Athletics Kenya v Tanui & 12 others (Civil Appeal E229 of 2024)
[2025] KECA 509 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 509 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E229 OF 2024

P NYAMWEYA, AO MUCHELULE & GV ODUNGA, JJA

MARCH 21, 2025

BETWEEN

ATHLETICS KENYA ..... APPELLANT

AND

MOSES TANUI ..... 1ST RESPONDENT

JULIUS KORIR ..... 2ND RESPONDENT

JULIUS KARIUKI ..... 3RD RESPONDENT

CHRISTOPHER KOSGEI ..... 4TH RESPONDENT

WILSON BOIT ..... 5TH RESPONDENT

SUSAN SIRMA ..... 6TH RESPONDENT

LEAH MALOT ..... 7TH RESPONDENT

NIXON KIPROTICH ..... 8TH RESPONDENT

HOSEA KOGO ..... 9TH RESPONDENT

MARY CHEMWENO ..... 10TH RESPONDENT

CABINET SECRETARY, MINISTRY OF SPORTS, CULTURE AND ARTS ..... 11TH RESPONDENT

REGISTRAR OF SPORTS ..... 12TH RESPONDENT

ATTORNEY GENERAL ..... 13TH RESPONDENT

(Being an appeal from the judgement and decree of the High Court of Kenya at Nairobi (L. N. Mugambi, J) delivered on 17th March 2024 in Petition No. 499 of 2016)

JUDGMENT

1. The history of this litigation has its origins in a petition dated 25th November 2016 which was amended on 17th October 2017 and subsequently re – amended on 22nd June 2018, filed by the 1st to 10th respondents in the High Court at Nairobi, in which they sought the following orders:

    a. A declaration that by dint of Article 36 of *the Constitution* as read with Section 46 of the *Sports Act*, all athletes including the respondents are entitled to be members of the appellant in their individual capacity.

    b. A declaration that *the constitution* of the appellant envisaged under Section 46 of the *Sports Act* is subject to Article 6 of *the Constitution* in terms of regional representation/branches.

    c. A declaration that *the constitution* of the appellant registered under the Societies Act lapsed on 1st August 2014 upon the expiry of the one-year period prescribed by Section 49(1) of the *Sports Act*, 2013.

    d. A declaration that by dint of Articles 36 and 81 of *the Constitution* as read with Section 46 of the *Sports Act* and the Second Schedule thereof the appellant is enjoined to consult all the stakeholders in drawing its constitution and have the same adopted and/or ratified through the direct voting of all members.

    e. A declaration that by dint of Articles 36 and 81 of *the Constitution* as read with Sections 46 and 49 of the *Sports Act* and the Second Schedule thereof the current officials and Executive Committee of the appellant are not lawfully in office.

    f. A declaration that by dint of Articles 36 and 81 of *the Constitution* as read with Sections 46 and 49 of the *Sports Act* and the Second Schedule thereof the appellant's constitution made, adopted and/or ratified on 27th April 2016 is illegal, null and void ab initio.

    g. An order of certiorari be issued to quash the appellant's constitution amended by members of its Annual General Meeting on 27th April, 2016 purportedly to bring it in harmony with the *Sports Act*, 2013.

    h. An order of permanent injunction be issued to restrain the 11th respondent, the Cabinet Secretary, Ministry of Sports, Culture and Arts from registering and issuing a registration certificate to the appellant on the basis of the amended constitution adopted and approved during the Annual General meeting held on 27th April 2016.

    i. An order of mandatory injunction be issued to compel the officials and Executive Committee Members of the appellant to relinquish or otherwise vacate their respective offices by dint of Sections 46 and 49 of the *Sports Act*, read with Articles 36 and 81 of *the Constitution*.

    j. An order of mandatory injunction be issued to compel the appellant to make a new constitution to be ratified by direct vote of all members that comply with the Second Schedule of the *Sports Act*, 2013.

    k. A declaration that the constitutional review process undertaken by the appellant pursuant to the directive referred to in the appellant's advocate's letter dated 13th May 2016 violated the respondents' rights and freedom under Articles 27, 36 and 81 of *the Constitution*.

l. This Court be pleased to issue an order of certiorari to quash the Certificate of Registration issued on 18th December 2017 by the 12th respondent, the Registrar of Sports, to the appellant registering it as a National Sports Organization.

m. The respondents be paid damages for compensation of violation of their rights under Articles 27, 28, 35, 36, 47 and 50 of *the Constitution*.

n. The costs of this petition be borne jointly and severally by the appellant, the 11th, 12th and 13th respondents.

2. The gravamen of the petition, which was supported by the 1st respondent's affidavit dated 22nd June 2018, was that, in accordance with the requirements of the provisions of *the Constitution* of Kenya, 2010, in November 2015, the appellant commenced the process of reviewing its constitution so that its provisions, which were enacted under the *Societies Act*, 2013, could be compliant with and the *Sports Act*, 2013 (the Act). After a number of consultative meetings culminating into the Annual General Meeting (AGM) on 27th April 2016, the appellant's constitution was approved thereat.

3. The petition revolved around the process undertaken in revising the said constitution. The petitioners' case was: that the process leading to the issuance of the Certificate of Registration violated Articles 10, 21, 27, 28, 35, 36, 47 and 50 of *the Constitution* and the provisions of the Act; that for the appellant's constitution to be legally compliant, it ought to have been enacted afresh rather than by a mere amendment; that *the constitution* having been enacted under the *Societies Act*, could not be amended to bring into line with the Act since under sections 46 and 49 of the Act as read with Articles 10, 36 and 81 of *the Constitution*, the appellant's members and leaders, who were registered and elected under the *Societies Act* had no right or power to amend their constitution; that in respect of clause 45 in the appellant's constitution, *the constitution* can only be altered by a special resolution passed at an AGM which clause is too restrictive, narrow and not democratic since it does not take into account the views and concerns of other stakeholders in the industry; that this contravenes the principle of involvement and consultation as provided in *the Constitution*; and that it also violates Articles 6 and 81 of Constitution because the appellant's constitution should be amended by all members of the Federation as drawn from the 47 counties.

4. It is was further contended: that the appellant by initiating this process violated the rights protected under Articles 10, 21, 27, 28, 35, 36, 47 and 50 of *the Constitution* as read with section 46(6) of the Act, which requires that all national sports organizations registered under the Act be open to the public in terms of leadership, activities and membership; that the appellant and the 11th to 13th respondents failed to comply with their duty under clause 21 that requires the rights of the stakeholders particularly the athletes, to be respected, protected and promoted in the establishment, management, operations and governing organs in the industry; that the amendment of the repealed constitution was an illegal scheme by the appellant to re–launch the repealed constitution and maintain the status quo; that despite the conservatory orders issued by the court on 30th November 2016 and subsequently on 27th April 2017, restraining the appellant from undertaking the constitutional review process and adopting the amended constitution, the 12th respondent in contempt of these orders proceeded to issue the appellant with the Certificate of Registration on 18th December 2017; that the actions of the appellant and the 12th respondent were intentionally geared towards disregarding the law and amounted to an abuse of power; and that the appellant was not entitled to the registration and issuance of a Certificate of Registration certificate.

5. In response to the petition, the appellant filed a replying affidavit by Lt. Gen. (Rtd) Jackson K. Tuwei sworn on 16th September 2020 in which he deposed: that the appellant was registered under the *Societies*

Act as the governing body in Kenya for Athletics and is affiliated to the International Association of Athletics Association (IAAF); that the affairs of the appellant are regulated by its constitution; that upon the enactment of the Act, all sports organizations were required to be registered thereunder and thereafter be issued with a Certificate of Registration; that in compliance with the said Act, the appellant lodged its application on 20th July 2014 and embarked on the process of amending its constitution to be in line with *the Constitution* and the Act; that towards this end, the appellant's Executive Committee appointed a constitutional review sub- committee on 11th November 2015 so as to receive the views and proposals on the intended amendments and they issued notices to all branches to submit their views on the process of amendment; that vide advertisements in print media, they invited appellant's members, athletes and stakeholders to submit their views and comments on the same; that the final draft was prepared after all the views had been received and considered; that since clause 45.1 of the appellant's constitution provided for amendments to *the constitution* by a Special Resolution, by a notice dated 6th April 2016, the appellant convened the AGM on 27th April 2016 with one of the agenda items being the intended amendment to *the constitution* and the amended constitution was passed on the same day to align it with the dictates of the Act.

6. It was further deposed: that the Court Order dated 30th November 2016 restrained the appellant from undertaking the constitutional review process and passing the new constitution when in fact the process had been already been completed and constitution adopted on 27th April 2016; that on 18th December 2017 the 12th respondent issued the appellant with a Certificate of Registration on condition that the appellant reviews its constitution in line with *the Constitution*, the Act and the international law and holds an election within 90 days from the date of registration and it develops strategic plans; that the appellant complied with all the conditions save for carrying out the elections due to the existing court orders; that according to the provisions of the Act, any person aggrieved by the decision of the 12th respondent is required to lodge an appeal first with the 12th respondent and if further dissatisfied, lodge an appeal with the Sports Disputes Tribunal; that the petition amounted to usurpation of the 12th respondent's mandate; that the petition was filed in bad faith and geared towards sabotaging the appellant's affairs since none of the petitioners submitted or tried to submit their views and comments during the public participation process; and that while the appellant's membership is open to all Kenyans, the petitioners who were former athletes chose not to register as its members.

7. In the appellant's view, the petitioners' underlying intention as seen under prayers (e), (i) and (j) was the removal of the appellant's Executive Committee members. It was noted that the 6th, 7th and 8th petitioners denied being aware of the existence of the petition and had sought to have their names struck out. The appellant sought to have the petition dismissed with costs.

8. On their part, the 11th, 12th and 13th respondents filed a replying affidavit by Rose M.N. Wasike, the 12th respondent, sworn on 17th July 2017 in which she averred: that all disputes relating to registration of the sports organizations under sections 58 and 59 of the Act are supposed to be adjudicated upon by the 12th respondent and if a party is dissatisfied by the decision appeal to the Sports Disputes Tribunal; that the appellant in compliance with sections 49 and 50 of the Act, submitted their application for registration and met the requirements; that in the interim, the appellant and other sports organizations were issued with transitional letters and not certificates; that it was not until the process of registration was gazetted in September 2016, that the 12th respondent started issuing the Certificates of Registration; that the 12th respondent and the Commissioner for Sports were invited by the appellant to participate in the process of amending their constitution during which she guided the appellant on the key principles that were to be adhered to in line with *the Constitution* and the Act; and that while participating in the process, she encountered the appellant who was also part of the team that discussed the amendment process.

9. According to the deponent, in accordance with the Second Schedule to the Act, the appellant together with its officials was successfully transited in the interim pending elections which were to be held at the expiry of their term; that the sports organizations whose transition was not successful under section 50 of the Act were the only ones that were required to conduct fresh elections for their officials; and that the appellant, the 11th and 12th respondents upheld their mandate lawfully hence the petition was unmerited and was for dismissal.

10. On its part the 13th respondent filed a replying affidavit by Anne Mwangi sworn on 20th January 2017 in which it was deposed: that the appellant was registered on 3rd October 2008 and issued with a Certificate of Registration No.28657; that since the 13th respondent no longer regulates registration of sports organization, sports federations and clubs, he was improperly joined to the proceedings; that registration is now undertaken under the *Sports Act* and the Sports Registrar Regulations, 2016; that the 12th respondent vide a letter 15th September 2014, requested for all the registered Sports Organizations Certificates, for the purpose of the transition and the fresh registration under the Act, which she complied with; and that the 1st to 10th respondents had failed to prove their case against it and prayed that the case against him be dismissed.

11. In his judgement, the learned Judge identified the issues arising for determination as: whether method adopted by the appellant to transit to the Act by regularizing its registration through amendment of its constitution made under the *Societies Act* instead of the making of a new constitution is legally tenable; whether under the exhaustion doctrine, the court had jurisdiction to entertain the petition; whether the appellant's constitutional review process violated the public participation principle for failing to involve stakeholders thereby violating Article 10 of *the Constitution*; whether the petitioners' rights under Articles 10, 27, 28, 36, 47, 50 and 81 of *the Constitution* were violated by the respondents; and whether the petitioners were entitled to the relief sought.

12. The learned Judge, dealing with the first issue, cited section 49 of the Act as the provision that provides for the procedure for transition of sports organizations from the *Societies Act* to the Act, a process that is facilitated by the 12th respondent whose mandate is spelt out under section 45 of the Act and the decision in Christine Joshi Jerome & 2 others v Kenya Swimming Federation & 10 others (2016) eKLR. He found that the rationale behind transitional clauses in legislation is to obviate confusion and prevent the possibility of creating a vacuum that a new law might bring if not properly managed by ensuring that such changes are introduced in a smooth and coordinated manner the importance of which was underscored in Timothy Njoya & 17 Others v Attorney General & 4 Others [2013] eKLR.

13. It was the view of the learned Judge: that under both sections 49 and 46 of the Act the transition of the existing organizations to the new Act was ambulatory and was only meant to preserve them temporarily and give them time to meet the new licensing requirements that had been introduced by the Act; that the legal transition of the appellant as an existing sports organization did not confer it with the registration status under the Act; that new registration had to be done and a certificate under section 47 of the Act issued after being ascertained that it had conformed with all the legal requirements of the Act; that one of those requirements was section 46(6) of the Act which specifically focused on the national sports organizations which required that they be open to the public in their leadership, activities and membership; and that another requirement was under section 46(5) of the Act which required that *the constitution* submitted for purposes of registration must contain, as a basic minimum, provisions set out in the second schedule to the Act.

14. It was held: that in order to meet these conditions, the appellant embarked on a review of its existing constitution and appointed a Constitutional Review Sub-Committee to receive views and proposals for the amendment of its existing constitution which gathered the views from multiple stakeholders;

that the appellant sent out notices to the branches informing them about the constitutional review exercise and asking the branches to coordinate the gathering of views from members and stakeholders in the respective branches; that an advertisement in the newspaper of 20th April 2016 was placed which not only invited its members, athletes, and other stakeholders to give their proposals on possible changes but directed them where the appellant's old constitution could be downloaded from and where the views were to be channelled; that the conclusion of that process was the presentation of the draft to the appellant's Annual General Meeting on 27th April, 2016 which passed the resolution that came up with the revised and/or amended constitution that was presented to the 12th respondent for purposes of registration.

15. The learned Judge found: that the Act did not prescribe that for compliance, the existing Organizations must undertake the process of rewriting their Constitutions afresh; that what was mandatory was inclusion of certain conditions which could be attained by the process of review as opposed to the making of a completely new constitution.

16. On the issue whether the stakeholders, and not necessarily the members of the appellant ought to have been allowed to vote for the amendments to *the constitution* of the appellant, the learned Judge held: that since non-members cannot have voting rights unless allowed by *the constitution* of the Organization, it was only the people with constituting rights (its members) that could legally alter its Constitution; that the only condition was that the National Sports Organizations be open to the public in their leadership, activities and the membership in order to give the general public a direct stake in National Sports Organizations which neither the members nor leadership of the organizations could not take away as it was a prescription of the law; that consequently, although stakeholders who are non-members had no voting rights in regard to the amendments that were adopted by the appellant's delegates at the AGM, the delegates had a duty to consider the inputs made by the public which the appellant's Sub-Committee had gathered; and that the rights that the public/stakeholders had was to have their views considered as opposed to the voting rights as suggested by the petitioner.

17. On the issue whether the petition is barred by the doctrine of non-exhaustion of remedies, the learned Judge held, from a consideration of section 58 of the Act, that this was not a dispute that could be resolved by either the 12th respondent or the Sports Disputes Tribunal since the dispute went beyond the legal prescriptions under the Act; that the matter raised a fundamental constitutional question of whether, in making the decisions complained of, the interest of the public was adequately considered by the appellant thus the doctrine of exhaustion of remedies was inapposite.

18. On the issue whether the appellant's constitutional review process violated the public participation principle for failing to involve stakeholders thereby violating Article 10 of *the Constitution*, the learned Judge held: that by requiring in section 46(6) of the Act that National Sports Organizations to be open to the public in their leadership, activities and membership, its deliberations are not only open to the public in terms of those who may be desirous of joining them but also they should integrate the concept of public participation, a key constitutional requirement in making key policy decisions; that there was evidence that the stakeholders (members of public) heeded the appellant's call and came out overwhelmingly to make their contributions; that although there was a duty cast on the appellant to demonstrate the extent to which the stakeholders' views influenced its decisions and if not, why it failed to consider the same, the appellant did not bother to highlight the changes, if any, that were attributable to stakeholders contributions; that the appellant chose to effect mainly the basic minimum conditions required to be included in its Constitution by the Act; that despite demonstrating that it undertook public participation, the appellant did not attempt to credit a singular amendment as the product of the public participation process but only effected the specific conditions mandatorily required by the Act as a basic minimum; that the public participation process raised fundamental concerns

of inclusivity, democratic representations of key sections in the athletic discipline and enhancing transparency in selection of athletes; that considering the enormous influence the appellant wields on the athletics, if such an Organization is allowed to glaringly ignore the concerns of the public, the benefit to the public envisaged by the transformative provisions of the Act will never be realized as the Organization will forever remain beholden to serve the interests of a few; and that the failure to accord due consideration to public views and concerns was a violation of the principle of openness to the public as advocated by section 46(6) of the Act and the principal aim underlying the requirement for public participation under Article 10(2) of *the Constitution*.

19. Based on the decision in the South African case of Hoffmann v South African Airways (CCT17/00) [2000] ZACC 17 the learned Judge granted the following reliefs:

    a. declaration be and is hereby issued that the appellant has a duty to the public to conduct its affairs having due regard to public interest and is thus enjoined by Article 10 (2) of *the Constitution* and Section 46 (6) of the Sports Act to hold consultation with the public and demonstrably give due consideration to concerns raised by the public while formulating or reviewing its policy documents.

    b. An order directing the appellant to carry out further review of its Constitution adopted and/or ratified on 27th April 2016 within the next 90 days of making of this order with a view to considering public views gathered during its last review for purposes of enhancing inclusivity, democratic representation of various players in the athletics discipline into the appellant's top decision-making organ and to guarantee enhanced transparency in areas of concern raised by the public/stakeholders.

    c. An order that by dint Sections 46 and 49 of the *Sports Act* and the Second Schedule thereof, the officials and Executive Committee of the appellant who have been in office been in office for a cumulative period of 8 years since the coming into force of the *Sports Act* have served their terms in full and must forthwith vacate office and shall be ineligible to contest for any position in the organization.

    d. Each Party to bear its own costs of this Petition.

20. Dissatisfied with the said decision, the appellant has appealed to this Court on the grounds that: the learned Judge granted reliefs that were neither pleaded nor supported by the grounds pleaded; the learned Judge's decision amounted to unlawful exercise of jurisdiction vested in the supreme organs of the appellant's constitution and the sports registrar; the learned Judge wrongly invoked sections 46 and 49 of the Act to justify the removal of the appellant's officials and executive committee members from office on the ground that they had served an aggregate term of 8 years from the time of coming into force of the Act when there was no such law and when they were in office in a transitional capacity; the learned Judge erred in entertaining a challenge on *the constitution* of the appellant from persons who had deliberately refused to apply for its membership; and that the learned Judge erred by declaring that the appellant's executive officers were ineligible to contest for any position in the appellant without jurisdiction and violated their right to be heard.

21. When the appeal was called out for hearing on 11th November 2024, learned counsel, Mr Elias Masika, appeared for the appellant while learned counsel, Mr Kibe Mungai, appeared with Ms Maurine Lagat for the 1st to 10th respondents. Despite due service of the hearing notice, there was no appearance for the 11th to 13th respondents. Both Mr Masika and Mr Mungai relied on the written submissions which they briefly highlighted.

22. At the hearing of the appeal, Mr Masika applied that the Notice of Cross Appeal filed by the 1st to 10th respondents be struck out, it having been filed out of time. Although Mr Kibe Mungai pleaded with the Court to admit the said Notice of Cross-Appeal, we found no basis for doing so hence the Notice of Cross Appeal was struck out.

23. At the hearing of the appeal, however, Mr Masika summarised the submissions by highlighting that the order by the learned Judge that the appellant's officials and executive committee members were not lawfully in the office was not sought and that the learned Judge failed to find that the conduct of the elections of the appellant's officials was, by consent, stayed pending the determination of the petition, hence the said officials were only in the office during the transitional period. Similarly, it was submitted that there was no prayer seeking that the said officials and executive committee members be barred from being re- elected and that the order was contrary to the provisions of the appellant's constitution that provided for the manner of removal of the said officials. According to the appellant's the order contradicted the direction to the appellant to amend its constitution by removing the same officials from office. Mr Masika did not challenge the order directing the appellant to properly undertake the amendment of its constitution.

24. On his part, Mr Kibe Mungai submitted that what was contemplated was the enactment of the appellant's constitution rather than its amendment. He argued that if the trial court issued orders which were not pleaded, this Court has the power to issue the relevant orders on the basis of the pleadings filed so as to ensure that justice is done. It was his case that the 12th respondent issued a certificate of registration after the order stopping the appellant's registration.

25. In his rejoinder, Mr Masika stated that there was no order stopping registration and that what was in fact stopped was the review of the appellant's constitution since by the time the said order was granted, the process of review had already been concluded and the process of registration was on course. It was noted that the respondents had not filed a notice of cross-appeal so as to justify this Court issuing orders which were not granted by the trial court.

26. We have considered the written submissions as well as the plenary address by learned counsel. It is clear from the reliefs granted by the learned Judge that apart from the declaratory order that the appellant was duty bound to comply with Article 10(2) of *the Constitution* and section 46(6) of the Act, there were only three substantive reliefs granted by the learned Judge. These were: the order directing the appellant to carry out further review of its constitution; an order that since the appellant's officials and Executive Committee members had been in office been in office for a cumulative period of 8 years since the coming into force of the Act, they had served their terms in full and must forthwith vacate office; and an order that the said officials were ineligible to contest for any position in the organization. The appellant is not challenging the first order before us. That leaves only two orders.

27. It is true that in directing the said officials to vacate the office the learned Judge found that they had been in the office for the cumulative period of 8 years. However, on 10th May 2017 the parties recorded a consent staying the conduct of the elections that commenced on 27th April 2017 until the hearing of the petition. During the period of review of the appellant's constitution, the law preserved the appellant's existing status for the purposes of transition. It cannot therefore be said that during the said period, a period when the said officials had to be in the office, courtesy of a legal provision, in order to effect the transition, the said officials could be said to have been in the office for the purposes of computing their tenure in the office. To do so would presume that the said officials and executive committee members ought to have vacated their offices with the result that there would have been no one in the office to carry out the transition. In our view, that could not have been the intention of the drafters of the *Sports Act*. In any case, we agree that sections 46 and 49 of the Act which the learned Judge relied upon to

remove the appellant's officials from office did not provide for their removal. Accordingly, the learned Judge erred in relying on irrelevant legal provisions in granting the orders removing the appellant's officials and executive committee members from the office.

28. As for the order barring the executive committee members from being re-elected to the office, no such relief was sought by the petitioners and the order could not be granted without affording the said executive committee members an opportunity of being heard. As Mr Masika, rightly in our view, abandoned the grounds directing the appellant to properly amend *the constitution*, we find it unnecessary to deal with the submissions made in that regard.

29. We however hold that in the absence of a properly filed cross appeal, the respondents' submission that we fashion appropriate reliefs has no basis.

30. In the premises, we allow the appeal and set aside the orders directing the officials and Executive Committee of the appellant to forthwith vacate office and that they are ineligible to contest for any position in the organization.

31. We make no order as to the costs of the appeal, this dispute being in the nature of public litigation.

32. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

P. NYAMWEYA

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.