



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 269 OF 2013

BETWEEN

BENJAMIN MOSES.....1ST PETITIONER

DAVID NJENGA NDIANGUI.....2ND PETITIONER

**CECILIA WAINAINA.....3RD
PETITIONER**

AND

THE REGISTRAR GENERAL.....1ST RESPONDENT

OLYMPIC BOXING ASSOCIATION OF KENYA.....2ND RESPONDENT

AND

ISAAC MBOTE

GEORGE ONYANGO AUNDO

JOHN KAMETA.....INTERESTED PARTIES

RULING

1. The Petition dated 24/5/2013 seeks orders as follows;

“i) That the Respondents be restrained from convening an annual general meeting scheduled for the 25th May 2013 or at any other date under the alleged new Constitution made/or amended on 10th May 2013.

ii) That an interim committee be appointed to oversee the day to day activities of the Olympic Boxing Association of Kenya.

iii) A declaration that the decision to amend the A.B.A. Constitution and Rules (Revised 1990 edition) registered on 15th November 199-0 by the A.B.A. officials was null and void and a contravention of the Petitioners' right to fair representation in an open and democratic society.

iv) ***Costs of this Petition.***”

2. The Petitioners in seeking the above orders have invoked the provisions of **Articles 22, 23, 47 and 165** of the **Constitution** as well as **Rule 12** of the **Constitution** of Kenya (Supervisory jurisdiction and **Protection of Fundamental Rights and Freedoms of the Individual**) **High Court Practice and Procedure Rules, 2006**.

3. Together with the Petition, a Notice of Motion premised on **Article 23(3)** of the **Constitution** was filed and the orders sought are the following;

“1) That this matter be certified urgent and be heard ex parte in the first instance.

2) That the Respondents be restrained from convening an annual general meeting scheduled for the 25th May 2013 or at any other date under the alleged new Constitution made/or amended on 10th May 2013 pending the hearing and determination of this application inter partes.

3) That the Respondents be restrained from convening an annual general meeting scheduled for the 25th May 2013 or at any other date under the alleged new Constitution made/or amended on 10th May 2013 pending hearing and determination of the substantive Petition herein.

4) That an interim caretaker committee be appointed to oversee the day to day activities of the Olympic Boxing Association of Kenya pending the hearing and determination of the Petition herein.

5) That the costs of this application be in the cause.”

4. In the Supporting Affidavit sworn on 24/5/2013 by Benjamin Moses, the 1st Petitioner who is the Secretary-General of the Nairobi County Boxing Association and a boxing coach, their case is that the Respondents have purported to call a Full Council Meeting of the Amateur Boxing Association of Kenya (ABAK) with a view to amending the Association's Constitution contrary to the same Constitution. That under the Association's Constitution, any amendment to it can only be made at a General meeting, an extra-ordinary General Meeting or a special General meeting and not in a Council meeting.

5. That on 10/5/2013, when the Council Meeting was held, an already prepared Constitution was discussed by six individuals aligned to the Respondents and the same was swiftly passed in preparation for elections under the “*new Constitution*” thus extending the terms of the Respondents who had been in office in an acting capacity.

6. Further, that the actions of the Respondents have contravened the fundamental rights and freedoms of the Petitioners and members of the Nairobi County Boxing Association.

7. In addition, the 1st Petitioner filed a Supplementary Affidavit sworn on 31/5/2013 and in it, he deponed at paragraphs 7 and 8 thereof, that an Annual General Meeting was held on 25/3/2013 where elections were conducted and John Kameta was elected as Chairman contrary to **Article 7(4)** of the “*previous/valid*” **Constitution** that the Chairman of the Association must be based in Nairobi while Kameta is based in Mombasa.

That interlocutory orders ought to be granted in the circumstances.

8. A Replying Affidavit on behalf of the Respondents was filed on 24/6/2013 by one, George Onyango Aundo, the Treasurer of the Olympic Boxing Association of Kenya on behalf of the Respondents. Their case is that the Petitioners are not bona fide officials of the Nairobi County Boxing Association as their purported election on 16/3/2013 and/or on 12/4/2013 was disputed leading to their non-recognition by the parent Association viz. the Olympic Boxing Association of Kenya (OBAK).

9. Regarding the amendment to the Olympic Boxing Association of Kenya (OBAK) Constitution, that the same was necessitated by the International Boxing Association's requirement that all national member Associations and Federations must amend their Constitutions to include certain provisions including the adoption of AIBA Pro Boxing program and World Series of Boxing provisions.
10. That therefore the prayers sought by the Petitioner should not be granted as the Respondents will thereby suffer great injustice and substantial loss and the operations of the Olympic Boxing Association of Kenya (OBAK) will be greatly prejudiced and hampered.
11. In determining the Motion before me, I must state from the outset that although the Petition is crafted as if it raises constitutional questions, in fact little of that is seen when the facts in issue are looked at critically. I say so, with respect, because the fact that the amendment of the Olympic Boxing Association of Kenya (OBAK) Constitution is the main issue in contest, that *per se* cannot translate the whole dispute into a constitutional question. The dispute is a simple matter between members and their Association and should have been dealt with as a normal civil dispute.
12. Secondly, it seems to me that looking at the Notice of Motion before me, prayers 2 and 3 cannot be granted as they have been overtaken by events. It is obvious why; the meeting scheduled for 25th May 2013 has taken place, the Constitution has been amended and certain persons elected as officials of the Olympic Boxing Association of Kenya (OBAK). Although I granted orders on 4/6/2013 restraining the 1st Respondent from registering the new officials of OBAK until this Ruling, it seems to me that even with those orders in place, the fact that the elections have taken place would make any orders to restrain the holding of the Annual General Meeting superfluous and academic.
13. But even if there was anything left to be determined, the Petitioners have sued the Olympic Boxing Association of Kenya (OBAK) but there are also references to the Amateur Boxing Association of Kenya (ABAK). Are they different legal entities or has one metamorphosed into another? I do not know because before me are two Constitutions relating to the two Associations and the one for Olympic Boxing Association of Kenya (OBAK) seems to be in draft form. Without a nexus being created between the two, I am unable to look to either Constitution and determine if the Respondents have acted unlawfully. The confusion is obvious from my summary of the case for each party above.
14. Further, and if I am to look at the Amateur Boxing Association of Kenya (ABAK) Constitution, **Article 13** provides that any amendment to the Constitution shall be made “*at the Annual General Meeting of the A.B.A. Or by a special General Meeting of the A.B.A. or by any Extra-Ordinary General Meeting ...*”
- The meeting of 23/5/2013, whatever the Petitioners' displeasure with it, was in fact an Annual General Meeting. The Council Meeting held earlier was merely a preparatory meeting and ordinarily, the Council sets the draft agenda for adoption at the AGM and the fact that members of the Council adopted the draft Constitution before submission to the AGM cannot invalidate the ultimate decision at the Annual General Meeting which is in any event the only lawful decision of the members of the Association.
15. The point I am making above is that all the issues raised by the Petitioners are pedestrian and the sole issue of amendment of the Constitution by the Annual General Meeting is difficult to fault and this Court cannot interfere with the free will of the membership of either the Amateur Boxing Association of Kenya (ABAK) or the Olympic Boxing Association of Kenya (OBAK). I am stating the above to highlight the fact that a party seeking conservatory orders must show at the very least, a *prima facie* with the probability of success – See **Giella vs Cassaman Brown & Co. Ltd (1973) EA 358 and Petition No.16 of 2011, CREAW & Others vs Attorney General.**
16. The above position being the correct one in law, I have shown that the Petitioners have been unable to jump that first hurdle and their Motion must collapse.
17. Before making final orders, the Respondents filed a Chamber Summons dated 20/8/2013 seeking orders *inter-alia* that directions and/or a clarification be given regarding the orders issued on

4/6/2013 and certain statements made by the Court in extending those orders. In view of what I have said above and in view of the final orders to be made shortly, I see no reason to delve into that Application at all.

18. In conclusion, the Petition and Notice of Motion have been depleted and it seems to me that only prayer (iii) of the Petition is live and capable of determination. All other prayers are superfluous and it follows that the Notice of Motion dated 24/5/2013 must be dismissed with costs.

19. Directions should now be taken on how to finalise the sole prayer remaining to be determined in the Petition.

20. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF MARCH, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Miss Ontiti for Petitioner

No appearance for Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

Further Order

Mention on 21/3/2014. Notice to Issue.

ISAAC LENAOLA

JUDGE