



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW APPLICATION NO.E025 OF 2021

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

SOFAPAKA FOOTBALL CLUB.....CLAIMANT

VERSUS

1. THE SPORT TRIBUNAL

2. MIKE EVANS KIBWAGE

3. FOOTBALL KENYA FEDERATION.....RESPONDENTS

RULING

The applicant filed a claim on 28th September, 2021 for orders that:-

1. This application be certified as urgent and the matter be heard on priority basis.
2. That this Honourable Court be pleased to grant leave to the applicant to file a motion on Judicial Review for;
- 3.

(a) an order of prohibition restraining the Respondent's from proceeding with or otherwise staying the 1st Respondent's order of 24th September, 2021 and the entire proceedings in the **SPORT'S TRIBUNAL SC. NO.12 OF 2021 MIKE EVANS KIBWAGE VS SOFAPAKA FOOTBALL CLUB AND FOOTBALL KENYA FEDERATION**.

(b) An order for CERTIORARI removing into this Honourable court and forthwith quashing the 1st Respondent's order of 24th September, 2021 and entire proceedings in the **SPORTS TRIBUNAL SC. NO.012 OF 2021 MIKE EVANS KIBWAGE VS SOFAPAKA FOOTBALL CLUB AND FOOTBALL KENYA FEDERATION**.

(c) An order of Mandamus directed to the Respondent's compelling them to refer the dispute in the **SPORTS TRIBUNAL SC NO.012 OF 2021 MIKE EVANS KIBWAGE VS SOFAPAKA FOOTBALL CLUB AND FOOTBALL KENYA FEDERATION** to arbitration as per arbitration agreement.

(d) That the leave be granted to operate as a stay of execution of the 1st Respondent's order of 24th September, 2021 and the entire proceedings in the **SPORTS TRIBUNAL SC. NO.012 OF 2021 MIKE EVANS KIBWAGE VS SOFAPAKA FOOTBALL CLUB AND FOOTBALL KENYA FEDERATION** until this court further directs.

(e) Costs of the application be borne by the Respondents.

THE FACTS OF THE CASE

4. On or about 1st October, 2020 the Respondent entered into a contract of employment for a period of two years with the applicant. The 2nd Respondent was to offer his services as a football professional salary of Kshs.130,000/= payable at the end of every month. There was an employer and employee relationship.

5. Clause 7.2 of the said contract provided that

“Any dispute on this contract is to be settled by arbitration in accordance with the Arbitration Act 1995 or any statutory modifications or re-enactment therefore for the time being in force or in accordance with FIFA and FKF statutes and regulations.

6. The 2nd Respondent states he continued to offer services to the applicant but the applicant only complied with the terms of contract upto January, 2021 when his full salary was paid.

The 2nd Respondent says his salary was not paid for February, 2021 and March, May and June. April 2021 salary was paid only in part.

7. He says he tried to engage the applicant for his unpaid salary but without any success and this led to the 2nd Respondent's resignation while thereafter he was subjected to intimidation and mistreatment by the applicant.

8. He says that when he realized the applicant was not going to pay his dues he gave 15 days' notice failure of which he would institute proceedings.

9. He says on 20th September, 2021 he instituted proceedings at sports dispute tribute **CASE O12 OF 2021** against Claimant, 1st Respondent and 3rd Respondent.

10. He says the Sports dispute tribunal directed the said application be served upon the applicant for hearing on 23rd September, 2021 at 4.00p.m.

11. He says the hearing took place in the absence of the applicants and 3rd Respondent despite having been served with the application.

12. The application having been unopposed the matter was certified as urgent.

Orders were issued as follows:-

(a) The matter be certified as urgent.

(b) That an order be issued directing the Respondent (applicant herein) to issue the Claimant (2nd Respondent herein) with a release letter as a free agent pending the hearing and determination of the suit.

(c) That an order be issued directing the interested party (3rd Respondent herein) to issue the Claimant (2nd Respondent herein) with a releases letter as free agent and where necessary also issue international transfer certificate (ITC) pending the hearing and determination of suit.

(d) That the matter be mentioned on 28th September, 2021 at 2.30p.m for directions on hearing of the main suit.

(e) The costs of the application were to abide the outcome of the suit.

13. The applicant was dissatisfied with this order of the 1st Respondent and moved the court challenging the same on the basis that it should have been subjected to arbitration.

14. The applicant's contention is that an ordinary court has no jurisdiction to hear this case as per Section 69 of FKF Constitution.

15. He says the applicant failed to appear for the hearing before the 1st Respondent.

16. The proper arbitration process should be before sports disputes tribunal but not under Arbitration Act 1995.

The 2nd Respondent avers the applicant's application is devoid of merits and should be dismissed with costs to the 2nd Respondent.

DETERMINATION

(a) The issues for determination in this application is whether this court Employment and Labour Relations Court has jurisdiction to hear this case.

(b) Is the applicant entitled to its prayers as per its application dated 28th September, 2021.

17. The 2nd Respondent avers ordinary court has no jurisdiction to handle sports matters. He says that according to FKE Constitution Article 69 the sports matters cannot be handled by ordinary courts. The matter should have been resolved in accordance to sports policy and only referred for arbitration in the sports disputes tribunal according to the 2nd Respondent's claim.

18. Having considered the evidence on record and submissions by the 2nd Respondent and the law related hereto I am convinced that the sport disputes tribunal deal with sports disputes. Section 58 (b) in particular of the sports act provide the tribunal deal with other sport

related disputes that all parties to the dispute agree to refer to the tribunal and that the tribunal agrees to hear.

19. On the other hand the issues of employment and labour are handled by the Employment and Labour Relations Court. This is provided in Article 162 (2)(9) of the Kenya Constitution and Section 12 of Employment and Labour Relations Court Act. The same provide that

“The court shall have exclusive and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provision of this Act or any other written law which extends jurisdiction to the court related to employment and labour relations including;-

(a) Disputes related to our arising or of employment between an employer and an employee.

20. The agreement of 1st October, 2020 between Sofapaka and Mike Evans Kibwage was an agreement of an employer and employee and therefore this court has jurisdiction to hear this case.

This in other words is an employment case not a sports dispute case.

21. Having ruled the court has jurisdiction, I can now address the issue of the arbitration agreement raised by the applicant.

“Section 10 Act 1995 provide the extent to which court intervene in arbitration matters. Specifically it provides that except as provided in this Act, no court shall intervene in matters governed by this Act”. This restricts the jurisdiction of the court to matters where the parties submit themselves to arbitration under arbitration agreement.

22. This means that where parties have bound themselves to arbitration proceedings by arbitration agreement the courts have no business to deal with such a matter before the arbitration proceedings are completed.

23. Further contrary to the averments of the 2nd Respondent the arbitration proceedings will not be under the sports disputes tribunal since the same deals with issues related to sports. So the arbitration Act 1995 applies in this case.

The parties must refer the matter for arbitration under Arbitration Act 1995.

24. Having held that this court has jurisdiction to hear this matter and that the applicable law is 1995 Arbitration Act and being premised that both the applicant and 2nd Respondent signed the agreement of employment willingly and voluntarily and being aware it had the arbitration agreement under Arbitration Act 1995, I now proceed to make these orders accordingly;-

1. This honorable court grants leave to the Applicant to file a motion on Judicial Review for; -

(a) An order of prohibition restraining the Respondent from proceedings with or otherwise staying the 1st Respondent's order of 21st September, 2021 and the entire proceedings in the **SPORTS TRIBUNAL SC. 012 OF 2021 MIKE EVANS KIBWAGE VS SOFAPAKA FOOTBALL CLUB AND FOOTBALL KENYA FEDERATION**.

(b) An order of Certiorari removing into this Honourable Court and forthwith quashing the 1st Respondent's order of 24th September, 2021 and the entire **SPORTS TRIBUNAL SC. NO.012 OF 2021 MIKE EVANS KIBWAGE VS SOFAPAKA FOOTBALL CLUB AND FOOTBALL KENYA FEDERATION**.

(c) An order of Mandamus directed to the Respondent's compelling them to refer the dispute in the **SPORTS TRIBUNAL SC. NO.012 OF 2021 MIKE EVANS KIBWAGE VS SOFAPAKA FOOTBALL CLUB AND FOOTBALL KENYA FEDERATION** to arbitration as per the Arbitration Agreement.

2. That the leave so granted operate as a stay of execution of the 1st Respondent's order 24th September, 2021 and the entire proceedings in the **SPORTS TRIBUNAL SC. NO.012 OF 2021 MIKE EVANS KIBWAGE VS SOFAPAKA FOOTBALL CLUB AND FOOTBALL KENYA FEDERATION** until this court further directs.

3. That the costs of this application be in the cause.

4. That the arbitrator be appointed by the parties within 30 days and the proceedings be completed within 90 days from date of this judgment.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 11TH DAY OF FEBRUARY 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE