Kenya Football Federation (Suing through It's officials Nicholas Mwendwa Kithuku - President, Doris Petra Mao, Vice-President and Barry Otieno-Secretary General) & 3 others v Republic & 16 others (Civil Application E035 of 2024) [2024] KECA 645 (KLR) (7 June 2024) (Ruling)

Neutral citation: [2024] KECA 645 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E035 OF 2024

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JUNE 7, 2024

BETWEEN

KENYA FOOTBALL FEDERATION (SUING THROUGH IT'S OFFICIALS NICHOLAS MWENDWA KITHUKU- PRESIDENT, DORIS PETRA MAO, VICE-PRESIDENT AND BARRY OTIENO-SECRETARY GENERAL) ..... 1ST APPLICANT

NICHOLAS MWENDWA KITHUKU ..... 2ND APPLICANT

DORIS PETRA MAO ..... 3RD APPLICANT

FKF ELECTORAL BOARD ..... 4TH APPLICANT

AND

REPUBLIC ..... 1ST RESPONDENT

GABRIEL MGHENDI ..... 2ND RESPONDENT

SPORTS DISPUTES TRIBUNAL ..... 3RD RESPONDENT

MILTON NYAKUNDI ORIKU ..... 4TH RESPONDENT

CABINET SECRETARY FOR SPORTS ..... 5TH RESPONDENT

HON ATTORNEY GENERAL ..... 6TH RESPONDENT

THE SPORTS FUND ..... 7TH RESPONDENT

MOMBASA COUNTY FOOTBALL ASSOCIATION ..... 8TH RESPONDENT

KAKAMEGA COUNTY FOOTBALL ASSOCIATION ..... 9TH RESPONDENT

MANDERA COUNTY FOOTBALL ASSOCIATION ..... 10TH RESPONDENT

MIGORI COUNTY FOOTBALL ASSOCIATION ..... 11TH RESPONDENT

UASIN GISHU COUNTY FOOTBALL ASSOCIATION ..... 12TH RESPONDENT

APS BOMET FC ..... 13TH RESPONDENT

DIMBA PATRIOTS FC ..... 14TH RESPONDENT

KONA RANGERS FC ..... 15TH RESPONDENT

MAYENJE SANTOS ..... 16TH RESPONDENT

FORTUNE SACCO FC ..... 17TH RESPONDENT

(Being an application for stay of execution pending hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Mombasa (O. Sewe, J.) dated 4th April 2024 in Judicial Review Misc. Application No. E001 of 2024)

RULING

1. The applicants, by a Notice of Motion dated 12th April 2024, seek an order to stay execution of the order dated 4th April 2024 made in Mombasa High Court Judicial Review Miscellaneous Application No. E001 of 2024 in which the learned Judge (O. Sewe, J.) stayed an intended Annual General Meeting of the 1st applicant pending hearing and determination of the intended appeal. Consequently, the 1st applicant prays that it be granted the liberty to proceed with its mandate to convene the said Annual General Meeting as it so wishes. The application is premised on grounds that the intended appeal is arguable, and that the consequences of the impugned order are irreversible, and no amount of damages is capable of compensating the 1st applicant and, by extension, the public.

2. From the record as put to us, the genesis of this dispute was the decision by the then Cabinet Secretary, Sports, Culture and Heritage, made on 12th November 2021 and who, by a Gazette Notice No 12374 of the same date, disbanded the National Executive Council (NEC) of the 1st applicant, Football Kenya Federation (hereafter, the Federation), described as a National Sports Organisation that runs football in Kenya. That action attracted several suits before the Sports Disputes Tribunal (hereafter the Tribunal), including Sports Disputes Tribunal Case (SDTSC) No. E006 of 2021 and SDTSC No. E036 of 2022 (as consolidated with SDTSC No. E038 of 2022 and SDTSC No. E039 of 2022, and which is referred to hereafter as the Consolidated Suits). The common issues in all the said suits were as to whether the Cabinet Secretary acted within the law in disbanding the NEC, and whether the NEC was lawfully in office. On 19th July 2022, the Tribunal in SDTSC No. E006 of 2021 declared that the removal of the 2nd to 13th respondents in that suit barred them from making any decision concerning the running of football affairs in the country. On 6th December 2022, the Tribunal in its decision made in the Consolidated Suits held that the appointment of the caretaker committee had the effect of removing from office the NEC and thereby disabling it from making decisions, including the decision of 9th November 2022.

3. On 4th November 2022, the Cabinet Secretary rescinded the earlier decision and reinstated the NEC. Notwithstanding that reinstatement, the Federation challenged the Tribunal's decision of 6th December 2022 in Nairobi Judicial Review Application No. 5 of 2022 and, in a judgement delivered on 14th July 2023, the court quashed the said decision. Before that decision was quashed, the 3rd respondent in the Consolidated Suits, Doris Petra Mao, had filed an application dated 10th February 2023 seeking orders that the NEC be committed to jail for contempt of court. When that application came up for

hearing, a preliminary objection on whether the application was sub judice was raised, which objection was upheld and the application stayed pending the outcome of the consolidated suits.

4. Despite the foregoing, the Tribunal went ahead and fixed the contempt application for hearing after ruling that it had jurisdiction to determine the contempt application. Dissatisfied with that decision, Gabriel Mghendi, the 2nd respondent herein (the ex parte applicant), in his capacity as a member of the NEC, instituted Mombasa Judicial Review Application No. E001 of 2024 seeking orders to quash the Tribunal's directions and contempt of court proceedings alleging illegality and want of jurisdiction. Leave was granted to the ex parte applicant on 1st March 2024, and it was directed that the grant of leave would operate as stay of proceedings before the Tribunal. Pursuant to the grant of leave, the ex parte applicant filed the substantive application dated 2nd March 2024. Appreciating the urgency of the matter, the court directed that the said application be served forthwith on the respondents for hearing on 12th March 2024.

5. By an application dated 11th March 2024, the 12th respondent, Uasin Gishu County Football Association, sought to have the orders for leave and stay stayed, varied or set aside on the grounds that there were in existence parallel proceedings before the High Court at Kiambu being Kiambu HCJR No. E003 of 2024 – *Doris Petra Mao & Ors v Milton Nyakundi & Ors*. The 4th respondent, Milton Nyakundi Oriku, also filed an application dated 13th March 2024, under certificate of urgency, seeking orders that the intended Annual General Meeting of the Federation be stayed pending the hearing and determination of the substantive application.

6. On 4th April 2024, a ruling was delivered on the application dated 13th March 2024 in which the learned Judge made the following orders:

    a. An order be and is hereby granted staying the intended Annual General Meeting of the Football Kenya Federation pending the hearing and determination of the substantive judicial review application.

    b. Costs of the application to be in the cause.

7. That is the ruling that the applicants herein are dissatisfied with and intend to appeal against. In the meantime, the applicants seek stay of execution of the said order by the Notice of Motion the subject of this application, whose reliefs we set out at the beginning of this ruling.

8. In support of the application, Barry Otieno, the Secretary General of the Federation, swore a supporting affidavit on 12th April 2024 in which he set out the background of the application and disclosed that the Annual General Meeting which the 4th respondent sought to be stayed by the Notice of Motion dated 13th March 2024 was scheduled for 14th March 2024; that, on 13th March 2024, the court issued an order stopping the said meeting and, upon hearing the application inter partes on 17th March 2024, a ruling was delivered on 4th April 2024 staying the intended Annual General Meeting; that, dissatisfied with that ruling, the applicants filed a Notice of Appeal on 5th April 2024; that the impugned orders have not received favour from FIFA, the World football regulating body, which vide a letter dated 26th March 2024 directed the Federation to conduct its Annual General Meeting soon, and to continue working towards conducting its elections scheduled to be held this year; that FIFA holds a significant regulatory mandate in football governance and, therefore, it is in the public interest for the State, State agencies and courts to manage the tension between FIFA Statutes and municipal law; that, unless the impugned orders are stayed, there is a risk that FIFA may soon suspend or ban Kenya from international football thereby jeopardizing the opportunity and chance of Kenya hosting the African Championship Cup 2024 and AFCON 2027; and that the intended appeal has high chances of success as demonstrated in the attached Draft Memorandum of Appeal.

9. The Motion was opposed by the 4th respondent who, in his replying affidavit sworn on 18th April 2024, averred that the appeal is grossly incompetent because the applicants have misrepresented themselves by claiming that the 2nd, 3rd and 4th respondents are officials of the 1st applicant while they had been removed by the Gazzette Notice No. 12374 dated 12th November 2021; that the 4th applicant had no authority to swear the supporting affidavit since he is not an official of the 1st applicant; that the question of the Annual General Meeting of the 1st applicant is presently before the High Court and the Tribunal, and hence this appeal is mischievous and a clever attempt by the applicants to render the pending proceedings nugatory, academic and a waste of judicial time; that the attempt to further delay the resolution of the matters before the High Court and the Tribunal gravely prejudices the public interest; that the cases before the trial court do not concern football or the 1st applicant as the main issue in the courts is about 160 individuals being held accountable for their attempts to circumvent the law; that this Court lacks jurisdiction to entertain this appeal because the validity of the Annual General Meeting was determined by the High Court and the Sports Dispute Tribunal in Petition No. E473 of 2021 and SDT/SC/E006/2021; and that the application should be dismissed with costs.

10. When the matter was called out for virtual hearing before us on 27th May 2024, learned Senior Counsel, Mr. Eric Mutua, appeared for the applicants, Mr. Njenga appeared for the 5th respondent, Mr. Odhiambo appeared for the 12th respondent while the 4th respondent, Mr. Milton Nyakundi Oriku, appeared in person. Mr. Mutua withdrew the case against the 7th, 8th, 9th, 10th, 11th, 13th, 14th, 15th 16th and 17th respondents with the concurrence of counsel and parties in attendance. Though served, the 3rd and 4th respondents were not represented.

11. Learned Senior Counsel, Mr. Mutua, relied on the submissions dated 8th May 2024, which he briefly highlighted. According to the applicants, although the subject matter of the judicial review proceedings is not whether the 1st applicant or its office bearers have legal capacity to call for an Annual General Meeting, the trial court issued an order barring the 1st applicant from calling for an Annual General Meeting; that the trial court therefore granted relief that was not sought in the judicial review proceedings; that the trial court entertained a matter without jurisdiction since the 1st applicant's constitution provides for an internal dispute resolution mechanism; that, pursuant to section 58 of the *Sports Act*, the jurisdiction to determine the issues the subject of the judicial review application lay with the Sports Disputes Tribunal; that the 1st applicant was not a party to the proceedings before the High Court, and was therefore condemned unheard; and that, based on the foregoing, the applicants had established an arguable appeal.

12. On the nugatory aspect, it was submitted on behalf of the applicants that FIFA had already invoked its Private Legal Order to demand that the 1st applicant convenes its Annual General Meeting for purposes of, inter alia, conducting elections and that, in the event that the 1st applicant fails to comply with those directive, Kenya is likely to be banned from international football; that such a ban will occasion social, economic and foreign policy implications to Kenya; that Kenya is expending millions of shillings towards renovation and construction of new stadiums in its bid to host the African Cup of Nations (AFCON) 2027 and stands to lose the huge sums already spent; that Kenya stands to be barred from participating in the African Championship Cup, 2024 as well as the FIFA World Cup, 2026 qualifying matches scheduled for June, 2024; and that, if banned from hosting the AFCON matches, the co-hosting East African countries will likewise be affected by the ban. In support of the application, the applicants cited the case of Kenya Industrial state Kenya Industrial Estate Limited & Another v Matilda Tenge Mwachia [2015] eKLR, highlighting the principle that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed, if allowed to continue, is reversible and, if not, whether damages will reasonably compensate the party aggrieved.

13. The application was supported by the 5th respondent while Mr. Odhiambo, on behalf of the 12th respondent, informed us that he would abide by the decision of the Court.

14. The 4th respondent submitted that this appeal is premature, inarguable and legally, factually and jurisprudentially incompetent; that the FIFA private law is inconsistent with our municipal legislation and Constitution; that the Court should analyse the findings in Mombasa Civil Suit No. 58 of 2004 - *FKF & Others v Sports Registrar & Others*; that, at the inter partes stage of the application from which the appeal arises, the 1st applicant was heard; that the impugned order is temporary and its survival is dependent on the life of the Judicial Review suit and, hence, it is against the best interest of justice to stay an interim order by this Court where the substantive determination is capable of being appealed against; and that this Court should down its tools to avoid a miscarriage of justice and dismiss this application with costs.

15. We have considered the application, the affidavits in support of and in opposition thereto, the written and oral submissions, the cited authorities and the law.

16. In applications of this nature, the principles that guide the Court in determining whether or not to grant the orders sought are well settled. This Court's jurisdiction, whether in an appeal or in an application, can only be invoked where there is a pending appeal or, in case the appeal is yet to be filed, where a Notice of Appeal has been lodged. Therefore, the appeal or the Notice of Appeal is the entry point at which a party approaches this Court. In this case, the applicants did file their notice of appeal. Having surmounted the jurisdictional hurdle, an applicant approaching the Court pursuant to the provisions of rule 5(2) (b) of the Rules of this Court must then demonstrate that the appeal or intended appeal, as the case may be, is arguable or, as is often said, not frivolous and, in addition, satisfy the Court that the appeal would be rendered nugatory absent stay. The two conditions apply conjunctively and sequentially so that, where an applicant fails to surmount the first hurdle, there is no need to consider the second limb. However, where an applicant meets the first condition but fails to meet the second, the application will still fail.

17. The rationale for these twin principles was explained by this Court in *Peter Gathecha Gachiri v Attorney General and 4 Others* Civil Application Nai 24 of 2014 (unreported) where it was held that:

> " Rule 5(2)(b) of *the Rules* of this Court on which the application is premised confers on us independent discretionary jurisdiction exercisable in accordance with the twin principles, namely, that the appeal must be shown to be arguable and, in addition, that the appeal, if successful, shall be rendered nugatory if stay is not granted. These principles have been developed by the court as a guide in the exercise of its discretionary power in determining an application premised on Rule 5(2)(b). The rationale in these principles is intended to balance two parallel propositions; first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and; secondly that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it in the next higher court (see Butt v Rent Restriction Tribunal [1982] KLR 417. See also Kenya Shell Ltd v. Kibiru & Another [1986] KLR 410...It is imperative for an applicant seeking an order under Rule 5(2)(b) to satisfy the Court on both principles. An applicant must show that the appeal is not frivolous and is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there be a solitary arguable point. An applicant must further show that the appeal, if successful, will be rendered futile if stay is not granted."

18. In *Stanley Kang'ethe v Tony Keter & 5 others* [2013] eKLR, the Court emphasised that it is sufficient if a single *bona fide* arguable ground of appeal is raised. See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004. Further, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. See Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd & 2 others, Civil Application No. 124 of 2008. It is one that is deserving of consideration by the Court and warrants a response from the opposite party. See *Kenafric Matches Ltd v Match Masters Limited & Another* (*supra*).

19. In this case, the applicants intend to argue in the proposed appeal, inter alia, that the 1st applicant was not a party to the proceedings before the court below, and that it was an error on the part of the learned Judge to have issued orders against it. It is further intended to be argued that the learned Judge ought not to have granted the orders which had no foundation in the reliefs sought or to be sought in the substantive judicial review application. We have no difficulty in finding that these two issues are arguable since, as held by this Court in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR:

> " It is to be remembered that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable."

20. While the applicants may at the hearing of the intended appeal fail to persuade the Court that their appeal is merited, we find, without saying more lest we embarrass the bench that will be seized of the substantive appeal, that the intended appeal is not frivolous. It is arguable. The issues raised are deserving of consideration by the Court and warrants a response from the opposite party.

21. On the nugatory aspect, which an applicant must also demonstrate, this Court in *Reliance Bank Limited v Norlake Investments Ltd* [2002] 1 E.A. 227 held that:

> " ..... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling."

22. As to what amounts to trifling, the Court in the case of *Permanent Secretary Ministry of Roads & another v Fleur Investments Limited* [2014] eKLR it was held that:

> " A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law."

23. In this case, the applicants' argument is that the country risks being banned by FIFA from participating in the FIFA organised sporting events, including the AFCON, which Kenya intends to co -host together with the neighbouring country, and for which substantial amounts of money continue to be expended.

24. In applications such as this, the position, as was held in *Kenafric Matches Ltd v Match Masters Limited & Another* Civil Application No. E902 of 2021 (UR) is that, in line with the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act*, in deciding whether an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties, and each case has to be considered on its own merits. Therefore, when exercising this discretion, the principle of

proportionality ought to be taken into account and as was restated in the case of *African Safari Club Limited v Safe Rentals Limited* [2010] eKLR:

> " ...with the above scenario of almost equal hardship by the parties, it is incumbent upon the Court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

25. Nyamu, JA in *Kenya Commercial Bank Limited V Kenya Planters Co-Operative Union* Civil Application No. Nai. 85 of 2010 pronouncing himself on the principle of overriding objective held that:

> " where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case."

26. In the case before us, the order sought to be appealed against barred the holding of an Annual General Meeting of the 1st applicant. The meeting in question was scheduled for 14th March 2024 (now past). If that was the position, then the application may well have been overtaken by events since the date on which the scheduled Annual General Meeting was to take place is now past. Apart from that, the applicant is not only seeking that the impugned order be stayed, but that:

> " for avoidance of doubt, Football Kenya Federation be at liberty to proceed with its mandate of convening a General Meeting as it wishes."

27. It is clear that what the applicant seeks is, in effect, an order that would pave way for it to convene an Annual General Meeting and proceed with its preparations for the said AFCON games and other sporting activities unimpeded. Should that happen, we are unable to see how the trial court and even this Court in the intended appeal would effectively deal with the pending matters. If, for example the trial court was to find against the applicants, how would the events that would have taken place be reversed? Although Mr Mutua, SC submitted that the trial court is unlikely to issue orders against the 1st applicants, we cannot at this stage be certain about that position since the matter is still pending hearing. What is clear is that there are chances are that the grant of the orders in the manner sought would have the effect of pulling the rag from the feet of the trial court as well as this Court in the intended appeal. The objective of stay, as we understand it, particularly in an interlocutory appeal such as the one intended in the present case, is to preserve the subject matter of litigation so that, at the conclusion of the pending proceedings or intended appeal, if it were to succeed, will not be rendered purely academic. Conversely, the grant of stay ought not to destroy the subject matter of the proceedings or foist upon the trial court or this Court a situation of complete helplessness or render nugatory any judgement or order that either the trial court or this Court upon the conclusion of the hearing, may arrive at. In other words, the purpose of a stay is not to determine the yet to be heard proceedings before the court below or the intended appeal.

28. Senior Counsel, Mr. Eric Mutua, informed us during the hearing that, at their meeting with FIFA at the end of the month, the applicants intend to persuade FIFA to indulge them in light of the pending proceedings before this Court.

However, we note from the proceedings of the trial court that the urgency of the matter weighed heavily in the mind of the learned Judge who directed that the substantive application be canvassed by way of written submissions; that the applicant files and serves his written submissions within 14 days from the date of the order made on 4th April 2024; that the respondents and interested parties file and serve their written submissions within 14 days from the date of service of the applicant's submissions; and that the application dated 11th March 2024 be served again for further directions on 10th April 2024.

29. In the foregoing premises, we are not persuaded that, unless the orders sought herein are granted, the intended appeal will be rendered nugatory. To the contrary, it is the orders that the applicants seek that will render the trial court case and the intended appeal nugatory. Being mindful of the necessity of preserving the subject matters of the dispute, we hereby decline to grant the orders of stay sought which, in any event, we are not persuaded in light of the fact that the initial date of the intended Annual General Meeting, has lapsed.

30. In view of the foregoing, the Motion dated 12th April 2024 fails and is hereby dismissed with costs.

31. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

Deputy Registrar