



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 100 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

ROBERT MACHARIA.....APPLICANT

VERSUS

SPORTS DISPUTE TRIBUNAL.....RESPONDENT

AND

FOOTBALL KENYA FEDERATION.....1ST INTERESTED PARTY

CHEPTIRET FOOTBALL CLUB.....2ND INTERESTED PARTY

BONDENI FOOTBALL CLUB.....3RD INTERESTED PARTY

RULING

The Application

1. Robert Macharia, the *ex parte* Applicant herein, and states that he is the Chairman-elect of the Muranga branch of the Football Kenya Federation, and also the Chairman and sole financier of Murang’a Seal Football Club which is currently playing in the Football Kenya Federation (FKF) Nationwide Super League.
2. The *ex parte* Applicant is aggrieved by the decision made on 17th March 2020 by the Sports Dispute Tribunal (the Respondent herein), in Sports Dispute Tribunal Case Numbers 3 and 5 of 2020. The *ex parte* Applicant states that the said decision stopped the National Delegates Conference convened by the Electoral Board of the Football Kenya Federation (the 1st Interested Party herein and hereinafter referred to as “FKF”), and directed the International Football Organization (FIFA) to constitute a “normalization committee” to run Kenyan football.
3. The *ex parte* Applicant has therefore filed an application by way of Chamber Summons dated 30th April 2020 seeking the following orders:

- 1) **THAT the Application be certified urgent and fit to be heard forthwith.**
- 2) **THAT the Applicant be granted leave to apply for an order of Certiorari removing into the high court and quashing the proceedings and decision dated 17th March 2020 of the Sports Dispute Tribunal Cases number 3 and 5 of 2020 and all subsequent proceedings**
- 3) **THAT the Applicant be granted leave to apply for an order of Prohibition, prohibiting the Sports Dispute Tribunal from interfering with the electoral process of the Football Kenya Federation Election Board.**
- 4) **THAT the grant of leave do operate as a stay of the decision dated 17th March 2020 of the Sports Dispute Tribunal Cases**

number 3 and 5 of 2020 and all subsequent proceedings.

5) **THAT the cost of this application be cost in the cause.**

4. The application is supported by a statutory statement dated 30th April 2020, and a verifying affidavit sworn on the same dated by the *ex parte* Applicant. The application was first filed in Muranga High Court, which declined to grant leave on the grounds that the Respondent and 1st Interested Party have their seats in Nairobi, and transferred this matter to this Court for hearing and determination.

5. I have perused the pleadings filed by the *ex parte* Applicant, and the main ground for the application is that under section 58 of the Sports Act the Respondent has no jurisdiction to hear or determine any matters relating to the electoral process of the Football Kenya Federation. Furthermore, that the modes of resolution of disputes relating to decisions of the FKF and the FKF electoral board are expressly provided for in FKF Constitution 2017 and section 7 of the Electoral Code of the FKF respectively, and the Respondent's jurisdiction is thereby ousted.

6. The *ex parte* Applicant annexed as his evidence copies of the Respondent's decision dated 17th March 2020, a previous decision dated 3rd December 2019 by the Respondent in SDT Case no 21 and 24 of 2019, of the FKF constitution and Electoral Code, proof of his election, and of the Notice of Convention of the FKF National Delegates Conference.

The Determination

7. I have considered the application dated 30th April 2020 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent. This for the reason that the election of the *ex parte* Applicant has been nullified, and new elections for his position are scheduled to be held.

8. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

9. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. In the present application, the *ex parte* Applicant has brought evidence of the decision made by the Respondent on 17th March 2020, has averred to the grounds and reasons why it considers the said decision to be illegal and *ultra vires*, and has cited the legal provisions relied upon, as illustrated in the foregoing.

10. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

11. On the question of whether the said leave can operate as a stay of the impugned report, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

12. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

13. It has in this regard been held that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation. See in this regard the decisions in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006, Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995. Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR and James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR.**

14. In the present application, it is notable that the FKF elections were nullified on 17th March 2020 and this aspect of the decision is complete. However, there is an aspect of the decision that is continuing, which is the holding of new elections, which would be amenable to stay. In this respect, given that the impugned decision by the Respondent was made slightly over two months ago, it is necessary to confirm the status of implementation as regards the holding of new elections, and any prejudiced caused thereby, before any orders of stay are made in this matter. The prayer for stay will therefore be canvassed *inter partes*.

The Orders

15. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 30th April 2020 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicant's Chamber Summons application dated 30th April 2020 be and is hereby certified as urgent, and is hereby admitted for hearing *ex parte* and on a priority basis.

II. The *ex parte* Applicant is granted leave to apply for an order of Certiorari removing into the high court and quashing the proceedings and decision dated 17th March 2020 of the Sports Dispute Tribunal Cases number 3 and 5 of 2020 and all subsequent proceedings.

III. The *ex parte* Applicant is granted leave to apply for an order of Prohibition, prohibiting the Sports Dispute Tribunal from interfering with the electoral process of the Football Kenya Federation Election Board.

IV. Prayer 4 of the *ex parte* Applicant's Chamber Summons dated 30th April 2020 seeking orders that the grant of leave do operate as a stay of the decision dated 17th March 2020 of the Sports Dispute Tribunal Cases number 3 and 5 of 2020 and all subsequent proceedings shall be heard *inter partes*, and a ruling thereon shall be reserved at a hearing to be held on 17th June 2020.

V. The *ex parte* Applicant shall file and serve the Respondent and Interested Parties with (i) the substantive Notice of Motion (ii) the Chamber Summons dated 30th April 2020 and its supporting documents, (iii) skeletal submission on the prayer 4 of the said Chamber Summons, (iv) a copy of this ruling, and (v) a hearing notice, within ten (10) days from today's date.

VI. Upon being served with the said pleadings and documents, the Respondent and Interested Parties shall be required to file their responses to the substantive Notice of Motion and skeletal submissions on prayer 4 of the *ex parte* Applicant's Chamber Summons dated 30th April 2020 within fourteen (14) days from the date of service.

VII. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine prayer 4 of the *ex parte* Applicant's Chamber Summons dated 8th May 2020 and the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

VIII. In this respect, all the parties shall file their pleadings, applications and written submissions electronically, by sending them to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com, and shall also avail the electronic copies in word format.

IX. The electronic copies of pleadings and documents sent by the parties shall be clearly and correctly titled to indicate the J.R Case Number, the name of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

X. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XI. The parties shall also be required to send the respective affidavits of service by way of electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XII. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling and the extracted orders to the *ex parte* Applicant by electronic mail by close of business on Monday, 18th May 2020.

XIII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 17th June 2020, and bring it to the attention of a Judge in the Division on that date for reservation of a ruling on prayer 4 of the *ex parte* Applicant's Chamber Summons dated 30th April 2020 and for further directions.

XIV. Parties shall be at liberty to apply.

16. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY 2020

P. NYAMWEYA

JUDGE