



**IN THE COURT OF APPEAL**

**AT KISUMU**

**CORAM: GITHINJI, WARSAME & M'INOTI, J.J.A.**

**CIVIL APPLICATION NO. 9 OF 2018 (UR 8/18)**

**BETWEEN**

**DAVE COLLINCE ]**

**MAURICE OTIENO ] Suing as officials of**

**MUHORONI YOUTH FOOTBALL CLUB.....APPLICANT**

**AND**

**NICK MWENDWA ]**

**ROBERT MUTHOMI ] Sued as representatives of**

**FOOTBALL KENYA FEDERATION.....1<sup>ST</sup> RESPONDENT**

**KENYA PREMIER LEAGUE.....2<sup>ND</sup>RESPONDENT**

**(An application for injunction pending the hearing and determination of**

**an intended appeal from the decision of the High Court**

**at Kisumu(Majanja, J.) dated 22<sup>nd</sup> January 2018**

**in**

**HCCC NO. 28 OF 2017)**

**\*\*\*\*\***

**RULING OF THE COURT**

***The applicant, Muhoroni Youth Football Club***, which is represented in these proceedings by ***Dave Collince*** and ***Maurice Otieno***, respectively its secretary and treasurer, is a registered society under the ***Societies Act***. ***The 1<sup>st</sup> respondent, the Football Kenya Federation (FKF)***, similarly represented in these proceedings by its Chairman ***Nick Mwendwa*** and its Secretary, ***Robert Muthomi***, is an affiliate of both the world football governing body, the ***Fédération Internationale de Football Association (FIFA)*** and the regional football body, the ***Confederation of African Football (CAF)***, and is the body recognised by FIFA to run and manage football in Kenya. For its part, ***the 2<sup>nd</sup> respondent, the Kenya Premier League (KPL)***, is a private company that owns and manages the professional top tier football league in Kenya known as the ***Kenya Premier League***. Pursuant to a memorandum of understanding between FKF and KPL, the former granted the latter the exclusive rights to own, organize, run and manage the Kenya premier league. It is apt to point out that shareholders of the KPL include the applicant, which at all material times was playing in the Kenya premier league.

What precipitated the dispute leading to this application was a letter dated 2<sup>nd</sup> February 2017 addressed to the applicant by FKF, communicating its decision to relegate the applicant from the premier league to the second tier, the national super league, for non-compliance with the club licensing guidelines. Subsequently the ***Sports Disputes Tribunal*** and the High Court nullified the club licensing guidelines and the applicant was reinstated to the top tier league, by which time the league had progressed without its participation. The applicant contends

that as a result of the relegation, it lost sponsorship, its best players, performed dismally in the premier league, and suffered grave prejudice.

On 29<sup>th</sup> December 2017, the applicant moved the High Court in Kisumu, seeking damages and the following orders:

**“(a) declaration that the earlier decision by the defendants to relegate the plaintiff in the 2017 Kenya premier league adversely affected their performance which led to their poor ranking at the end of the league.**

**(b) A permanent injunction do issue to restrain the defendants by themselves, their agents, servants and /or employees or otherwise jointly and severally from...relegating the plaintiff from the 2017 Kenya premier league and include the plaintiff in the 2018 fixtures.**

On the same day the applicant applied for conservatory orders to restrain the respondents from relegating it from the Kenya premier league pending the hearing and determination of its suit. The application for conservatory orders was opposed by FKF vide an affidavit sworn on 15<sup>th</sup> January 2018 by its Secretary and Chief Executive Officer in which it contended, among others, that the 2017 Kenya premier league had already concluded; that the applicant was duly allowed to participate in the 2017 Kenya premier league; that the applicant finished 18<sup>th</sup>, the last team on the table; and that by reason thereof, it was relegated to the national super league.

By the ruling dated 22<sup>nd</sup> January 2018 that the applicant intends to appeal to this Court, **Majanja, J.** found that the applicant had not established a *prima facie* case with a probability of success and that in any event, an award of damages would be an adequate remedy. After filing a notice of appeal, the applicant applied under **rule 5(2)(b)** of the **Court of Appeal Rules**, in the notice of motion now before us, for an injunction to restrain the respondents from relegating it to the national super league.

Urging the application for injunction, **Mr. Odeny**, learned counsel for the applicant, submitted that the poor performance of the applicant in the 2017 league was as a result of the wrongful relegation based on the club licensing guidelines, which were subsequently found to be null and void. He contended that the applicant was blameless and ought not to be punished by relegation for the mistakes and wrong doings of the respondents. He submitted further that although the decision of the High Court regarding the licensing guidelines was stayed by this Court in **Nick Mwendwa & Another v. Sam Nyamweya, CA No. Nai. 223 of 2017**, the decision of the Sports Tribunal on the same regulations was never appealed against and was still in force, meaning that the guidelines were still null and void. In his opinion, there was an arguable case deserving to be considered by this Court

The applicant next submitted that the intended appeal will be rendered nugatory if we do not issue the orders that it craves. It was the applicant's contention that the conclusion of the premier league, which is already on going, will render the appeal a mere academic exercise, if it succeeds. The applicant denied that its application was overtaken by events and contended that there was precedent where the respondents had reinstated clubs to the league mid-season, after the Sports Disputes Tribunal found their relegation to have no basis. It cited the case of **Peter Omwando v Nick Mwendwa & Another, SDT Pet No. 25 of 2016** involving **Shabana Football Club**, as an example and argued that if it was reinstated to the premier league, the fixtures will be re-organized accordingly.

Although the respondents' advocates were duly served with the hearing notice, they did not attend the Court. Nevertheless, they had already filed a replying affidavit to oppose the applications, sworn by Robert Muthomi on 11<sup>th</sup> April 2018, as well as a list of authorities in support of their position. The respondents' contention is that the application is an abuse of the court process because, other than the application giving rise to the present application, the applicant had also filed **Kisumu High Court Misc. App. No. 29 of 2018** seeking to restrain the respondents from relegating it to the national super league, which was dismissed for lack of merit. They added that the applicant was lawfully relegated after being reinstated to the premier league in 2017 and finishing last on the table.

The respondents further contended that the application was overtaken by events; that after the applicant's relegation, **Vihiga United Football Club** and **Wazito Football Club**, who finished top in the national super league, were promoted to the premier league; that the premier league had progressed almost to mid-season; that an order to include the applicant in the premier league so late in the day will disrupt the league and occasion great hardship and damage to the teams in the premier league; and that if the applicant's appeal were to succeed, an award of damages would be an adequate remedy.

We have anxiously considered this application. The applicant contends that its intended appeal is arguable because it failed to qualify for the premier league due to wrongful relegation by the respondents, which relegation was reversed by decisions of the Sports Tribunal and of the High Court. It adds that unless we grant the injunction prayed for, the premier league will conclude without its participation and its appeal will be rendered academic and nugatory. In reply, the respondents argue that the applicant was properly relegated for finishing last in the previous premier league table; the judgment of the High Court was stayed by this Court; damages would be an adequate remedy if the appeal were to succeed; both the premier league and the national super league have progressed substantial and should not be thrown into confusion; teams, which are not parties to this application will be adversely affected by the orders sought by the applicant; and that the balance of convenience favours dismissal of the applicant's application.

We are satisfied that the applicant's intended appeal is arguable and not entirely frivolous. The applicant intends to convince this Court that the trial court erred by finding that it did not have a *prima facie* case whilst its failure to qualify was caused solely by its wrongful relegation by the respondents and late reinstatement back to the premier league after the intervention of the Sports Tribunal. As has been stated time without number, an arguable appeal is not one that must succeed when the appeal is heard; it is one that raises even a single *bona fide* issue worth of full consideration by the Court. (See **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001**).

As regards whether the intended appeal will be rendered nugatory if we do not grant the injunction sought by the applicant, we are not persuaded that it will be. An appeal will be rendered nugatory if what is sought to be stopped is irreversible if it comes to pass, or cannot be reasonably compensated by award of damages. (See **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others CA. No. 31 Of 2012**). The

applicant's losses arising from the short-lived relegation, if proved, are quantifiable in monetary terms. (See *Ecomil Pasag Co Ltd & 2 Others v. UAP Insurance Co Ltd [2017] eKLR*).

The applicant is obliged to establish both an arguable appeal and the fact that it stands to be rendered nugatory; proving only one of the issues will not suffice. (See *Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31*). We cannot grant its application for injunction because it has satisfied us on only one score.

What has also weighed heavily in our minds is the balance of convenience arising from the present scenario in both the premier and national super leagues. They are now approaching mid-season with 18 teams having played many matches in which they have invested heavily. Two new teams from the national super league, which were promoted to the premier league, have also honoured their premier league fixture, at an expense, we must add, and we do not see how, by a stroke of the pen, we can exclude them from the premier league without even the simplest courtesy of a hearing. The decision of the Sports Tribunal relating to Shabana Football Club, which the applicant relies on, was rendered within a month of the disputed relegation and it is obvious it did not entail disruption of any of the leagues.

We are entitled, in making our decision, to consider the balance of convenience. (See *Oraro & Rachier Advocates v. Co-operative Bank of Kenya Ltd [2000] eKLR* and *Reliance Bank Ltd v. Norlake Investments Ltd (2002) 1 EA 227*). Taking into account all the foregoing factors, and being sympathetic to the applicant's industry, resilience and commendable community roots and ethos, we are not persuaded that this is a suitable application in which to grant the orders sought.

In the result, the application is not merited and the same is hereby dismissed. The costs of the application will abide the outcome of the intended appeal. It is so ordered.

**Dated and delivered at Kisumu this 26<sup>th</sup> day of July, 2018.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**