



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Omolo JA, Onyango Otieno & Deverell Ag JJ A)**

**CIVIL APPLICATION NO NAI 241 OF 2004**

**ERIC KETER & 6 OTHERS..... APPLICANT**

**VERSUS**

**ISAIAH KIPLAGAT**

**DAVID OKEYO**

**JOSEPH KINYUA .....RESPONDENTS**

(An application for an injunction pending the hearing of an intended appeal from the ruling & order of the High Court of Kenya at Nairobi (Ransley J) dated 23rd September, 2004 in HCCC No 971 of 2004)

**RULING**

Though the motion before us is merely one under rule 5 (2) (b) of the Court's Rules, it was very vigorously and laboriously contested before us and on several occasions we had to remind the respective counsel for the parties that the Court was not hearing the appeal which is yet to be filed.

There are seven applicants to the motion and they are led by Eric Keter (1st applicant) and Lukas Sang (2nd applicant). These are the ones who swore affidavits in support of the motion before us. On the other side of the divide are Isaiah Kiplagat as 1st respondent, David Okeyo as 2<sup>nd</sup> respondent and Joseph Kinyua as 3rd respondent. The applicants say they are members of Kenya Amateur Athletics Association or Kenya Athletics.

The respondents are the Chairman, Secretary and Treasurer respectively of KAAA, or Athletics Kenya as the case may be. The parties are not even agreed on what the correct name of their body is. We are not called upon to resolve that dispute at this stage. The disagreement appears to be based on the fact that two constitutions are placed before us – one for the year 1953 in which the body was called Kenya Amateur Athletics Association and one for the year 1994 in which the body was called Athletics Kenya. The applicants appear to rely on the 1953 Constitution and seem to say that they are not aware of the 1994 Constitution. The respondents say the only valid and current Constitution is the 1994 one.

As we have said, we are not called upon to determine that issue within this application. Even Ransley, J, whose decision it is proposed to appeal against did not purport to determine it. It is one of the issues which will have to be determined either at the trial of the stayed suit or by the arbitrator to whom Ransley J referred the dispute between the parties for resolution.

For our own convenience we will refer to the body to which all parties say they belong as Athletics Kenya but this should not be taken to mean we are accepting any of the two Constitutions; we are simply using Athletics Kenya because it is shorter and easier to spell out than Kenya Amateur Athletics Association.

Athletics Kenya is due to hold its Annual General Meeting on 12th October, 2004 and among the business to be transacted at that meeting is the election of its officials. The applicants contend that the meeting has not been convened in accordance with the body's Constitution(s) and they allege they will be deprived of their right to vote. So they came to the High Court to seek an injunction restraining the three respondents from holding the Annual General Meeting. The respondents, for their part, reacted by filing an application in the High Court asking that Court to stay the suit and refer the dispute to an arbitrator in accordance with the provisions of Athletics Kenya's Constitution(s). Ransley, J agreed with the respondents, stayed the suit, referred it to arbitration, and for good measure, refused to grant the injunctions sought. The applicants were aggrieved by those orders and have filed a notice of appeal. In the meantime, they now ask us for orders that:

“(a) a temporary injunction be issued to restrain the respondent, their servants and/or agents from convening and conducting the Annual General Meeting of Athletics Kenya on 12th October, 2004 and further restraining them from conducting national elections due to be conducted on 12th October, 2004 pending the hearing and determination of an intended appeal against the ruling and order of Honourable Justice R J Ransley given on 23rd September, 2004.

(b) Omitted as no longer sought.

(c) There be a stay of execution of the ruling and order dated and given on 23rd September, 2004 by Honourable

Justice R J Ransley .....

The principles on which this Court acts when faced with this kind of application are well known and we need not set them out. Have the applicants got an arguable appeal? An arguable appeal does not mean an appeal which must succeed. All that an applicant has to show the Court is that his appeal or intended appeal is not frivolous. We listened to the rival arguments of Mr Katwa and Mr Gicheru, on the one hand, and those of Mr Ochieng Oduol, on the other hand. We are satisfied that the applicants' intended appeal is arguable, that is, it certainly is not frivolous.

As we pointed out at the beginning of this ruling, the parties are not even agreed on what the Constitution of Athletics Kenya is and that will be one of the issues, to be determined. Again, Ransley, J referred the matter to arbitration and the 1994 Constitution gives the respondents the sole power to appoint the arbitrator. The applicants contend that that is contrary to the rules of natural justice and they have relied on certain previous decisions of the High Court and this Court which would appear to have touched on that point. Ransley J differed with the pronouncements made by Visram, J on the point; he then said the remarks of this Court on the point were *obiter* – see *Eric Keter vs Isaiah Kiplagat & Others*, HCCC No 1223 of 2000 and *Isaiah Kiplagat & Others vs Eric Keter*, Civil Application No NAI 239 of 2000 (UR 111/00 (unreported)). As we have said we are not prepared to hold on the arguments we have heard that the applicants' intended appeal is frivolous.

Will the appeal be rendered nugatory if it were to succeed and the injunctions sought were not granted? On this point, we say straightaway that the applicants have failed to show us how the success of their intended appeal will be rendered nugatory. Even if the elections are held on the 12th October, 2004, and the applicants' intended appeal were to succeed, the success of the appeal would have the effect of nullifying those elections and fresh ones would have to be held. The applicants' complaint against that position appeared to us to be that the money of Athletics Kenya would have been used on unnecessary elections. That, in our view, is inevitable in this kind of situation and we suppose an appropriate order for costs can be made to deal with the situation. Even if the arbitration were to be carried out and an award made before the appeal is determined, if the appeal were to succeed, the consequence of that would be that those arbitration proceedings and the award consequent upon them would have been rendered useless

and unnecessary and they would be set aside. Again an appropriate order for costs to cover the situation would be made.

Accordingly, these things the applicants fear would not render the success of their intended appeal nugatory – see for example *Silverstein vs Cheshoni*, [2002] 1 KLR 867.

The only other point we wish to touch on is the applicants’ fear that the respondents might not allow them to participate in the coming annual general meeting. Our short answer to that is that if the applicants are members of Athletics Kenya and the respondents were to lock them out of the proceedings of the annual general meeting, that, in itself, if proved, would be a ground for nullifying those proceedings.

We have said enough, we think, to show that we are not for allowing this motion. While the applicants have satisfied us that they have an arguable appeal, they have failed to satisfy us that their intended appeal’s success will be rendered nugatory. The applicants were bound to satisfy us on both aspects of the matter. Accordingly, the notice of motion dated 27<sup>th</sup> September, 2004 and lodged in this Court on 28th September, 2004 fails and we order that it be and is hereby dismissed. The costs of the dismissed motion shall be in the intended appeal.

Dated and delivered at Nairobi this 8<sup>th</sup> day of October, 2004

**R.S.C OMOLO**

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**JUDGE OF APPEAL**

**J.W. ONYANGO-OTIENO**

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**JUDGE OF APPEAL**

**W.S. DEVERELL**

.....

**Ag JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**