



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE JUDICIAL REVIEW DIVISION

(MILIMANI LAW COURTS)

MISC CIVIL APPLICATION NO JR 400 OF 2016

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 8 OF THE LAW REFORM ACT CAP. 26, LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION BY THE NATIONAL OLYMPICS COMMITTEE KENYA (NOC-K) FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF SPORTS ACT, 2013

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2015

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE DECISION BY

THE CABINET SECRETARY FOR SPORTS TO DISBAND NOC-K

AND

IN THE MATTER OF OLYMPIC CHARTER AND THE CONSTITUTION AND RULES NOC-K

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE CABINET SECRETARY

HASSAN WARIO ARERO..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

EX-PARTE

1. KIPCHOGE KEINO

2. FRANCIS KINYIRI PAUL

3. FRIDAH SHIROYAH

(Suing as officials of The National Olympic Committee of Kenya – NOCK)

JUDGEMENT

Introduction

1. By a Notice of Motion dated 7th September, 2016, the *ex parte* applicants herein seek the following orders:

- 1. An order of certiorari do issue to remove to this Honourable Court and quash the 1st respondent's decision of 25-08-16 disbanding NOCK.**
- 2. Costs of this application be provided for.**

Ex Parte Applicants' Case

2. According to the applicants, who are suing as officials of the National Olympic Committee of Kenya (hereinafter referred to as "NOCK"), the NOCK is the local branch of the International Olympic Committee (IOC) and is duly registered under the ***Societies Act***, Cap 106 Laws of Kenya. The International Olympic Committee (IOC), on the other hand, is established by the IOC Charter and NOCK's operations, activities and the way its conducts its affairs is governed by its Constitution and Rules. It was however averred that NOCK is affiliated to and recognized by the IOC as the sole body in Kenya mandated to handle sporting affairs of the International Olympic Committee (IOC) and the Commonwealth Games Federation (CGF) amongst others.

3. Apart from being registered under the Societies Act, the applicant disclosed that they had lodged an application for registration as a sports organization under the ***Sports Act, 2013*** and to their knowledge an interim certificate of registration was pending from the Sports Registrar.

4. It was averred that as the body mandated to oversee and handle the organisation, participation and composition of sports teams to represent Kenya on behalf of the Government of Kenya the applicants are bound by and operate under the rules and mission of the Olympic Charter, which in turn all NOCK's member federations are similarly bound by as stated in its constitution and the Committee of NOCK is empowered to act and make any decisions that is considered conducive to the pursuit of its objectives. It was contended that NOCK's mandate to organise and send teams to participate in the Olympics is set out by the Olympic Charter where the provisions state that it is the National Olympic Committee (NOC) that enters all teams and personnel (Article 40).

5. It was however averred that on or about 25th August, 2016, the 1st respondent purported to disband NOCK, alleging several issues of malpractice and on the part of NOCK officials during the just concluded Olympic Games 2016 at Rio Janeiro citing the **Sports Act** as the law empowering him to do so. The applicants however were of the view that the 1st respondent does not have any powers under the **Sports Act, 2013** or any other law to disband the NOCK.

6. It was averred that the 1st respondent did not make any inquiry from the applicants as to the happenings on the games, and neither did he put any accusations to them or even ask for their report before taking his unlawful action of disbanding the organization. It was therefore the applicants' case that the 1st respondent has breached their legitimate expectations that before condemning the entire organization, he should have at least asked the applicants as officials to explain whatever anomalies he felt had occurred and caused by whichever particular official he had a complaint against.

7. It was averred that the 1st respondent acted contrary to the provisions of the **Sports Act** as no inspection or investigation report had been procured and we do not know under what basis he purported to act in banishing the organization. It was the applicants' case that contrary to their legitimate expectations even after making his public pronouncement disbanding NOCK the 1st respondent neither issued them with any official notification or communication in writing stating the nature of his actions or the provisions of law that he purported to invoke, hence the applicants had to rely on his various utterances to the press and media gatherings.

8. It was reiterated by the applicants that nowhere in the **Sports Act** is he empowered to unilaterally disband any federation and he has clearly acted unreasonably and in blatant disregard of the law given that he is fully aware that his interference with the affairs of NOCK is prohibited under the Olympic Charter and which will have dire consequences and ramifications for sports in the country as Kenya will face a likely ban from the IOC.

9. It was further contended that the 1st respondents actions especially by purporting to transfer the functions of NOCK to a government agency, Sports Kenya, is irrational as Sports Kenya is not a recognized organ under the Olympic Charter and does not subscribe to the provisions and mission of the Olympic Charter, a fact that must be well known to the 1st respondent. It was therefore the applicants' view that the 1st respondents' action of disbanding NOCK was for ulterior reasons and aimed at shielding himself from the strong public criticism he had faced for the many blunders and scandals that have marked his tenure as CS.

10. It was asserted that the 1st respondent acted contrary to the provisions of Article 47 of the Constitution of Kenya 2010 as amplified by the provisions of section 4 of the **Fair Administrative Act** by not giving any of the applicants an opportunity to be heard before being condemned wholesale.

Respondents' Case

11. In response to the application the Respondents filed the following grounds of opposition:

- 1. THAT the Notice of Motion application is defective has no merit and is based on a misconception of the law.**
- 2. THAT the impugned decision has not been availed before the court contrary to provisions of Oder 53 rule 7 of the Civil Procedure Rules and renders the application incompetent.**
- 3. THAT he application offends the statutory provisions of section 9(2)(3) of the Fair Administrative Action Act, the legal principles of exhaustion of alternative dispute resolution mechanisms.**
- 4. THAT this court has no jurisdiction to handle this matter in the first instance. Order 53 invoked on the face of the substantive motion does not confer jurisdiction on the court grant**

the orders sought and renders the application wholly incompetent.

Determination

12. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed. As the Respondents did not swear any affidavit, the factual averments deposed to by the applicants remain wholly uncontroverted.

13. It is true that the only provision of the **Sports Act** that permits the intervention by the 1st Respondent is section 54 thereof which provides as follows:

(1) Where a sports organisation fails to comply with the recommendations of an inspection, the Cabinet Secretary may—

(a) appoint any person or committee to assume the management, control and conduct of the affairs of a sports organization, to exercise the powers and functions of the sports organization to the exclusion of its officials, including the use of its corporate seal, where the sports organization concerned has been unable to conduct its affairs in a proper manner; or

(b) remove any official of a sports organization who, in the opinion of the Cabinet Secretary, has caused or contributed to any contravention of any provision of this Act, or any regulations or directions made thereunder or to any deterioration in the financial stability of the sports organization or has conducted himself in a manner which is detrimental to the interest of the relevant sporting discipline, or which has brought the sporting discipline into disrepute.

(2) The appointment of a person or committee under this section shall be for such period as the Cabinet Secretary shall specify in the instrument of appointment, but shall not exceed six months.

(3) A person or committee shall, upon assuming the management, control and conduct of the affairs of a sports organization, discharge his or its duties with diligence and in accordance with sound management and financial principles.

14. It is clear from the foregoing that the 1st Respondent had no power to disband the applicant under the said provisions. The Respondent has not justified its action on any positive law. It is now trite that for an executive decision to be justified, it must be based on some legally recognised provision or policy. Executive power must therefore be properly exercised within the lawful bounds or parameters and ought not to be misused or abused. According to **Prof Sir William Wade** in his learned work **Administrative Law**:

“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a

responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...”

15. It is trite that an executive body or authority has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525**, Madan, J (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34**; **Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195**; **Choitram vs. Mystery Model Hair Salon** (supra); **Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489**; **Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516**; **Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461**.

16. It is therefore clear that the powers of an executive authority must be conferred by the Statute under which the said authority exercises its powers which instrument must necessarily set out its powers expressly. Unless such powers are expressly donated by the parent instrument, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

17. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies or executive authorities. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**.

18. Where an executive authority operates outside its sphere, the Court would be entitled to intervene. It is however now well settled that:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of

illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.**

19. In this case it is clear that the 1st Respondent had no power under the *Sports Act* to purport to disband the NOCK. By purporting to do so it exceeded its jurisdiction and its decision must therefore be set aside.

20. The Respondents contended that in light of the existence of alternative remedy, the applicants ought not to have moved this Court. Although it was not expressly stated so, I take it that the Respondents were referring to section 58 of the *Sports Act* which deals with the powers of the Sports Tribunal. It is however clear that the said Tribunal only deals with appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal; other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear; and appeals from decisions of the Registrar under the Act.

21. It is therefore clear that the 1st Respondent's decision is not covered thereunder and cannot be the subject of determination by the Sports Tribunal.

22. Having considered the instant application it is my view and I so hold that the Notice of Motion dated 7th September, 2016 is merited.

Order

23. In the premises an order of certiorari is hereby issued removing into this Court for the purposes of being quashed and quashing the 1st respondent's decision of 25th August, 2016 disbanding National Olympic Committee of Kenya.

24. The applicant will have the costs of these proceedings to be borne by the 1st Respondent.

25. It is so ordered.

Dated at Nairobi this 6th day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Okoth for Mr Rombo for the applicant

CA Mwangi