



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI NO. 154 OF 2008

SAMSON KEENGU NYAMWEYA

TWAHA MBARAK

PETER OCHIEL

(Suing as officials Chairman, Senior Vice Chairman,

and 3rd Vice Chairman of the Kenya

Football Federation 1ST APPLICANT

THE KENYA FOOTBALL FEDERATION (KFF)..... 2ND APPLICANT

AND

MOHAMED HATIMY 1ST RESPONDENT

TITUS KASUVE 2ND RESPONDENT

SAMMY OBINGO 3RD RESPONDENT

JACOB KABANZE ODUNDO 4TH RESPONDENT

(Application for injunction pending the lodging, hearing and determination of an intended appeal against the ruling/order of the High Court of Kenya at Nairobi (Waweru, J.) dated

6th June, 2008

in

H.C.C.C. NO. 609 OF 2007)

RULING OF THE COURT

The dispute herein relates to the leadership and management of the ***Kenya Football Federation***

(KFF) which body is involved in the control and management of football in the country.

What is before us is an application by way of notice of motion pursuant to *rule 5(2)(b)* of the Court of Appeal Rules. The applicants are *Samson Keengu Nyamweya, Twaha Mbarak, Peter Ochiel (Suing as officials, Chairman, Senior Vice Chairman and 3rd Vice Chairman of the Kenya Football Federation)* as the 1st applicant and the *Kenya Football Federation (KFF)* as the 2nd Applicant. For completeness we must also state that the respondents are *Mohamed Hatimy (1st respondent), Titus Kasuve (2nd respondent) Sammy Obingo (3rd respondent) and Jacob Kabanze Odundo (4th respondent)*. This application has its origin in *High Court Civil Case No. 609 of 2007* in which the applicants herein as the plaintiffs sued the respondents herein in a suit that was filed in the superior court on *29th August, 2007*. The applicants (as plaintiffs) sought against the respondents the main reliefs of injunction to restrain them from opening, operating or running any bank accounts in the name of or on behalf of the *Kenya Football Federation (KFF)* or from receiving any kinds of funds from any person, organization or firm, on behalf of or in the name of *KFF*, from running the Kenya National Premier League and/or the *Kenya National Team (Harambee Stars)* for or on behalf of or in the name of *KFF*; and from opening, operating or maintaining offices of *KFF* or assuming the functions of such offices. The suit in the superior court was based on the plea that the applicants are the bona fide officials of *KFF* duly registered by the Registrar of Societies. *KFF* itself is a society registered under the Societies Act.

Even before a defence had been filed the applicants applied by chamber summons dated *7th March, 2008* for orders of temporary injunction pending disposal of the suit to restrain the respondents, in effect from conducting themselves as the officials of *KFF* or handling its affairs. The application, just as the suit itself, was based on the ground that the applicants are the bona fide officials of *KFF* duly recognized by the Registrar of Societies. That application was heard inter partes before Waweru, J. on *24th April, 2008*. Perhaps it may be necessary to set out the reliefs sought by the applicants in their Chamber Summons application of *7th March, 2008*. The pertinent reliefs sought were:-

“3. THAT the defendants whether by themselves, delegates, agents and/or servants be restrained by injunction from convening, calling for, assembling at, congregating at, chairing, officiating at, or in any other manner purporting to meet at the Annual General Meeting of the Kenya Football Federation pending the hearing and determination of this suit.

4. THAT the defendant whether by themselves and/or through delegates and/or agents, employees and/or servants be and are hereby restrained by injunction from discussing, deliberating on, adopting and/or passing and adopting any resolution on the Agenda at the Annual General Meeting of the Kenya Football Federation pending the hearing and determination of the suit.

5. THAT the defendant whether by themselves and/or through agents, delegates, servants and or employees be restrained by injunction from communicating to any legal person and representing themselves out to any such person as officials of the Kenya Football Federation.”

That application was, naturally, opposed by the respondents upon grounds set out in the grounds of opposition dated *12th March, 2008* and filed in the superior court on *10th April, 2008*. Those grounds were:-

“1. That the application is incompetent.

2. That the court lacks jurisdiction to entertain the application.

3. That there is no or proper suit before the court upon which the application is founded.

4. That the defendants have not been served with summons to enter appearance and copy of the plaint.

5. That the application is an abuse of the process of the court.”

The learned Judge considered the submissions by counsel appearing for the respective parties and came to the conclusion that the applicants had, prima facie, established that they and not the respondents were the bona fide officials of KFF. In concluding his ruling delivered on 16th May, 2008, in which he allowed the applicants' application, the learned Judge stated:-

“As already pointed out, the plaintiffs are, prima facie, the duly elected officials of KFF, not the defendants. The defendants have therefore, again prima facie, illegally and wrongfully constituted themselves as officials of KFF. I am satisfied that to permit them to run the affairs of KFF may do irreparable harm to KFF.”

In the circumstances, and for the reasons given above, I will allow this application and grant the orders sought in prayers Nos. 3, 4 and 5 thereof. Those orders are granted subject to the plaintiffs filing within five (5) days of delivery of this ruling an appropriate undertaking as to damages. Costs of the application shall be in the cause. It is so ordered.”

As from that date (16th May, 2008) the applicants left the court victorious but their celebrations were rudely disrupted when the respondents went back to the superior court seeking a review and the setting aside of that ruling. That application was made by way of notice of motion essentially under *Order XLIV Rule 1(1)* of the Civil Procedure Rules. That application was dated 16th May, 2008 and filed in the superior court on 19th May, 2008. The application was brought on the following grounds:-

- “1. There is good and sufficient reason for the Honourable Court to review its ruling read on 16th May, 2008 and the orders made pursuant thereto;*
- 2. The Honourable Court's ruling was delivered without the benefit of crucial material and evidence which it ought to have had on its record to determine the issues before it;*
- 3. It was not possible to produce the evidence to the Honourable Court at the time of the hearing;*
- 4. Failure by the defendants to place crucial evidence before the Court by way of replying affidavit was caused by an inadvertent but grave error on the part of the defendants' counsel;*
- 5. The defendants' counsel handling the matter had erroneously diarised the matter as coming up for hearing in her diary on 24th June, 2008 and not 24th April 2008 and therefore verily believed there was more than sufficient time to consider the matter and file a replying affidavit;*
- 6. Moreover, having erroneously diarised the date as 24th June, 2008, because two other suits dealing with the question of the leadership of KFF which were scheduled for hearing on 27th May 2008 and 04 June, 2008, and whose determination were likely to affect this application, it was only prudent that the filing of the replying affidavit await the hearing of those matters;*
- 7. It is extremely important that the Court have the full picture in this matter as set out in the affidavit of Sammy Joel Obingo in order for justice to be done;*
- 8. Notwithstanding the foregoing, there is evidence of material non-disclosure of matters within the plaintiffs' knowledge, evidence which the defendants did not have at the time of the hearing but the plaintiffs had and ought to have candidly disclosed;*
- 9. The orders sought by the plaintiffs are not efficacious and are sought for selfish gain against the interest of the country at large because the plaintiffs have not been recognized and cannot transact any football business not just in the country but internationally as well;*
- 10. It is in the interest of justice that the Court has an opportunity to review the orders made on 16th May, 2008 in light of the material and evidence which the Court ought to have had at the hearing of the application;*

11. *The honest but inadvertent mistake of counsel ought not be visited upon litigants;*

12. *The application has been brought without unreasonable delay.”*

Even before that application for review could be listed for hearing the applicants filed a chamber summons application dated 20th May, 2008 seeking various injunctions under Order XXIX of the Civil Procedure Rules, to restrain the respondents from opening or operating any bank accounts for or on behalf of KFF; from receiving any kind of funds whatsoever on behalf of KFF; from running, organizing, managing and administering the Kenya National Premier League and/or the Kenya National Team (Harambee Stars) for or on behalf of KFF; from opening operating, maintaining or administering any offices or functions or assets or properties of KFF; and from “negotiating, selling, exploiting infringing on or receiving funds emanating from the legal right accruing from competitions and other events organized by and for or in the name of KFF.

From the look of things it would appear that all those who wanted to be involved in the running of football in the country had decided to do battle in courts of law.

Both applications, that is, the notice of motion dated 16th May, 2008 and the chamber summons dated 20th May, 2008 were certified urgent and were heard together before Waweru J. on 27th May, 2008.

The learned Judge carefully considered the rival arguments submitted before him and in the end came to the conclusion that he was entitled to review and set aside his earlier ruling delivered on 16th May, 2006. The learned Judge made a finding that the applicants herein had not denied that KFF is affiliated to FIFA (*Federation Internationale de Football Association*) – which is the International Federation of Football Associations), the *Confederation of African Football* (CAF) and the Council of East and Central African Football Associations (CECAFA).

In the course of his ruling delivered on 6th June, 2008 the learned Judge said:-

“Finally, the plaintiffs have not denied that Kenya is in grave danger of being banned from international football to the detriment of the country generally and specifically to the detriment of the country’s young men and women who have taken up potentially lucrative careers as football players. The commercial interests of third parties are also clearly at risk. These risks have been brought about by quarrels between men (there are no women here, not surprisingly) as to who should manage KFF. These quarrels over management of KFF have been a recurrent feature plaguing the sport of football in this country.”

After considering the issue of the other pending suits between the warring parties the learned Judge went on to observe:-

“FIFA, for the time being, recognizes the defendants and not the plaintiffs as the bona fide officials of KFF. FIFA will not do business at all with the plaintiffs. FIFA has threatened to ban Kenya from international football if the defendants are hindered, contrary to the statutes of FIFA, from managing the affairs of KFF. By its own constitution KFF is affiliated to FIFA and is bound by the FIFA statutes. Its members are similarly bound.”

Finally the learned Judge concluded his ruling thus:-

“The defendants are, and have been for the past year or so, in actual control and management of the affairs of KFF. The plaintiffs are not, and have not, been in control of the affairs of KFF despite their recognition by the Registrar of Societies. It is clear to me that the interests of Kenya and its young men and women in football will be best served, pending resolution of the dispute as to who are the bona fide officials of KFF, by letting the defendants continue with the control and management of KFF.

Review of an order made after inter partes hearing in strongly contested proceedings must of necessity be rare. But I am satisfied, for all the reasons given above, and in the particular circumstances of this case,

that the defendants have clearly demonstrated sufficient reason for the order of review sought. I will in the circumstances allow the application by notice of motion dated 16th May, 2008 and set aside the order of 16th May, 2008 by which the plaintiff's application by chamber summons dated 7th March, 2008 was allowed. The effect of this is that the said application dated 7th March, 2008 stands dismissed."

Having allowed the respondents' application by notice of motion dated 16th May, 2008, the learned Judge dismissed the applicants' application by chamber summons dated 20th May, 2008.

Being aggrieved by that ruling of the learned Judge the applicants through their advocates, filed a notice of appeal on 20th June, 2008. It is pursuant to that notice of appeal that the applicants are now before us pursuant to their application under *rule 5(2)(b)* of this Court's Rules. In that notice of motion the applicants are seeking the following reliefs:-

- "1. THAT the respondents whether by themselves, agents and/or employees and /or any other person acting on their behalf be and are hereby restrained by an injunction from opening, operating, running any Bank Account in the name of for and on behalf of the Kenya Football Federation (KFF) and/or from drawing, withdrawing, receiving any funds, monies, donations, sponsorship and or any other form of emoluments from any person, society, organization or any other body corporate and/or any other legal person whether local or international for and on behalf of and in the name of the Kenya Football Federation pending the lodging, hearing and determination of an intended appeal from the decision of the High Court of Kenya at Nairobi given on 06/06/2008 in HCCC 609/2007.*
- 2. The respondents whether by themselves or through agents, servants and/or employees be and are hereby restrained by injunction from negotiating, soliciting, promoting, marketing, selling, exploiting, infringing on, receiving funds emanating from the legal rights accruing from competitions and other events organized by and/or for and in the name of the Kenya Football Federation and other National and International Associations affiliated to it, including but not limited to the Kenya Premier League, the Kenya National clubs and the Kenya National Team (Harambee stars) and other events incidental thereto or connected therewith pending the lodging, hearing and determination of the intended appeal against the ruling of the High Court of Kenya at Nairobi given on 06/06/2008 in HCCC 609/2007.*
- 3. The respondents whether by themselves and or through servants and/or employees be and are hereby restrained by injunction from opening, operating, running, maintaining, administering and assuming the functioning of offices or control of the assets and the properties of the Kenya Football Federation (KFF) pending the lodging, hearing and determination of the intended appeal against the decision of the High Court of Kenya at Nairobi given on 06/06/2008 in HCCC 609 of 2007.*
- 4. The respondents whether by themselves, delegates, agents and/or servants be and are hereby restrained by injunction from convening, calling for, assembling, congregating at, chairing, officiating at, meeting and discussing, deliberating on, adopting, passing, registering any resolution on the agenda at the Annual General Meeting of the Kenya Football Federation pending the lodging, hearing and determination of the intended appeal against the decision of the High Court of Kenya at Nairobi given on 06/06/2008 in HCCC 609 of 2007.*
- 5. THAT the respondents whether by themselves and through agents, delegates, servants and/or employees be and are hereby restrained by injunction from communicating to any legal person and representing themselves out to any such person as officials of Kenya Football Federation pending the lodging, hearing and determination of the intended appeal against decision of the High Court of Kenya at Nairobi given on 06/06/2008 in HCCC 609/2007.*
- 6. THAT the costs of and incidental to this application abide by the result of the said intended appeal."*

It is that application that came up for hearing before us on 18th September, 2008 when Mr. C.B.G. Ouma together with Mr. Ashimosi Shitambasi appeared for the applicants while Ms. Julie Soweto Aullo appeared for the respondents.

In his opening remarks, Mr. Ouma stated that the application before us was seeking an interim injunction pending the hearing of an appeal which was yet to be filed and lodged. He however relied on the notice of appeal and a letter bespeaking the proceedings from the superior court. Mr. Ouma then gave us a chronological sequence of disputes and elections within *KFF*. It was Mr. Ouma's submission that the learned Judge misunderstood the facts and the history of the matter in reaching his decision.

An interesting aspect of this matter is that, according to Mr. Ouma, the applicants' term of office expires on 28th December, 2008 since they were elected in August, 2007. Hence, in his view, it is highly unlikely that the intended appeal would be lodged and determined before 28th December, 2008. Mr. Ouma also appeared to agree with the position that if this application were to be allowed then Kenya would be at risk of being banned from *FIFA*. He however submitted that his clients were in a position to manage the issue of Kenya being banned by *FIFA*. Finally, Mr. Ouma submitted that the balance of convenience tilts in favour of allowing the registered officials run the *KFF* office.

On her part, Ms. Aullo submitted that the applicants have been the source of the many suits filed in the superior court. It was her view that had the applicants accepted the decision of the superior court this matter would not have reached this Court. She complained that this dispute has not been resolved due to the fact that when one set of officials is registered by the Registrar of Societies another set presents itself as the bonafide officials.

In concluding her submissions, Ms. Aullo reminded us that this was an application for interlocutory injunction and for that reason the principles set out in *GIELLA V. CASSMAN BROWN & CO. LTD.* [1973] E.A. 358 should apply. She was of the view that since the applicants are not recognized by *FIFA* the status quo should be maintained.

The law as regards the legal principles to be considered by the Court when dealing with an application brought under rule 5(2)(b) of this Courts Rules, is now well settled. An applicant seeking orders under that rule, whether for injunction or for stay of execution, or stay of proceedings, as the case may be, is enjoined to demonstrate, first, that the appeal or intended appeal (as is the case here) is arguable, that is to say it is not frivolous. Secondly the applicants must show that if the orders sought are refused and eventually the appeal or the intended appeal succeeds, the results of that success would be rendered nugatory. – See *GITHUNGURI V. JIMBA CREDIT CORPORATION LTD. (No. 2) (1988) KLR 838*, *J.K. INDUSTRIES LTD. VS. KENYA COMMERCIAL BANK LIMITED (1982-88) 1 KAR 1638*, *RELIANCE BANK LIMITED VS. NORLAKE INVESTMENTS LTD. [2002] 1 E.A. 218* and *EXCLUSIVE ESTATES VS. KENYA POSTS & TELECOMMUNICATIONS CORPORATION AND ANOTHER [2005] 1 E.A. 53*. With respect to M/s Aullo, the Court does not apply the *GIELLA* principles when dealing with an application under Rule 5(2)(b).

We have attempted to give the background to this dispute and it would appear that the real issue is the control and management of *KFF*. It has now emerged that although the superior court had made a finding that the applicants had established, prima facie, to be the bona fide officials of *KFF* yet the world body that *KFF* is affiliated to (*FIFA*) does not recognize them. To the contrary *FIFA* recognizes the respondents. It has also emerged that the respondents have been for the past year or so, in actual control and management of the affairs of *KFF*. We have also been informed that if we allowed this application then Kenya risks being banned from all events organized by *FIFA*.

The position before us is that the respondents herein have been for the past year or so in the actual control and management of *KFF*. The applicants, on the other hand, have been out of the management and, worse still, they are not recognized by *FIFA*. There is a real danger for this country being banned from *FIFA* controlled activities if the applicants were to be allowed to run *KFF*. We now know that elections are due in December, 2008 when all and sundry, including the applicants and the respondents will be entitled to offer themselves for election as officials of *KFF*. Currently, the situation has been relatively calm while the respondents were in control. The intended appeal by the applicants is unlikely to be heard and determined by the end of this year. And the intended appeal is yet to be lodged. We wonder whether the applicants' efforts in this matter cannot be described as an exercise in futility.

In view of the history of this matter and what we have observed as relates to the prevailing circumstance and the dire consequences of allowing this application (*as conceded by Mr. Ouma- counsel for the applicants*), we are satisfied that this is not a proper case in which we can grant the reliefs sought. Even if the applicants have an arguable appeal, they have not satisfied us that the success of the intended appeal will be rendered nugatory. Since they were registered they have never been and they still are not in charge of the day to day management of *KFF*.

In the result, the notice of motion dated 25th June, 2008 is hereby dismissed with costs to the respondents.

Dated and delivered at NAIROBI this 24th day of October, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR