposed the application arguing that the applicants have not alleged fraud, collusion, mistake or misrepresentation as grounds for setting aside the consent order.

10) It is also pointed out that the application is filed by advocates who are not properly on record. The respondent further argued that the court has no jurisdiction to entertain the application in that it is *functus officio* and that the proposed variation seeks to expand the terms of the consent order.

11) The 2nd defendant stated that the actions to be undertaken for purposes of the execution of the consent order were to be done by the Interim Executive Board which comprised among others, the 3rd plaintiff, 3rd defendant, 10th defendant and one Kalpesh Solanki who is not a party to this suit.

12) The respondent argued that there was no iota of evidence to suggest that the failure to adhere to the terms of the consent order was on the part of the defendants, therefore it is unfair to blame them.

13) Having considered the rival submissions, it is apparent that the main question which should be answered is whether the applicants have satisfied the conditions for setting aside of a consent order. The conditions necessary for the setting aside of a consent order/judgment were restated in the case of **Flora Wasika =vs= Destinmo Wamboka (1988) 1 KAR 625** inter alia as follows: **“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be unfulfilled which are not carried out.....”**

14) In the case before this court it is alleged that the respondents have frustrated the implementation of the terms of the consent. The record shows that the consent bound the Interim Executive Board.

15) There is no allegation of fraud, collision, mistake or misrepresentation on the part of the persons named in this application. There is no credible evidence to show the role the respondents individually played to frustrate the implementation of the consent order.

16) The other serious issue which was missed is the fact that the application was filed by an advocate who is not properly on record. It is apparent that the effect of the consent order is that this suit was marked as fully settled.

17) Under order 9 rule 9 of the Civil Procedure Rules, a new advocate who wishes to come on record thereafter must seek for leave.

18) At the time of recording the consent order, the firm of George Gilbert Advocates and Kiarie, Kabita and Kihunyu Advocates were on record for various plaintiffs. The firm of Okatch and Partners came on record after the consent had been recorded. There is no evidence on record to show that the firm sought for leave to come on record. This therefore renders any application or pleadings filed by such an advocate to be improperly on record therefore amenable to being quashed.

19) It is the submission of the 2nd defendant that the application having been filed after the lapse of the mandate of the Interim Executive Board, this court is rendered as *functus officio* hence lacks jurisdiction to determine the matters which relate to fulfilled or unfulfilled matters of the consent order.

20) With respect I am persuaded by the 2nd defendant's submission that the consent order is not capable of being set aside since the mandate of the Interim Executive Board lapsed on 10th May 2020.

21) A careful reading or perusal of the application will reveal that the applicants are seeking to have the consent order set aside/reviewed and they have proposed some names to be constituted as members of the Interim Executive Board.

22) In my view, the invitation is akin to rewriting the terms of the consent between the parties which is not the function of this court. In any case the mandate of the Interim Executive Board lapsed on 10/5/2020.

23) On the basis of the above reasons, I find no merit in the motion dated 26th October 2020. The same is dismissed. In the circumstances of this case a fair order on costs is to order, which I hereby do, that each party bears its own costs.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 5th day of March, 2021.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant