IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKI, OUKO & M'INOTI, JJ.A.

CIVIL APPLICATION NO. 223 OF 2017 (UR 172/2017)

BETWEEN

NICK MWENDWA]

ROBERT MUTHOMI].....….APPLICANTS

(SING AS REPRESENTATIVES OF

FOOTBALL KENYA FEDERATION)

AND

SAM NYAMWEYA.....…….....RESPONDENT

(Application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mativo, J.) dated 21st September 2017 in HCCP NO. 59 OF 2007)

****

RULING OF THE COURT

The dispute leading to this application has been long and intricate and revolves around the question of the size of the Kenya Premier League. The main protagonists in the dispute are the ***Football Kenya Federation Ltd (FKF)*** and

the ***Kenya Premier League Limited (KPL Ltd)***. The FKF is a society registered under the ***Societies Act*** and is represented in these proceedings by ***Nick Mwendwa*** and ***Robert Muthomi***, respectively its President and Secretary General/Chief Executive Officer, ***(the applicants).*** It is the body responsible for managing and running football in Kenya and is an affiliate member of the world football governing body, the ***Fédération Internationale de Football Association (FIFA)*** and the ***Confederation of African Football (CAF).*** The KPL Ltd, on the other hand is a limited liability company that owns and manages the Kenya premier league, the top tier football league in the country. Before the dispute erupted, the top tier Kenya premier league was made up of 16 teams, who were the shareholders of KPL Ltd, together with FKF, which holds one special share.

Pursuant to a five-year agreement dated 24th September 2015, FKF granted KPL, which had been running the premier league since 2003, the exclusive rights to own, run, organize and manage the Kenya premier league on the terms and conditions set out therein. The agreement set up a Joint Executive

Council of FKF and KPL Ltd with a mandate, *inter alia:*

> **"to review and agree at least one full season prior to their implementation on any proposals for approval by KPL Governing Council regarding any major changes in the league and especially in the calendar of the football season, in the number of teams in the league or in the relegation of two (2) teams from the league and promotion of the two (2) top teams from the FKF National League at the end of the season." (Clause 1.2(g)). Clause 1.3** of the agreement gave KPL Ltd the casting vote in the Joint Executive Council in the event of tied vote.

On or about 12th October 2016, KPL Ltd filed a claim before the ***Sports Disputes Tribunal*** against the applicants, FKF, and ***Petra Doris*** challenging expansion of the Kenya premier league from 16 to 18 teams during the currency of the agreement, without its approval or concurrence. The Tribunal is a dedicated body set up by ***section 55*** of the ***Sports Act, 2013*** to among others, hear sport-related disputes. After hearing the dispute, the Tribunal concluded that the relationship between FKF and KPL Ltd was that of a principal and agent with the latter running and managing the Kenya premier league under the authority of the former. The Tribunal further held that clause 1.3 of the agreement, which gave KPL Ltd the casting vote was in violation of ***Article 18*** of the ***FIFA statutes*** and ***Article 17.1*** of the ***FKF Constitution*** which do not allow subordination of FKF to KPL Ltd or any other group. Specifically on the question of expansion of the league, the Tribunal expressed itself thus:

> ***"The 1st and 2nd respondents (the applicants) as president and vice president respectively of FKF have been elected by the members of FKF which include the shareholders of KPL (Ltd) to lead the promotion, organization and running of the sport of football in Kenya. Premised on this mandate the president and vice president have determined that one of their agendas for the promotion of the sport of football in Kenya is to increase the number of teams participating in the league. This is within their remit as the elected leaders of the FKF and it is not within the purview of the Tribunal's jurisdiction to debate the merits or otherwise of (the) decision neither do we consider that it is within the mandate of KPL (Ltd) as agent to second guess the aspirations of the respondents. The president of the respondent has stated in his evidence in chief and on oath the FKF will make available the necessary resources to finance the expansion of the league and will forego certain revenues flowing from the agreement in order to achieve this aspiration. The Tribunal takes the view therefore that KPL (Ltd) which freely acknowledges its position as an agent cannot and must not be allowed to subvert these aspirations."***

Ultimately the Tribunal declined to issue an order of permanent injunction, as prayed by KPL Ltd., to restrain expansion of the league. But because it also found the agreement to be valid, save for the impugned clause, and that FKF could not interfere with KPL Ltd.'s right to manage the Kenya premier league during the currency of the agreement, it directed both parties to discuss the merits, modalities and mechanism for the expansion of the league from 16 to 18 teams for the 2017/2018 season. The parties were further directed to complete the discussions by 16th January 2017 and report to the Tribunal on 17th January 2017.

The record before us does not disclose what transpired as regards the discussions that were ordered for 16th January 2017 and the report to the Tribunal. What is not in dispute, however, is that the Kenya premier league 2017/2018 season kicked off on 11th March 2017 with the active participation of KPL Ltd and FKF, and involving 18 teams. The two new kids on the block were ***Nakumatt Football Club*** and ***Zoo Football Club***. It is common ground also that none of the parties appealed against the decision of the Tribunal in terms of ***clause 10*** of the agreement, which provides that the decision of the Tribunal is to be appealed to the ***Court of Arbitration for Sport (CAS)*** in Lausanne, Switzerland.

Matters took an ominous turn on 22nd February 2017 when the respondent in this application, ***Sam Nyamweya,*** the immediate former president of FKF, filed a lengthy petition in the High Court alleging violation of his constitutional rights by the Tribunal, the applicants, FKF and KPL Ltd who, he also accused of violating the agreement of 24th September 2015 by ***inter alia*** introducing unlawful club licensing regulations to the detriment of football and the lovers of the beautiful game in the country.

Specifically he was aggrieved by the expansion of the league from 16 to 18 teams, which he considered illegal and arbitrary, as well as the decision of the Tribunal of 10th January 2017, which he claimed was faulty and contradictory. He therefore sought a host of declarations, among them that the maximum number of teams in the Kenya premier league is 16.

The petition fell for hearing and determination before ***Mativo J***., who in a judgment dated 21st September 2017, held that there were many players involved in football in the country and that there was no proper public participation before adoption of the club licensing regulations and expansion of the teams in the premier league, as required by the Constitution of Kenya, 2010. Accordingly he issued, among other reliefs, declarations that the Kenya premier league shall have a maximum of 16 teams during the 2017/2018 season consisting of 14 Kenya premier league teams that qualified for sporting merit during the 2016 season, plus the 2 highest ranked clubs at the end of the 2016 season in FKF's national super league, and that the FKF club licensing regulations were null and void.

That is the decision that aggrieved the applicants and prompted them, after filing a notice of appeal on 25th September 2017, to take out the motion on notice now before us in which they seek in the main, an order of stay of execution of the decree of the High Court pending the hearing and determination of their intended appeal. Urging the application, ***Mr. Ochieng,*** learned counsel for the applicants relied on their draft memorandum of appeal raising some 18 grounds of appeal and submitted that the intended appeal was arguable. Some of the main grounds on which the applicants intend to impugn the judgment of the High Court are that the learned judge erred by holding that there was no public participation whilst the evidence on record showed that the issues complained of were discussed at the 4th FKF Annual General Meeting on 15th October 2016 which was preceded and followed by sensitization meetings, workshops and seminars for stakeholders; by ignoring the fact that under the express provisions of the agreement between FKF and KPL Ltd, any dispute between the parties was to be heard and determined by the Tribunal, with an appeal to the CAS in Switzerland; by entertaining the respondent's petition whilst he was not a party to the agreement of 24th September 2015 or a party to the litigation before the Tribunal; by failing to note that the dispute which the respondent was re-agitating had been fully heard and finally determined by the Tribunal and that no appeal had been preferred as provided in the agreement; by failing to hold that what the respondent was seeking to stop had already taken place; and by making declarations and orders that were not practical to implement.

Next learned counsel submitted that unless the judgment of the High Court was stayed, the applicants' intended appeal would be rendered nugatory if it ultimately succeeded because the two new teams had already been made shareholders of KPL Ltd; FKF had already paid Kshs 5. Million and was in the process of paying a further Kshs 16 million to KPL Ltd to cater for the expanded league; the two teams had already played 25 matches of the season; the 2016/2017 season was coming to a close on 18th November 2017 with only about 9 rounds remaining; the National Super League, the second tier, where the two teams would have played was also in its 25th round, meaning that the two had no room there; the two teams would be in limbo for the remainder of the season, having expended substantial funds meeting their premier league fixture obligations; if the two teams were relegated to the second tier it would result in a negative ripple effect requiring two other teams from the national super league to be relegated to the division one leagues; the livelihoods of the players in the two teams, their families and coaches would be completely ruined; relegation of the two teams would result in loss of sponsorships and revenue; six members of the two teams, who had received call ups to the national team due to their good form would suffer severe losses and miss out on the opportunity to play for the national team; and that three players from the two teams were contenders for premier league honours including the premier league's best player and top scorer and stood to lose out if the decision of the High Court were not stayed.

The applicants relied on the rulings of this Court in ***Housing Finance Co of Kenya Ltd v. Sharok Kher Mohammed Ali Hirji & Another [2015] eKLR*** and ***The Engineers Registration Board v. Jesse Waweru & Another [2013] eKLR*** to demonstrate the considerations that guide the Court while determining an application for stay of execution.

Opposing the application ***Mr. Wahome***, learned counsel for the respondent, was of the view that the applicant's intended appeal as set out in the draft memorandum of appeal is not arguable. He contended

that an order of stay would undo the judgment, yet it affirmed the validity of the agreement between of 24th September 2015, a position that the applicants themselves supported. In his view, the inclusion of the two teams in the premier league constituted a breach of the agreement, which this Court should not countenance or tolerate. Counsel further urged us not to grant the application because the appellant had another concurrent application for stay of execution before the High Court, which it had not withdrawn.

On whether the intended appeal would be rendered nugatory, counsel submitted that it would not because the members of the two teams did not have to be in the premier league to earn a national team call up. In his view the two teams would not suffer substantial loss and that it was possible for them to continue playing in the second tier league for the remainder of the season.

Turning now to the merits or otherwise of the application, we begin by reiterating that the jurisdiction of this Court under rule 5(2)(b) is original and unfettered and is invoked by the filing of a notice of appeal. (See ***Safaricom Ltd v. Ocean View Beach Hotel Ltd & 2 Others [2010] eKLR***. It is common ground that the applicants duly filed a notice of appeal on 25th September 2017. Secondly, to entitle an applicant to an order of stay of execution pending the hearing and determination of an intended appeal, he or she must demonstrate first that the intended appeal is arguable and that unless an order of stay of execution is granted, the appeal will be rendered nugatory if it succeeds. (See ***Reliance Bank Ltd v. Norlake Investments Ltd [2002]1 EA 227).*** The applicant must satisfy those two requirements; it is not enough to establish only one. (See ***Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31)***.

As this Court has stated consistently, an arguable appeal is not one that must necessarily succeed. On the contrary, it is an appeal which raises even one *bona fide* issue deserving the consideration of the Court (See ***Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001).*** The draft memorandum of appeal shows that the applicants intend to raise a number of issues, among them whether on the evidence the learned judge erred by holding that there was no public participation before the premier league was expanded to 18 teams; whether the learned judge should have entertained the respondent's petition whilst he was not a party to the agreement he was purporting to enforce; whether the learned judge should have heard and determined the dispute when the same had been heard and determined by the Tribunal; and whether in view of the dispute resolution mechanisms provided in the agreement, including the right of appeal which had not been invoked, the learned judge erred by entertaining the petition.

In our view these are not idle or frivolous issues. They are *ex facie bona fide* issues that deserve to be considered by this Court. We do not intend to say more as regards the first issue because it is not our duty at this stage to determine with finality the merits or otherwise of the intended appeal. The parties will have ample opportunity to agitate that in the appeal itself. (See ***Central Bank of Kenya Deposit Protection Fund Board v. Uhuru Highway Development Ltd & Others, CA No. 95 of 1999).***

Turning to the question whether the intended appeal will be rendered nugatory, it is apt to reiterate what this Court stated in ***Kenya Airports Authority v. Mitu-Bell Welfare Society & Another, CA No. 114 of 2013 (UR 77/2013)*** regarding the rationale for this consideration, which is:

> ***"to obviate the spectre of a meritorious appeal, when successful, being rendered academic, the apprehended harm, loss or prejudice having come to pass in the intervening period. Our stay of execution jurisdiction is meant to avoid such defeatist eventualities in deserving cases."***

Whether or not an intended appeal will be rendered nugatory depends on the circumstances of each case. The applicants point to several reasons why they think their appeal will be rendered nugatory if it succeeds absent an order of stay of execution. If the appeal succeeds after the league has been concluded and the two teams excluded, the damage cannot be reversed. The two teams cannot be called upon to play the remaining round of matches because the league will have ended. Already they have played the bulk of the premier league matches and have slightly over a month to conclude the season. Along the way they have expended huge sums of money and incurred a lot of expenses participating in the premier league. More importantly they stand to lose sponsorship for the remaining matches and their players and their dependants, coaches and staff risk being rendered destitute. Purporting to relegate the two teams to the

league below will disrupt not only that league, but also the ones below it. Last but not least, there is also the danger of losing an almost guaranteed opportunity, which every young lad in a league cherishes, of donning the national team jersey and the honour of playing for the national team. Such a patriotic and sentimental opportunity may not be easily quantified in monetary terms.

If the appeal does not succeed, the two teams will have played the few remaining games, which is a lesser evil considering that they have already played the bulk of the league matches. FKF has deponed, which is not disputed or controverted, that it is about to pay to KPL Ltd the final tranche of funds to cater for the expanded league and that the expansion of the league to 18 teams had the blessings of FIFA. In appropriate cases, this Court has stated that it will weigh the respective hardship and prejudice that each party is likely to suffer by the granting or denial of an order of stay. (See ***Oraro & Rachier Advocates v. Co-operative Bank of Kenya Ltd [2000] eKLR***, ***Nation Media Group & 2 Others v. John Joseph Kamotho & 3 Others [2010] eKLR*** and ***Erwen Electronics Ltd & 3 Others v. Radio Africa Ltd & Another [2012] eKLR).***

Ultimately, we are persuaded that the applicants' intended appeal is arguable and that it will be rendered nugatory if we do not grant an order of stay of execution and the appeal ultimately succeeds. We accordingly direct that there shall be a stay of execution of the judgment and decree of the High Court dated 21st September 2017 until the hearing and determination of the intended appeal. Costs of this application shall abide the outcome of the intended appeal. It is so ordered.

Dated and delivered at Nairobi this 10th day of November, 2017

P. N. WAKI

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR