



Sofapaka Football Club v Sports Dispute Tribunal & 2 others (Judicial Review Application E025 of 2021) [2022] KEELRC 13154 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13154 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION E025 OF 2021**

**AN MWAURE, J
NOVEMBER 3, 2022**

BETWEEN

SOFAPAKA FOOTBALL CLUB APPLICANT

AND

SPORTS DISPUTE TRIBUNAL 1ST RESPONDENT

MIKE EVANS KIBWAGE 2ND RESPONDENT

**FOOTBALL KENYA FEDERATION (C/O FOOTBALL KENYA FEDERATION
CARETAKER COMMITTEE) 3RD RESPONDENT**

RULING

1. The applicant filed the notice of motion application dated the February 28, 2022 seeking for orders that:
 - a. The honourable court does review its ruling delivered on the February 11, 2022 directing that the disputes in the Sports Dispute Tribunal SC No 012 of 2021 Mike Evans Kibwage v Sofapaka Football Kenya be referred to arbitration as per the arbitration agreement
 - b. This honourable court does make a finding that the arbitration clause in the agreement between the applicant and the 2nd respondent, is vague and incapable of being performed. Therefore, the dispute in the Sports Tribunal SC No 012 of 2021 Mike Evans Kibwage v Sofapaka Football Club and Football Kenya Federation cannot be referred to arbitration as per the arbitration agreement.
 - c. That this honourable court do find that the arbitration clause being vague and incapable of being performed, the dispute in the Sports Tribunal SC No 012 of 2021 Mike Evans Kibwage v Sofapaka Football Club and Football Kenya Federation must be resolved in accordance with



the FIFA and FKF statutes and regulations, which recognize the Sports Disputes Tribunal as an independent tribunal for sports disputes resolution.

2. The application is premised on the ground that in the ruling delivered on the February 11, 2022 the honourable court considered the evidence on record which included the replying affidavit sworn on the November 17, 2021 by one Barry Otieno allegedly as the chief executive officer of Football Kenya Federation, the 3rd respondent herein. That by virtue of the gazette notice No 12374 dated the November 11, 2021 published on the November 12, 2021, all the affairs of Football Kenya Federation were taken over by the caretaker committee and its secretariat from November 11, 2021.
3. The applicant says that consequently, Barry Otieno who was before the said gazette notice, the chief executive officer of the 3rd respondent herein ceased to be an official of Football Kenya Federation from November 11, 2021 and had no *locus standi* to represent it in any capacity, including swearing a replying affidavit sworn on the November 17, 2021 and filed before this honourable court. Thus, the said replying affidavit could not be relied upon by the honourable court in arriving at the decisions and orders in rulings delivered on the February 11, 2022.
4. The applicant says that in the ruling delivered on the February 11, 2022 the honourable court granted the applicant leave to apply for judicial review orders of prohibition, *certiorari* and *mandamus* in relation to the Sports Tribunal SC No 012 of 2021 and at the same time directed that the matter be referred to arbitration thus opening two parallel forums to deal with the dispute simultaneously.
5. Moreover, the applicant having already been granted leave on the September 28, 2021 to proceed and file substantive motion applying for the judicial review orders of prohibition, *certiorari* and *mandamus* in relation to the Sports Tribunal SC No 012 of 2021 Mike Evans Kibwage v Sofapaka Football Club and Football Kenya Federation this honourable court could not at the same time grant leave to apply for the same judicial review orders.
6. That the contract entered into on October 1, 2020 between the applicant and the 2nd respondent provided for a mode of dispute resolution at clause 7.2 which stipulates that any dispute is to be settled by arbitration in accordance with the *Arbitration Act* 1995 or any statutory modification or re-enactment therefore for the time being in force or in accordance with FIFA and FKF statutes and regulations.
7. The applicant says that by virtue of the *Arbitration Act*, 1995 before staying the proceedings and referring the dispute for resolution by arbitration, the court has to be satisfied amongst other considerations that there is a valid arbitration clause in the agreement capable of performance. For arbitration clause to be capable of performance, it must provide way before the dispute arises for the appointment of the arbitrator.
8. That the clause 7.2 of the contract between the applicant and 2nd respondent having not provided for the appointment of the arbitrator, the court could not direct the parties to do what was not provided for in the arbitration clause as that was tantamount to re-writing the arbitration clause for the parties, thus it is vague and incapable of being performed.
9. The applicant states that the arbitration clause being vague and incapable of being performed the dispute between the applicant and the 2nd respondent must be resolved in accordance with the FIFA and FKF statutes and regulations as provided for under the said clause 7.2 of the contract between the applicant and the 2nd respondent.
10. According to the applicant article 2 (5) & (6) recognizes that the general rules of international law shall form part of the laws of Kenya and that any treaty or convention ratified by Kenya shall form part of the



laws of Kenya under the constitution. Kenya being a member of International Federation of Association Football (FIFA), then the regulations of the FIFA governing football in the world also form part of the law in Kenya as regards football matters.

11. The applicant says that article 22b of the regulations on the status and transfer of players (January 2021 edition) recognises that employment-related disputes between a club and a player can be decided by an independent arbitration tribunal that has been established at a national level within the framework of the association and/or collective bargaining agreement.
12. The independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of the players and clubs. The applicant states that article 69 of the Football Kenya Federation provides that disputes or disputes affecting leagues, members of leagues, clubs, members of clubs, players, officials and other association officials shall not be submitted to ordinary courts but shall be taken to an independent arbitration tribunal recognised by FKF or CAF or to the Court of Arbitration for Sports in Lausanne, Switzerland. The application is supported by the supporting affidavit which reiterates the grounds in the application which I have gone through.
13. The applicant did not file a response.
14. The applicant cited order 45 rules 1 & 2 of the Civil Procedure Rules 2010 and section 80 of the Civil Procedure Act to argue that a party can make an application for review based on discovery of new and important evidence, on account of some mistakes or error apparent on the face of the record, and for any other sufficient reason. The reason for review therefore would be threefold:-
 - a. A discovery of a new or important matter of evidence which after exercise of due diligence was not within the applicants knowledge or could not be produced by him at the material time.
 - b. A mistake or error apparent on the face of the record
 - c. Any other sufficient reason.
15. The applicant argues that under clause 7.2 of the contract between the applicant and the 2nd respondent any dispute on the contract was to be settled in accordance with the Arbitration Act 1995 or any statutory modification or re-enactment thereof for the time being in force or in accordance with FIFA and FKF statutes and regulations in force. The applicant referring to, *inter alia*, the cases of Niazsons K Ltd v China Road and Bridge Corporation of Kenya 2001 eKLR argue that under section 6 (1) of the Arbitration Act, 1995 before staying the proceedings and referring the dispute for resolution by arbitration, the court has to be satisfied amongst other considerations that there is a valid arbitration clause in the agreement capable of performance. The applicant submits that if an arbitration clause does not provide for the mode of appointment of an arbitrator, then arbitration clause is said to be incapable of performance.
16. The applicant also submits on the applicability of section 12 (2) and (4) of the Arbitration Act. The applicant relies, on among others, the decision of the Supreme Court of Kenya in the case of Dhanjal Investments Limited v Kenindia Assurance Company Limited (2018) eKLR for the proposition that section 12 (2) and 4 of the Arbitration Act are inapplicable to a dispute as these provisions would only apply if the parties had agreed upon a procedure of appointing the arbitrator.
17. The applicant submits that any dispute on the contract was to be settled by arbitration in accordance with the Arbitration Act 1995 or any statutory modification or re-enactment thereof for the time being in force which he says is vague and incapable of being performed as it does not provide for the mode and process of appointment of an arbitrator hence the dispute between the applicant and the 2nd respondent cannot be referred to arbitration.



18. The applicant also argues that under arbitration agreement any dispute was to be settled in accordance with FIFA and FKF statutes and regulations. That under article 2(5) & (6) of the Constitution of Kenya 2010 the general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya forms part of the law of Kenya under the Constitution. The applicant further says that Kenya is a member of the Football Kenya Federation therefore the regulations of FIFA as regards football are applicable in Kenya and forms part of the laws of Kenya.
19. The applicant further contends that the Sports Act 2013 which was enacted to promote the development of sports also provides for dispute resolution mechanisms at the national level.
20. On the *locus standi* of Barry Otieno, the applicant argues that in arriving at the decision of February 11, 2022 the court considered the evidence on record which included the replying affidavit sworn on the November 17, 2021 by one Barry Otieno allegedly as the chief executive officer of Football Kenya Federation. That the said Barry Otieno misled the honourable court on the true legal position of the 3rd respondent herein as regards the relevant FIFA statutes and FKF statutes and regulations.
21. The applicant submits that for instance in paragraph 7 instead of pointing to the court that the dispute resolution clause, clause 7.2 provided that any dispute between them would either be resolved by arbitration in accordance with the Arbitration Act or any statutory modification or re-enactment thereof for the time being in force or in accordance with FIFA and FKF statutes and regulations. That he only emphasized arbitration under the Arbitration Act, 1995 without guiding the honourable court on the second part of the said clause 7.2 which also provided that the dispute between them would also be resolved in accordance with the FIFA and FKF statutes and regulations.
22. The applicant says that by virtue of the gazette notice No 1274 dated November 11, 2021, Vol No 230 published on November 12, 2021 all the affairs of Football Kenya Federation were taken over by the caretaker committee and its secretariat from the November 11, 2021.
23. The applicant contends that the said Barry Otieno who was before the said gazette notice, the CEO of the Football Kenya Federation, the 3rd respondent herein, ceased to be an official of the Football Kenya Federation from the November 11, 2021 and had no *locus standi* to represent it in any capacity, including swearing the replying affidavit sworn on the November 17, 2021 and filed before the honourable court and so the replying affidavit could not be relied upon by the court in arriving at the decision on the February 11, 2022.
24. The applicant argues that in the ruling delivered on the February 11, 2022 the honourable court granted the applicant leave to apply for judicial review order of *certiorari*, prohibition and *mandamus* in relation to the Sports Disputes Tribunal SC No 012 of 2021 Mike Evans Kibwage v Sofapaka Football Club and Football Kenya Federation and at the same time directed the matter to be referred to arbitration, thus opening two parallel forums to deal with the dispute simultaneously.
25. That moreover the applicant having already been granted orders on the September 28, 2021 to proceed and file substantive motion applying for the judicial review orders of prohibition, *certiorari* and *mandamus* in relation to the Sports Disputes Tribunal SC No 012 of 2021 Mike Evans Kabwage v Sofapaka Football Club and Football Kenya Federation, the honourable court could not grant leave to apply for the same judicial review orders. The applicant says that due to the apparent error on the face of the ruling, the honourable court should review its ruling delivered on the February 11, 2022.

Determination

26. The court has considered the application and submissions in the matter in light of what the law provides under section 80 of the Civil Procedure Act, and order 45 of the Civil Procedure Rules, 2010.



The court in the instance application can do no better than make reference to the High Court's decision in *Patrick Miano v Mathira Coffee Farmers* 2017 eKLR where the court stated that:-

“As always, a difference of opinion on the interpretation of the law or a legal principle cannot be a ground for review. I have previously stated elsewhere (HCCC No 12 of 2014(Nyeri) Ecobank Ltd v David Njoroge Njogu and Ann Wanjiru Njogu) that where a party aggrieved by an order or a decree is of the conviction that the order or the decree was based on a misapprehension of the law, the correct course would be to appeal against that decree or order rather than file a review application which, in my humble view, puts the judge or the magistrate who made it in a somewhat awkward position of explaining or defending the order or the decree.”

27. In the *National Bank of Kenya Ltd v Njau* (1995-1998) 2EA 249 (CAK) the court held that a review may be granted whenever the court considers an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law constructing a statute or other provision of the law cannot be a ground of review.
28. Another point is that what may be a good ground for appeal may not be a good ground for an application for review. Thus an erroneous view of evidence or law is no ground for review though it may be a ground for an appeal. From learned authors of commentaries or the *Code of Civil Procedure* by Chitale and Rao (4th edition).
29. The point raised by the applicant on the vagueness of the arbitration clause is a matter of propriety and merit of the decisions. That is not in the ambit of review as per the provisions of order 45 of *Civil Procedure Rules*.
30. Neither does the question of whether the arbitration clause had provided for how the parties should appoint the arbitrator. The court reserves its comments on that but just to mention that arbitration agreements do not necessarily provide always on the procedure of appointing an arbitrator as the parties are always at liberty to agree on how to appoint an arbitrator even outside the agreement.
31. The issue of having issued parallel orders is also not accurate as this court only issued orders to stay the respondents from proceedings with the 1st respondents orders of September 24, 2021 but did not give orders to review orders. The court is not aware of such review orders and the reference to an order dated September 28, 2021 was just cited in a copy of an order casually produced in court and with no pleadings in support and purported to be delivered by Justice Rika. The court finds no relevance of that prayer as the prayers granted by the court on February 11, 2022 and which the application for review refer are very specific.
32. In my considered opinion the application has raised several grounds in support of his applicant's prayers to review the aforesaid ruling of this court of February 11, 2022. The other one he has raised is that the deponent who swore the supporting affidavit Barry Otieno on November 17, 2021 had no mandate to depone the same. The reason given is that he was no longer working for 3rd respondent Football Kenya Federation and by gazette notice of November 12, 2021 the federation was taken over by a caretaker committee. Even if that is the case the court is not advised of the takeover and that the deponent had no mandate to depone the affidavit. This again is an allegation which require facts in support.



33. It is the view of this court that the grounds raised in support of the prayers for review of the court order are issues that need to be interrogated probably in appeal but not on review. The grounds raised do not comply with that requirement. Under the circumstances it is now clear that the court is not satisfied that the applicant has established grounds to justify review of this court's orders of February 11, 2022. The application dated February 28, 2022 is therefore not merited and is dismissed. Costs in the cause. Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 3RD NOVEMBER, 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 had 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 *Civil 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.

ANNA NGIBUINI MWAURE

JUDGE

