



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 172 OF 2013

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR OF SOCIETIES.....1ST RESPONDENT
REGISTRAR OF SPORTS.....2ND RESPONDENT
NATIONAL SPORTS COUNCIL.....3RD RESPONDENT
GEOFFREY MWANGI MBUTU.....4TH RESPONDENT
SHUAIB ADAMS.....5TH RESPONDENT
SHADRACK MALUKI.....6TH RESPONDENT
JOAN GITHUA.....7TH RESPONDENT
DAVID BUSOLO WALUBENGO.....8TH RESPONDENT
DAVID JOSEPH OCHIENG.....9TH RESPONDENT
JOHNSON MWADIME.....10TH RESPONDENT
JOSEPH MBURU.....11TH RESPONDENT
JEAN JENIFFER LOUIS.....12TH RESPONDENT
DUNCAN CHEMIRYO.....13TH RESPONDENT

EX-PARTE

HEZRON MISATI
SAMMY KIPYEGO SANG

JUDGEMENT

Through the notice of motion application dated 7th June, 2013 the ex-parte applicants namely Hezron Misati and Sammy Kipyego Sang pray for orders:

- “1. THAT an order of certiorari do issue removing into this court for the purposes of being quashed, the decision of the Registrar of Societies of acting on the purported election of Kenya Judo Association AGM/Elections 2013-2017 held on the 23rd February 2013 at Nyayo House, 9th Floor and of the act of the 28th day of February, 2013 of registering the following as the Kenya Judo Association Society’s Office bearers; Geoffrey Mwangi Mbutu-Chairman, Shuaib Adams-vice chairman, Shadrack Maluki-secretary general, Joan Githua-assistant secretary general, David Busolo Walubengo-treasurer, David Joseph Ocheing- assistant treasurer, Johnson Mwadime-sports director, Joseph Mburu-coaching/education/director, Jean Jeniffer Louis-refereeing director and Duncan Chemiryo-publicity secretary/P.R.O. and that the certificate of registration issued thereon to the said persons on the 28th day of February 2013 be forthwith cancelled.**
- 2. THAT an order of prohibition do issue, prohibiting the Registrar of Societies from registering, recognizing and/or maintaining in their records as having been elected pursuant to an AGM/Election of the Kenya Judo Association held on the 23rd February 2013 at Nyayo House, 9th Floor, the following persons as the Society’s Office bearers; Geoffrey Mwangi Mbutu-chairman, Shuaib Adams-vice chairman, Shadrack Maluki-secretary general, Joan Githua-assistant secretary general, David Busolo Walubengo-treasurer, David Joseph Ocheing-assistant treasurer, Johnson Mwadime-sports director, Joseph Mburu coaching/education/director, Jean Jeniffer Louis–refereeing director and Duncan Chemiryo-publicity secretary/P.R.O.**
- 3. THAT an order of prohibition do issue prohibiting the Registrar of Sports, the National Olympic Committee of Kenya, the Kenya National Sports Council, from recognizing, registering, from dealing and/or from any other manner dealing with the said Geoffrey Mwangi Mbutu as chairman, Shuaib Adams as vice chairman, Shadrack Maluki as secretary general, Joan Githua as assistant secretary general, David Busolo Walubengo as treasurer, David Joseph Ocheing as assistant treasurer, Johnson Mwadime as sports director, Joseph Mburu as coaching/education/director, Jean Jeniffer Louis as refereeing director and Duncan Chemiryo as publicity secretary/P.R.O. or indeed as the officials of the Kenya Judo Association or at all until a properly constituted Kenya Judo Association AGM is held where the election forms part of the Agenda and legitimate officials elected therein.**
- 4. THAT an order of mandamus do issue commanding and/or directing the Registrar of Societies to follow the provisions of the Constitution of Kenya, 2010, the Societies Act Cap 108 Laws of Kenya, Kenya Judo Association constitution and rules, in the management and dealing in affairs of the Kenya Judo Association.**
- 5. THAT the costs of this application be provided for.”**

The application is based on the statutory statement and the verifying affidavit of the 1st Applicant which were filed together with the chamber summons application for leave on 20th May, 2013.

The 1st to 13th respondents are the Registrar of Societies, the Registrar of Sports, the National Sports Council, Geoffrey Mwangi Mbutu, Shuaib Adams, Shadrack Maluki, Joan Githua, David Busolo Walubengo, David Joseph Ochieng, Johnson Mwadime, Joseph Mburu, Jean Jeniffer Louis and Duncan Chemiryo. It appears that the 4th to 13th respondents are essentially interested parties and they ought to have been named as such. However, their being named as respondents does no harm to the applicants’ case.

From the papers filed in Court, the applicants’ case can be summarized as follows. On 23rd February, 2013 an Annual General Meeting for the Kenya Judo Association (KJA) was held at the 9th Floor of

Nyayo House in Nairobi. During the meeting, elections were conducted and on 28th February, 2013 the 1st Respondent registered the 4th to 13th respondents as members of the Executive Committee of KJA.

The applicants were aggrieved both by the way the elections were conducted and the manner their complaints were handled by the 1st Respondent. That is why they have come to Court to seek the reliefs already reproduced in this judgement.

Among the grounds upon which they seek relief is that the meeting of 23rd February, 2013 was illegal as no notice of the same had been issued as required by Articles 11 and 12 of the Constitution of KJA and the rules made thereunder. It is the applicants' case that according to the Constitution of KJA a notice convening an annual general meeting should be accompanied by a statement of accounts and the agenda for the meeting and shall be sent to all member clubs not later than 21 days prior to the meeting and where practicable the notice should be carried in the press. Further, that no notice was given to the officials of KJA in office.

The applicants assert that not only was the meeting populated by members of the Kenya Prisons Judo Club, but it was also held behind closed doors at a venue that was not accessible to all delegates. In support of this assertion, the applicants cite Article 11(a) of the KJA Constitution which provides that only two delegates can represent a member club at the KJA annual general meeting and the predominant attendance by members of the Kenya Prisons Judo Club breached the said Article.

The applicants contend that the major stakeholders like the Kenya Defence Forces Judo Association, GSU Judo Club, Kenya Police Judo Club and the Nakuru and Malindi judo club branches were never notified of the meeting.

It is the applicants' case that the holding of the meeting on a restricted government facility on a Saturday only goes to demonstrate bad faith on the part of the convenors of the meeting. They aver that traditionally the meetings of KJA have always been held at the Kenya National Sports Council Boardroom within the Nyayo National Stadium. The 1st Applicant avers that when he got wind of the meeting, he tried attending the meeting but was turned away by the security personnel stationed at the entrance by the organizers of the meeting. Further, that the members of the Executive Committee led by the then Chairman Mr Stephen K. A. Soi were not in attendance thus raising doubts about the legitimacy of the meeting. They assert that in the absence of the Chairman and his Deputy there could not have been a meeting that was properly convened and chaired because a meeting of KJA can only be chaired by the chairman or in his absence the vice-chairman. The applicants assert that the meeting proceeded without quorum as the quorum requires attendance by 30% of member clubs of KJA which was not attained on the material day.

The applicants assert that the election of Shadrack Maluki the 6th Respondent and Johnson Mwadime, the 10th Respondent as Secretary General and Sports Director respectively was illegal as they were on suspension at the time of the purported elections.

The applicants and others on 28th February, 2013 wrote protest letters concerning the elections to the Permanent Secretary, Ministry of Youth Affairs and Sports and other government officers. They called for the nullification of the elections. Further, that on 27th February, 2013 the applicants through their lawyer wrote a letter dated 27th February, 2013 to the 1st Respondent asking him to declare a dispute and enforce the provisions of sections 17 and 18 of the Societies Act, Cap 108. The applicants aver that instead of complying with the law the 1st Respondent on 28th February, 2013 registered the officials elected on 23rd February, 2013. According to the applicants the 1st Respondent's action is an illegality that must be met by the full supervisory force of this Court.

The applicants submitted that there was in existence **Nairobi High Court Civil Suit No. 559 of 2012, STEPHEN K. A. SOI v MWANGI MBUTU & OTHERS** in which the defendants had been restrained from convening, conducting, officiating and or presiding over an annual general meeting of KJA and the

meeting of 23rd February, 2013 was therefore in clear breach of the said order.

It is the applicants' case that failure by the 1st Respondent/Registrar of Societies (the Registrar) to investigate their complaints and issue a decision is contrary to the requirements of good administrative action. They argue that the actions of the Registrar contravened the rules of natural justice and contravened Article 47 of the Constitution of Kenya which provides for fair administrative action.

The applicants contend that the decision of the Registrar will affect other offices and that is why it is necessary to seek orders of prohibition against the Registrar of Sports, the National Olympics Committee of Kenya, and the Kenya National Sports Council.

The 1st Respondent opposed the application through a replying affidavit sworn on 1st July, 2013 by Joseph L. Onyango, a Deputy Registrar General. Through the said affidavit the 1st Respondent asserts that the application has been overtaken by events as the officials elected on 23rd February, 2013 have been duly recognized.

The Registrar asserts that the applicants have no *locus standi* to institute these proceedings as they are neither officials nor members of KJA as per the records held by the 1st Respondent. Further, that the branches alleged to have been left out, to wit, Ulinzi Judo Association, GSU Judo Club, Nakuru Judo Association and Kenya Police Judo Club are not legally recognized entities as they are not registered with the 1st Respondent.

The Registrar asserts that a copy of the notice of the meeting was issued on 31st January, 2013 and this means that KJA issued a notice 21 days prior to the meeting as required by the Constitution.

The 1st Respondent states that the returns of the meeting were filed on 25th January, 2013 and on the same date a letter confirming the new officials was issued. It is therefore the 1st Respondent's case that the confirmation of the elected officials was done on 25th February, 2013 and not 28th February, 2013 as alleged by the applicants.

The 1st Respondent reveals that the injunctive orders issued in **Nairobi High Court Civil Suit No. 559 of 2012** had been lifted by a ruling delivered by G. V. Odunga, J on 30th January, 2013. Further that the 1st Respondent was not a party to the said suit and nothing therein barred him from carrying out his statutory duties. It is the 1st Respondent's case that he has no powers to cancel an already concluded election and it is only the Court that can issue such an order.

The 4th to 13th respondents opposed the application through a notice of preliminary objection dated 24th May, 2014 and a replying affidavit sworn by the 5th Respondent Shadrack Maluki on the same date.

The notice of preliminary objection is couched in the following terms:

- “1. THAT the application is incurably defective and the orders sought are incapable of being granted because the prayers for leave are different from the prayers for such leave to operate as a stay.**
- 2. THAT the application is incurably and fatally defective in that they seek to prohibit what has already occurred.**
- 3. THAT the application is incurably defective in that the applicants have sought orders against persons who are not parties to these proceedings.**
- 4. THAT the application is incompetent because the applicants have not demonstrated that they are fully paid up and up to date members of the Kenya Judo Association.”**

In the replying affidavit, Mr. Shadrack Maluki averred that he is the Secretary-General of KJA. He averred that in 2012 he was the Secretary of KJA and at a meeting held on 6th October, 2012 which meeting was attended by the 2nd Applicant who was the Assistant Treasurer, it was resolved that the KJA annual general meeting and elections be held on 17th November, 2012. The meeting, however, did not proceed as one Stephen K. A. Soi who was the Chairman of KJA obtained injunctive orders in **Nairobi H.C.C.C. No. 559 of 2012, STEPEHN K. A. SOI v MWANGI MBUTU & OTHERS** stopping the meeting.

By an order dated 30th January, 2013, the Court declined to extend the injunction and on 31st January, 2013 the Executive Committee met and approved the issuance of a fresh notice for a meeting to be held on 23rd February, 2013. He averred that notices were issued to all members including members of the Executive Committee and all affiliates. The 1st Respondent was informed accordingly. He averred that the elections were presided over by one Mr. Paul Muturi of the Kenya National Sports Council and the 1st Applicant and his group were in attendance but walked away on sensing defeat. Thereafter the applicants started scandalizing the elected officials by writing letters to various government organs.

It is the 4th to 13th respondents' case that since the applicants have not shown that they are fully paid up members then these proceedings are incompetent, bad in law and misconceived. Further, that failure to join the KJA as a party to these proceedings is a fatal omission which renders the pleadings herein bad in law.

They fault the applicants for failing to challenge the elections. They assert that the applicants are dishonest in asserting that there is a subsisting injunctive order in **HCCC No. 559 of 2013**. They contend that this application is a proxy continuation of **Nairobi HCCC No. 559 of 2013** by Stephen K. A. Soi the former Chairman and the applicants who are his associates.

Before proceeding further, I must state that at this stage, there is only one applicant on board. That Applicant is Hezron Misati. The 2nd Applicant Mr. Sammy Kipyego Sang withdrew from these proceedings through a notice dated 22nd August, 2013 which was filed in Court on the same date. He also filed an affidavit he had sworn on the same date averring that he never gave instructions to Arusei & Company Advocates to file this matter. The withdrawal notice does not need any interrogation and the same is taken on its face value. Senior Counsel Mr. Nzamba Kitonga submitted that the withdrawal of the 2nd Applicant from these proceedings should lead to the collapse of this cause. With respect, I find that is not the case. These proceedings were commenced by two individuals in their personal capacities and the surrender of one of the individuals cannot lead to the collapse of the case. Fortunately for the 1st Applicant, he is the one who swore the verifying affidavit. The 1st Applicant is therefore entitled to soldier on.

Another thing to note is that through an affidavit sworn on 12th February, 2014 the 4th Respondent Geoffrey Mwangi Mbutu threw in his towel. Through the said affidavit he informed the Court that the matter had been settled through the intervention of one Dr. Dhoub Hedi, the IJF Director, International Affairs. The 4th Respondent exhibited a document dated 16th December, 2013 titled: "RESOLUTION OF MEETING BETWEEN THE KENYA JUDO ASSOCIATION EXECUTIVE COMMITTEE, MAJOR STAKE HOLDERS AND THE INTERNATIONAL JUDO FEDERATION DIRECTOR OF INTERNATIONAL AFFAIRS HELD ON 16TH DECEMBER 2013."

The resolutions contained in the said document include the formation of an interim National Judo Coordinating Board to run the affairs and activities of Judo in Kenya with effect from 16th December, 2013 pending elections of a new Board on or before 31st March, 2014. The interim National Judo Coordinating Board was to be made up of Mr. Stephen Arap Soi, Mr. Geoffrey Mwangi Mbutu, Mr. Col. Hans Nyange, Mr. Duncan Chemiryo and Jeniffer Shamalla.

The 1st Applicant also swore a further affidavit dated 13th February, 2014 in which he alluded to the said

document. He averred that the rival camps had reconciled and it was imperative that the Court issues the prayers sought in the application by quashing the registration of Shadrack Maluki and his group as officials of KJA by the Registrar.

I do not know what to make of this alleged reconciliation. First and foremost, the 4th to 13th respondents have been sued in their individual capacities. Anyone of them who opts to get out of the matter does so as an individual. That is how the 4th Respondent should be treated.

Secondly, if indeed an interim National Judo Co-ordinating Board was formed after reconciliation, then there was no need to pursue this application. What the parties ought to have done was to file a consent terminating this matter. Indeed one of the terms of the reconciliation document was that all cases pending in court, except those involving financial impropriety, were to be withdrawn and resolved out of court. Consent orders are voluntary and are never forced down the throats of others like the 1st Applicant and the 4th Respondent have attempted to do. There is therefore no formal consent terminating this matter and I will proceed to make decisions on the issues raised by the parties.

The parties in this matter identified various issues for the determination of this Court. In my view, however, the core issue is whether the Registrar's decision to confirm the interested parties as officials of KJA was contrary to the principles of natural justice, made in bad faith and *ultra vires* the Societies Act (Cap 108) Laws of Kenya and the Constitution of Kenya, 2010.

Although the applicants proceeded at length to fault the manner in which the elections were called and conducted on 23rd February, 2013, they tacitly admitted from the beginning that it is only the decision of the 1st Respondent to register the 4th to 13th respondents that they could challenge through these proceedings. They knew that the person to whom they could complain to about the manner the elections were conducted was the 1st Respondent.

The only thing this Court has to do is to examine the 1st Respondent's conduct and decide whether he discharged his statutory mandate. If this Court finds that the 1st Respondent proceeded in an unfair manner then the applicants will be entitled to relief.

I must state with a lot of disappointment that the parties in this case have not been very honest. For this reason, one cannot easily elicit the facts surrounding this matter. In his replying affidavit Mr. Joseph L. Onyango averred at paragraph 14:

“THAT the returns of the meeting were filed with the 1st Respondent on 25th February, 2013 where after a letter confirming the new officials was issued by the 1st Respondent on the same date. Annexed and marked “JLO-2 is a file copy of the said letter from our records to allude to the said facts.”

The exhibit marked “JLO-2” is indeed a letter dated 25th February, 2013 which is addressed to the Secretary of Kenya Judo Association by the said Joseph Onyango. The contents of the letter are as follows:

“RE: SOCIETIES ACT (CAP. 108) AND SOC/5365 KENYA JUDO ASSOCIATION

We refer to your letter dated 25th February, 2013 and wish to inform you that your application for amendment of your constitution has been approved.”

The letter does not say anything about elections.

The applicants claim that they made a formal complaint to the 1st Respondent on 28th February, 2013 concerning the meeting of 23rd February, 2013. The applicants then proceed to display several letters.

All the letters dated 26th and 28th February, 2013 were addressed to Mr. James M. Waweru, the Permanent Secretary, Ministry of Youth Affairs and Sports.

The letter addressed to the 1st Respondent is dated 14th March, 2013 and it seems to be the first one by the way it is written.

It states in paragraph 1:

RE: ILLEGALLY CONVENED AGM OF KENYA JUDO ASSOCIATION

We are writing to bring to your attention of an illegally convened Annual general meeting of the Kenya Judo Association which took place on 23rd February, 2013 at Nyayo House, 9th floor.....”(sic).

If the issue was being brought to the 1st Respondent’s attention for the first time on that day, then the 1st Respondent is correct in saying that he had registered the officials by the time the complaint reached him. The question therefore is whether he was *functus officio* or he could still have exercised his powers at that time.

Section 18 of the Societies Act states:

The respondents submitted that the applicants failed to exhibit the decision which they seek to quash. This is indeed true. There is however agreement that a decision was made by the 1st Respondent to register the officials elected on 23rd February, 2013. In fact the applicants exhibited as “HM6” a letter dated 15th April, 2013 addressed to the secretary of Kenya Judo Association by Joseph Onyango, the Deputy Registrar of Societies. Through the said letter he refers to the secretary’s letter dated 15th February, 2013 and names the 4th to 13th respondents as the office bearers of KJA. In my view there is an identifiable decision which can be quashed and the applicants cannot be denied judicial review remedies on what amounts to a technicality.

The applicants concealed some facts from the Court. They pretended that they were not aware that injunctive orders in **Nairobi H.C.C.C. No. 559 of 2014** had been lifted but then went ahead to exhibit the ruling delivered by Odunga, J on 30th January, 2013. How can they claim the meeting of 23rd February, 2013 contravened a court order yet they had a ruling showing that the order had been set aside? The applicants did not approach this Court with clean hands. In fact the dishonesty of the applicants was exposed when the 2nd Applicant jumped ship and alleged that he had not instructed Mr. Arusei to pursue this matter.

Judicial review orders are discretionary in nature. When an applicant conceals material facts, the Court can deny him orders. The genuineness of the application before this Court cannot be gauged.

Nevertheless, it is noted that judicial review is an antidote to maladministration. The 1st Respondent is not being asked to cancel the elections held on 23rd February, 2013. What the 1st Respondent is being asked to do is to exercise his statutory powers and enquire into an alleged dispute about the leadership of KJA. In this regard, the 1st Respondent is ordered to proceed in accordance with Section 18 of the Societies Act and respond to the 1st Applicant’s complaints contained in the letter dated 14th March, 2013. The 1st Applicant should be given a response within sixty (60) days from the date of this judgement.

The parties shall bear their own respective costs.

Dated, signed and delivered at Nairobi this 14th day of November , 2014

W. KORIR,

JUDGE OF THE HIGH COURT