



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 69 OF 2015

FOOTBALL KENYA FEDERATION
.....**PLAINTIFF**

VERSUS

KENYA PREMIER LEAGUE & ANOTHER.....DEFENDANT

R U L I N G

Before this court for determination is an application by way of notice of motion dated 2nd March 2015 and filed instant, supported by the sworn affidavits of the applicants Sammy Tiyoi Sholei and Daniel A. Shikanda, the proposed interested parties.

The application is brought under the provisions of Article 19 (1), (2) and (3) (*sic*), Section 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law.

The applicants seek from this court orders that

1. This application be heard and determined before the hearing of the notice of motion dated 20th February, 2015.
2. Sammy Tiyoi Sholei and Daniel A. Shikanda be granted leave to be enjoined in this suit as interested parties.
3. That the costs of this application be in the cause.

The notice of motion is predicated on 8 grounds on the face thereof namely:

1. That the proposed interested parties are former football players and have been involved in the management of football as National Vice Chair and Regional Coordinator respectively at Football Kenya Federation (the 4th plaintiff herein as per the amended plaint dated and filed on 2nd March 2015.)
2. That the notice of motion dated 20th February 2015 is due for hearing before any

Judge of the Civil Division on 3rd March 2015.

3. That the court has issued orders restraining the Kenya Premier League Limited from commencing the Premier League in Kenya, thus affecting the stakeholders and participants in the football industry.
4. That the proposed interested parties have and continue to be involved in the management of football in the country and regionally through harnessing and nurturing football talent.
5. That the proposed interested parties are involved in nurturing talent at the grassroots level, mentoring the youth in schools and clubs and provision of the necessary equipment for the advancement of the football game.
6. That the proposed interested parties are enthusiasts of the football game and support local teams in the Kenyan League which they would have loved to see participate in the Premier League.
7. That the proposed interested parties have a legitimate interest to be enjoined in this suit so that the specific concerns related to the stakeholders can be put into consideration before the suit is determined.
8. That it is in the interest of justice that this application should be allowed to allow the proposed interested parties to have their day in court.

In the supporting affidavit by the 1st proposed interested party, Mr. Sammy T. Sholei deposes that as a former player, he played for Rivatex and Raymonds FC (both now defunct) as a midfielder before moving to Kenya Breweries Ltd (Tusker FC) and was part of the latter team that reached finals of CAF Cup Winners Cup in 1994, and he later retired from the club and international football in 1997.

Further, that albeit he retired from professional football, he has continued to actively participate in the harnessing football talent and football management in the country and was on 7th April 2012 elected as the National Vice Chair of the Football Kenya Federation but was unprocedurally suspended for a period of six (6) years and the matter is still pending before the Sports Tribunal.

The applicant is concerned that the wrangles between the management of the 4th plaintiff and 1st defendant are adversely affecting the football industry in Kenya.

He therefore seeks leave of this court to be enjoined to this suit to represent the interests of the people involved in the mentoring and harnessing of football talent and families and children whose sources of livelihood is dependent on football.

In addition, that his presence before this court will enable the court take into account the effect of the dispute herein to the stakeholders in the football industry as well as the players that he is nurturing and other players in the football industry.

The applicant urged the court to find that it is in the interest of justice that the application herein is allowed and that he is willing to abide by the directions of this court on how to conduct himself during these proceedings.

The 2nd applicant proposed interested party, Mr. Daniel A. Shikanda too swore an affidavit in support of the notice of motion, deposing to similar issues raised by the 1st applicant save that he played for several clubs in the country including Gor Mahia and won several accolades. He also deposes that he vied and was elected as the Nairobi Regional Coordinator for Football Kenya Federation but was unprocedurally suspended from the management for 6 years on 2nd July 2012 and the matter is still pending before the

Sports Tribunal. He reiterates the rest of the depositions by the 1st applicant.

The application by the proposed interested parties is opposed by the plaintiffs who filed a replying affidavit through Mr. Sam Nyaweya the President and Chairman of Football Kenya Federation.

In his sworn affidavit dated 4th March 2015 and filed in court on 5th March 2015, Mr. Nyamweya deposes that the proposed interested parties have not come to court with clean hands since they were both suspended and eventually banned from all football related activities as shown by annexure A copies of letter communicating the suspension and minutes of the suspension and subsequent ban hence they cannot purport to manage any football activity in Kenya.

In addition, that the said ban has never been lifted by any court of law or any other body or tribunal. Further, that the applicants challenged their suspension and ban in **HC Petition No. 476/2014** which suit was dismissed by **Hon. Justice Mumbi Ngugi** hence they cannot purport to be interested in management of football in Kenya as that would contravene the ban.

The plaintiffs further contend that the applicants' interests are adverse to those of the plaintiffs and that they are effectively not stakeholders under the Constitution of the 4th plaintiff since the stakeholders are only identified as clubs, players, the referees and the sponsors.

This matter was heard by way of oral submissions, with Miss Ngesa submitting on behalf of the applicants whereas Mr. Eric Mutua advocate represented the respondent/plaintiffs. Other parties to this suit- defendants were also represented. However, the defendants' advocates who included Mr. Obura for 1st defendant, Mr. Thangei and Mr. Akech for 2nd defendants and Mr. Mungla for the 3rd defendant did not oppose the application. They supported the motion in unison and urged the court to allow the participation of the proposed interested parties to take care of the interests of fans and players who are in essence not represented in this suit. They also urged that the applicants have knowledge and expertise in football matters and that their presence before the court will add value.

Miss Ngesa's submissions reiterated the grounds and depositions by her clients as replicated above.

She added that the Federation Rules 2013 do not bar the proposed interested parties from participating in these proceedings and that no prejudice has been shown to be likely to be suffered by the plaintiffs should the applicants be enjoined to these proceedings, as the applicants represent interests of players and fans of football in Kenya.

Mr. Mutua advocate for the plaintiffs vigorously opposed the propositions by the applicants reiterating his client's depositions in the replying affidavit, and maintaining that since the applicants herein were effectively suspended from managing or participating in all football activities in Kenya, they have adverse interests to those of the plaintiffs and that they have no special interests to be considered in this matter. He relied on the case of **Trusted Society of Human Rights – Vs – Mumo Matemu & 5 Others (2014 eKLR)** where the issue of interested parties to a suit was elaborately considered by the Supreme Court of Kenya and that in the premise herein, the applicants could only be made defendants not interested parties since they have adverse interests to those of the plaintiff against whose previous decisions they have challenged in court.

That since the applicants were banned from participating in all football activities yet they state on oath that they have been and continue to be involved in management of football activities, they cannot be trusted parties to these proceedings as the court will be assisting them to violate the ban and at the same time, this court will be interfering with the decision of another court which affirmed their suspension and ban.

Mr. Obura added that Article 48 of the Constitution on access to justice will be violated if the applicants are denied accessing this court.

Determination:

I have carefully considered the application by the proposed interested parties, the opposition thereto and the able rival submissions by both parties' advocates, as well as those of the defendant's advocates who supported the motion.

Before I make my determination on this sole issue of whether or not the applicants have made out a case to warrant being enjoined to these proceedings, it is essential to set out the salient features of the main dispute between the substantive parties to this suit.

The plaintiffs herein Sam Nyamweya, Robert Asembo, Michael Esakwa who are the President, Vice President and Secretary General of the 4th plaintiff, Football Kenya Federation. Sued the defendants herein Kenya Premier League Ltd, Kenya Football Referees Association and Sports Kenya.

The plaintiff claims that it is the sole governing body of football in Kenya, responsible for organizing Kenya Premier League, Kenya Women Premier League, Kenya National Football Team, FKF Division One and all other leagues. That it is affiliated to and is recognized by Federation Internationale du Football Association (FIFA), Confederation of African Football (CAF) and Council of East and Central Africa Football Association (CECAFA).

The plaintiffs further state that the 1st defendant Kenya Premier League is a limited liability company owned by 16 Premier League Clubs and that over the years, the plaintiff's predecessors had unprocedurally given room to the 1st defendant to run or manage the Premier League (top tier) in Kenya as a service provider, yet it is not affiliated to a recognized by either FIFA, CAF and or CECAFA.

On the other hand, the 2nd defendant Association of Referees is described as a member of the plaintiff Federation and some of its members are recognized by FIFA.

The 3rd defendant is the successor of Sports Stadia Management Board whose mandate is inter alia to promote, coordinate and implement grassroot, national and international sports programmes and also run the football and other football facilities.

It is further alleged that all Premier League Clubs are members of the 4th plaintiff.

The main bone of contention is that in violation of the plaintiff's constitution and FIFA Statutes, on 3rd February 2015, the 1st defendant organized a parallel Premier League competition, drew and approved its own 2015 season fixtures for the game to commence on 21st February 2015 yet at a special general meeting held in Kakamega Golf Club on 30th January 2015 the plaintiffs resolved that:

“The top tier league in Kenya shall be referred to as Football Kenya Premier League (FKF Premier League).

The participating teams shall be 18 in number.

The Leagues shall be run and managed by a company limited by guarantee namely FKF Premier League Ltd. The plaintiffs are apprehensive that the act of having 2 parallel Premier League competitions threatens the existence of football clubs in Kenya and the said clubs risk being banned by FIFA from participating in regional, continental and international football, the banning of Kenyan players from playing in other clubs or transferring from one club to another, regionally and internationally; and Kenya referees being banned from officiating any regional, continental or international matches.”

The plaintiffs therefore sought an injunctive relief to restrain the defendant from implementing, running, managing or playing other Kenyan Premier League, or in any other names whatsoever, and contended

that unless the defendants are restrained, the country will suffer irreparable loss and damage.

That is the brief substance of this case which is still in its very nascent stages as summons to enter appearance have not been issued and served upon the defendants to solicit their solid defences to the allegations leveled against them by the plaintiffs.

However, from the various motions on record that were provoked by an interim order of injunction issued by **Hon. Msagha Mboghli J** on 20th February 2015 *ex parte* in the first instance and extended by this court, I gather from affidavit evidence filed herein that the defendants do not admit the plaintiff's allegations and have variously craved for leave of court to be heard to have the suit herein either struck out or the injunction as granted on the interim basis discharged.

I shall restrain myself from attempting to touch on the justiciability or otherwise of the plaintiff's suit as that is the subject of the pending applications and whose determination is expected on 13th March 2015, lest I be engaged in a mini trial before hearing the parties' arguments.

The Applicable Law

My commencement point is the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules which provide that:-

"2. The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out. And that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

From the above procedural rule, it is clear that the court has unfettered discretion to admit or strike out of proceedings a party with or without an application being made. In the former case, it is trite that the court can, upon satisfying itself that the person whose presence before the court may be necessary in order to enable or assist it effectually and completely determine all questions involved in a dispute, add such person as a party. The rules do not define who this person whose presence before the court is necessary is.

Under Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, an interested party is defined as:-

"A person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation."

In the case of **Judicial Service Commission – Vs – Speaker of the National Assembly & Another (2013) eKLR**, the court, referring to the definition of an interested party under the Constitution of Kenya ((Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules as defined above stated that:-

"From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings."

Amicus curiae on the other hand is defined as ***"an expert on an issue which is the subject matter of proceedings but is not a party to the case and serves to benefit the court with their expertise."*** *Amicus curiae* is therefore a person who shows that he is possessed of some expertise relevant to the matters for determination before the court. Such a person as is expected of experts is required to be non-

partisan and his role is meant to enable the court get a clearer picture of the issues in dispute in order for the court to arrive at an informed and just decision. Therefore the mere fact that the applicant herein may be partisan does not necessarily render him unsuitable to be joined in these proceedings as an interested party.

It is however a requirement that a person who intends to be joined to existing legal proceedings ought to show that he has "an identifiable stake or legal interest in the proceedings before the court".

The underlying issue flowing from the above decision of the court is whether the applicants herein have an identifiable stake or legal interest in the proceedings before this court.

The applicants aver that they are former players who have been involved in the management and continue to be involved in the management of football in Kenya. In addition, that they nurture talent and harness and nurture football talent in the country. Besides, they are football enthusiasts/fans and are affected by the on goings in the football industry in Kenya. They are concerned, on their own behalf and on behalf of the players they mentor and nurture and who eke a living out of football that if this dispute escalates without a solution in hand, and more particularly, if the injunction granted on an interim basis continues or remains in force, then those players they nurture and mentor, as well as those fans who enthusiastically and passionately support football in this country, and who are not represented in these proceedings stand to suffer irreparable harm and damage.

On the other hand, the plaintiffs contend that the applicants who were suspended from being officials of the 4th plaintiff and subsequently banned from involving themselves in the management of or involving themselves in all football activities are only seeking a backdoor entry into the court corridors following the dismissal of their suit challenging their suspension. Further, that because the applicants have unresolved scores to settle with the plaintiffs they might use this forum to advance their personal interests which are adverse to the interests of the plaintiffs.

From the holding in the **Judicial Service Commission Case (Supra)**, it is clear that the mere fact that the applicants herein may adverse interests from those of the plaintiffs does not in itself render them unsuitable to be enjoined to these proceedings as interested parties, as long as they demonstrate that they have an identifiable stake or legal interest in the proceedings herein.

I am persuaded by the above decision and in this case, I add that from the submissions by all counsels on record for their respective clients (parties) to this suit, it has not been shown that the applicants herein are mere busy bodies whose intention is to derail or delay expeditious disposal of this case. They lodged their application timeously upon learning of the existence of this suit.

My examination of the amended plaint filed on 2nd March 2015 does not reveal any reference to the interests of players or fans of football in Kenya. The first time I have heard those terms is when the applicants herein brought this application seeking to have them, being former seasoned players, who are now involved in mentoring and or nurturing young talents enjoined in the suit. They also say that they are fans and therefore represent the interests of such young players as well as fans of football in Kenya.

It is not in doubt that the substantive parties to this suit are either organizers of the football or umbrella bodies of football or association for the welfare of referees, or those responsible for managing sports facilities in the country.

The game of football is a live game, loved by many, world over and Kenya is no exception. There are those enthusiasts who eat, talk, sleep and even die football. However, it is not un-usual like in this case, to find the big wigs fight and the sufferer being the grass-players and even fans.

In my humble view, there can be no football without the players. On the sidelines are always ardent and passionate supporters who are ever ready to lay down their lives or do or die, in support of their teams. The fans too provide that much needed moral support to the players in the field. Some fans have been known to have provided financial support to players and teams. Besides, a football field full of organizers

and or managers without fans makes no gate collections which go a long way in supporting the said players to earn a decent living while the excess goes towards managing and or rehabilitating or maintaining those sports facilities.

In my mind, therefore, players, fans, managers and or organizers, referees etc, all make football. They all have an identifiable stake and legal or equitable interest in football and therefore in this case, they should not be ousted from the judgment seat, to ventilate their grievances.

Without the players, we cannot have the clubs that are owned by the 1st defendant and neither will the 2nd defendant's members officiate any game.

In this whole dispute, it is my view, and I am persuaded by the applicants' submissions that players and fans are a critical component and or key stakeholders in the football industry, and they cannot be wished away just because the organizers and managers are disputing. The only way their voices can be heard is by allowing them to be enjoined in these proceedings, for them to be governed by the rule of law as opposed to the more often than not rule of the jungle.

Albeit the applicants were suspended and effectively banned from participating in the management and or involvement in football activities for 6 years, that action does not bar them from ventilating their grievances in court. In addition, it would be near impossible to ban a football fan. You may bar him from accessing closed areas where football is being played, but he will still remain a fan in his own house. The act of mentoring young players to excel can also not be a subject of a ban particularly when such mentoring and nurturing is done informally and at individual levels. As such, even though the applicants were banned by the plaintiffs from associating themselves with the 4th plaintiff's activities in accordance with the 4th plaintiff's constitution, but the dispute is pending determination by the sports tribunal. Furthermore, the freedom of association is guaranteed under Article 36 of the Constitution of Kenya, 2010, which includes the right to form, join or participate in the activities of an association of any kind. The applicants have chosen to associate themselves with players and fans of football. I have perused the decision by my sister **Judge Mumbi Ngugi J** in **Petition No.476 of 2014** and I find nowhere in her decision where she affirmed the suspension or ban of the applicants from involving themselves in all football activities in Kenya. That matter was dismissed for reasons that the applicants should have sought recourse by way of an appeal to the Sports Tribunal, not by way of Judicial Review proceedings.

I find that the applicants have an identifiable interest in football matters and in my view, any fears and apprehensions by the plaintiffs that allowing the applicants to be enjoined to these proceedings will be prejudicial to the plaintiff's interest is unfounded and unsupported by any tangible evidence.

Furthermore, it cannot be possibly true that the judgment by **Hon. Mumbi Ngugi** did excommunicate the applicants herein or render them *persona non grata* the corridors of justice, on all matters relating to football.

It has not been shown by the plaintiffs that the applicants have no recognizable stake and therefore standing in this matter. I also see nowhere in their application, depositions and submissions, the applicants seeking a window of opportunity to use this court to lift the ban imposed on them by the plaintiffs and if that were to be the case, this court is vigilant enough not to be used to determine a dispute that is pending before another competent body or tribunal established by Statute.

The decision in the case of **Trusted Society of Human Rights Alliance - Vs - Mumo Matemu & 5 others [2014] eKLR** cited by the plaintiff's counsel Mr. Mutua, supports the applicants' case in the sense that it recognized that an interested party is one who has a stake in the proceedings, though he or she was not a party to the *cause ab initio*. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well arbitrated unless he himself or she appears in the proceedings and champions his or her cause.

In my view, and from the affidavit evidence on record, what invites the applicants to these proceedings at this early stage is not to seek a second bite at the cherry, as the doctrine of *res judicata* would easily catch

up with them.

Once enjoined, this court will guide their role in the proceedings and they will be expected to express their feelings as fans of football and mentors of young players of football, when the substantive parties to this suit engage in stalemates of this nature and how any order issued or to be issued by this court affects them.

This court hesitates to place unnecessary hurdles on access to justice and by extension, access to the courts except when such litigation is apparently and overly hypothetical, abstract or is an abuse of the judicial process.

For those reasons and in the absence of any sign of bad faith on the part of the applicants, I find that the applicants have persuaded this court to exercise its discretion under the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules and add them to these proceedings as necessary parties, whose presence before court will enable the court to effectively and completely adjudicate upon and settle all issues and questions involved in the suit herein at the opportune time and I so order that Sammy Tiyoi Sholei and Daniel A. Shikanda be and are hereby added as interested parties to this suit.

I make no orders as to costs of this application as the applicants sought to be enjoined at the earliest opportunity.

Dated, signed and delivered at Nairobi this 6th day of March, 2015.

R.E. ABURILI

JUDGE