



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 250 OF 2018**

**SABRY HASHIM.....APPLICANT**

**VERSUS**

**RAMESH PANDYA & 2 OTHERS.....RESPONDENTS**

**AND**

**SUDESH HIRANI, CHAIRMAN OF COAST GYMKHANA.....INTERESTED PARTY**

**R U L I N G**

1. The court is called upon to determine the plaintiff's application dated 17/01/2020 by which the plaintiff prays in the main that the Respondents are jointly and severally in contempt of court orders of 16/4/2019 for which reason they be committed to civil Jail at Shimo La Tewa for a period of six months or that a penalty or fine be imposed upon them for deliberately disobeying the court orders aforesaid.

2. The reasons disclosed to found the application and stated on the grounds on the face of the application and the Supporting Affidavit of RAMESH PANDYA were to the effect that the law under Sports Act, 2013, makes it mandatory that no sports organization shall operate unless registered under the Act and that with such appreciation the parties came to court and recorded the consent order dated the 16/4/2019 (sic) pursuant to which the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents were elected but they have to date failed to comply with the result that the club cannot participate in the National Cricket events. On these grounds the respondents are said to be in blatant and willful disobedience of the court orders and have invited unto themselves sanction for contempt of court. In support of the application, the applicant exhibited the consent order (RP 1) a notice to members by the trustees of mandate given to them by the court to run the club (RP 2) and minutes of special general meeting held on the 28/2/2019 at the club at which elections were held (RP 3).

3. I understand the application to accuse the respondent of failure to have the club registered under the Societies Act contrary to the court order. I also understand the target order to have been issued on 16/4/2019 or 16/2/2019 according to prayer 3 and ground 3 of the application yet my perusal of the court file reveal that no such orders were ever issued after the 24/01/2019.

4. In opposition to the application the Respondent filed a Replying Affidavit by one Amit Kanji Ruda on 12/2/2020 and a Notice of Preliminary Objection on 13/2/2020. The preliminary objection faults the application as incapable of being granted on the basis that the court has become *functus officio* and that the same is defective pursuant to **Section 5 Judicature Act and Order 52 Rule 2** of the Civil Procedure Rules and lastly that the applicant is a stranger to the suit having not been a party and cannot seek to obtain order in it.

5. In the Replying Affidavit, the position taken is that the current applicant has never sought to be a party in the proceedings. On the merits, the deponent posited that the consent order was complied with by calling a special general meeting on 28/2/2019 while order No. 2 was complied with as evidence by the minutes of a General Meeting held on 15/4/2019.

6. It was added that the question of registration under the Sports Act was put before the General Meeting and a resolution reached against such registration. For those reason the terms of the agreement between the parties, the respondents assert, have been fully satisfied and there can be no need to go behind such terms and that litigation ought to come to an end.

7. I purpose to deal with the merits of the case without paying any undue premium on the procedural requirements under both **Section 5 Judicature Act and Order 52 of the Civil Procedure Rules**. I consider the prayers before me as very clear enough to be understood by the respondent and the court and that no prejudice has been demonstrated to have been visited or capable of visitation upon the respondent by the alleged failure to comply. In doing so I take refuge on the provisions of Article 159(2) d of the Constitution. It is the same provisions I have employed to find that even though the applicant cites non-existent orders, the order in the court file that answer to the dispute is only that of 24/1/2019.

8. On the merits of the application, all one needs to investigate, based on the court file and the documents availed by the parties, is whether the consent, a contract between the parties, has been complied with. My reading of that order tell me that the parties agreed to finally end their dispute on conditions that election for the management committee be concluded not later than 28/01/2019 and that audited accounts be prepared and tabled before the membership of the club at an Annual General Meeting not later than 15/4/2019 at which meeting members were to resolve regularization of registration under Sports Act.

9. The minutes exhibited to court by both sides for the meetings held on 28/2/2019 and 15/4/2019 do confirm that the terms of the orders were duly complied with.

10. The dispute about registration under the Sports Act was left to the membership in the consent order. I see that in the minutes of the meeting of 15/4/2019, the question of regularization of status of the club under Sports Act was indeed tabled before the membership at the Annual general meeting and member resolution was passed. According to those minutes, it is recorded as follows:-

**MINUTE 10/2017 – 2018 TO REGULARISE OF CLUB STATUS**

**UNDER SPORTS ACT 2013 AS PER COURT ORDER**

**“MR. CHARLES then asked the members if they wish to register**

**under the Act, to which none of the members agreed. Hence in conclusion the club shall not register under the Sports Act”.**

11. In all the papers filed, none of the parties has contested or put into issue the authenticity or accuracy of the minutes. I take those minutes to reflect the wishes of the club. For now the club must remain to the members and its status can only be altered or tinkered with in accordance with the wishes of the members expressed at a lawfully convened General Meeting. It is not part of the court mandate to run a members club by imposing on the club what the membership considers not in their benefit and interests.

12. Indeed if it be true that any provisions of the Sports Act have been or are being violated, the statute provides sanctions for such violation and the court has not been constituted the regulator of the sports sector. An aggrieved member of the club merely need to consult the constituting document of the club take legal advice and to discern his remedy under such document.

13. For the foregoing reasons, this court finds and holds that the order of 24/01/2019 remain a valid order which has not been challenged but has in fact been executed. It is not open to the court in such circumstances to revisit the order without the consent of the parties. The parties having agreed that the dispute be buried upon the terms of the consent, each and every one of them is bound by such terms and court must view itself for what its position today remain. It has done its work and exhausted mandate - it is *functus officio*. It is forbidden from reopening a validly concluded matter from purposes of re-investigating the merits.

14. On such finding, I find no merit in the application and order that it be dismissed with costs to be paid by one MR RAMESH PANDYA the deponent of the Affidavit in support thereof. I deem him the originator of the motion because I see no other hand of any other member of the club to have sought to exhume the buried dispute from its peaceful resting place.

**Dated, signed and delivered at Mombasa this 5<sup>th</sup> day of March 2020**

**P J O OTIENO**

**JUDGE**