



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. E001 OF 2021**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF CONTRAVENTIONS OF ARTICLES 19, 22,**

**23, 27 AND 41(1) AND ARTICLE 47 OF THE CONSTITUTION**

**IN THE MATTER OF BANDARI FOOTBALL CLUB CONSTITUTION**

**IN THE MATTER OF CONSTITUTIONAL PETITION BY:**

**DICKSON KIBAGENDI.....PETITIONER**

**- VERSUS -**

**BANDARI FOOTBALL CLUB.....1<sup>ST</sup> RESPONDENT**

**EDWARD ODUOR.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 11<sup>th</sup> June, 2021)

**JUDGMENT**

The petitioner filed the petition on 26.01.2021 through Mokaya & Onyambu Advocates. The petitioner pleads as follows. He is a member and organising secretary of the 1<sup>st</sup> respondent club since 2019 and has duly performed in that office as expected. The 1<sup>st</sup> respondent is a football club established as per its constitution. The 2<sup>nd</sup> respondent is the secretary and Chief Executive officer of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent's constitutions creates several positions for its officials to manage and run its affairs. On 14.01.2021 the 2<sup>nd</sup> respondent without any known authority and without following the 1<sup>st</sup> respondent's constitution and due process of the law has purported to reorganise the office of the 1<sup>st</sup> respondent by removing the position of the Organising Secretary thus effectively removing the petitioner from the club and its management. The 2<sup>nd</sup> respondent's actions contravene Articles 41 and 47 and thus the rights of the petitioner to fair labour practices and fair administrative action. The actions of the 2<sup>nd</sup> respondent should therefore be found null and void.

The petitioner prays for:

- 1) An order of injunction and prohibition do issue against the respondents restraining them or any other person or persons acting under their instructions and behest from removing the petitioner as the organising secretary of the Bandari Football Club without due process accorded to the petitioner and in violation of his right to a fair hearing.
- 2) An order of injunction and prohibition do issue against the respondents restraining them or any other person or persons acting under their instructions from interfering or meddling in the office, functions and duties of the petitioner as the organising secretary of Bandari Football Club.
- 3) An order of judicial review of prohibition do issue forthwith prohibiting the respondents either by themselves, their agents, servants and employees from carrying out any process with intent of removing the petitioner from his position as the organising secretary of Bandari Football Club.
- 4) An order for damages for breach of the petitioner's fundamental rights.

5) The respondents to jointly and severally do pay the costs of the petition.

The petition was based on the annexed petitioner's affidavit. The petitioner filed his further affidavit on 27.04.2021.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents appointed Addraya E. Dena Advocate to act in the petition effective 02.03.2021. They filed on 18.03.2021 the replying affidavit of the 2<sup>nd</sup> respondent. The affidavit urged as follows:

1) The 2nd respondent is employed by the Kenya Ports Authority (KPA) as Superintendent Conventional Cargo and by reason of that employment the acting Managing Director of KPA has appointed the 2<sup>nd</sup> respondent as the Secretary and Chief Executive Officer of the 1<sup>st</sup> respondent.

2) The Court is established pursuant to Article 162 (2) (a) of the Constitution of Kenya to settle employment and industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations. The petitioner is not employed by either of the respondents and therefore the Court lacks jurisdiction to litigate the matter because the petitioner is an employee of KPA and not either of the respondents.

3) Section 2 of the Employment and Labour Relations Court Act, 2011 defines an employee as a person employed for wages or a salary and includes an apprentice and indentured learner. The petitioner does not earn any wages or salary from the respondents and thus these proceedings have been filed in the wrong forum and the petition should be struck out or dismissed with costs to the respondents as the Court lacks jurisdiction to entertain the petition.

4) The 1<sup>st</sup> respondent is governed by its constitution and per Article 1(5) thereof it is affiliated to the FKF and is obliged to respect the statutes, regulations, directives and decisions of FKF and to ensure that the same are respected. Article 53 of the constitution highlights that any recourse to the normal courts of law is excluded in respect of the definitive decisions taken by the Organs of the Club in conformity with F.I.F.A statute. Further, any such legal action must be submitted to the authority of any arbitration or tribunal set under the constitution or the Sports Disputes Tribunal. Further the petitioner has not complied with Article 11 of the club's constitution requiring him or other members who want to undertake legal action requiring dispute settlement involving him and the club and relating to statutes, regulations, directives and decisions of the 1<sup>st</sup> respondent and FKF must be subjected to the sole authority of the Club's Disciplinary Committee and the Arbitration Tribunal which will settle the legal action and subject to the jurisdiction of the Sports Dispute Tribunal set up under the Sports Act and the policies and jurisdiction of the Court of Arbitration for Sports.

5) The petitioner is a trustee to the Club and only has obligations set out for a trustee which does not include specific role such as the organising secretary. Further the Court lacks jurisdiction because Article 11 of the 1<sup>st</sup> respondent's constitution gives jurisdiction to alternative dispute resolution to determine, in the first instance, disputes like the one alleged for the petitioner. The petition is therefore premature.

6) Despite being removed from the position of organising secretary of the club, the petitioner will continue as an employee of KPA as Terminal Engineering Grade HM4 and he continues to draw a salary.

7) Serving in the internal standing Committee is at the prerogative of the KPA's Managing Director and the respondents have not played any role in that regard.

8) The respondents have not violated the petitioner's rights contrary to Articles 41 and 47 of the Constitution of Kenya as alleged.

Final submissions were filed for the parties. The Court has considered the material on record and makes findings as follows.

To answer the **1st issue** for determination, by the letter dated 21.01.2019 Dr. Arch. Daniel Manduku as Managing Director of KPA appointed Musa Hassan Musa as the Chairman of Bandari Football Club Board of Trustees and in the same letter listed the other members of the Board including the petitioner as Organising Secretary. The letter states that the Board is to provide oversight roles of the club management and is entrusted with:

- a) Offering leadership to the team and overall guidance, governance and strategic direction.
- b) Ensuring prudent financial and other resources management.
- c) Focusing on high and sustained performance of the team in tournaments.
- d) Offering effective stakeholder engagements with the main sponsor (KPA), FKF and the Community.
- e) Optimizing utilization of the club as a communication and publicity vehicle to enhance KPA corporate visibility and positive image.

The Court has considered that instrument of appointment and finds that it is by the KPA Managing Director within the terms of that instrument.

To answer the **2<sup>nd</sup> issue** for determination the Court finds that it has jurisdiction to entertain and determine the current petition. The Court

has considered the objection raised for the respondents that there exist no employer-employee relationship between the respondents and the petitioner. The evidence is that the petitioner was appointed by the KPA Managing Director per the letter dated 21.01.2019 and in absence of the trust deed or other instrument establishing the Bandari Football Club Board of Trustees, the Court finds that the appointment in issue is within the petitioner's service as an employee of KPA and by which service and reason the 2<sup>nd</sup> respondent was appointed by the same KPA Managing Director as the Secretary and Chief Executive Officer of the Bandari Football Club Board of Trustees as per the letter Ref. No. HRAM/1/6/28 dated 14.01.2021.

The Court has further considered the objections by the respondents that the constitution of the 1<sup>st</sup> respondent provides for alternative dispute resolution and the dispute ought not to have been filed in Court. The Court finds that while all the parties have relied on that 1<sup>st</sup> respondent's constitution, they have not cited any provision of that constitution that provides for the Bandari Football Club Board of Trustees. The Court finds that to the extent that the Bandari Football Club Board of Trustees has not been shown to have been provided for under the 1<sup>st</sup> respondent's constitution and the rules thereunder, the parties were misconceived when they invoked that constitution. The Court finds that the respondents were equally misconceived in submitting that by reason of the cited provisions of the constitution of the 1<sup>st</sup> respondent on alternative dispute resolution and role of disciplinary committee thereunder, the Court lacked jurisdiction or the petition was premature.

Thus the Court finds that the petitioner's and 2<sup>nd</sup> respondent's appointment to the Board of Trustees was by the KPA's Managing Director and it was flowing from their being employees of the KPA and in that regard, the subject matter in the petition is employment relationship within KPA's workplace and therefore within the Court's jurisdiction. The Court has also found that the parties have not shown that the provisions of the 1<sup>st</sup> respondent's constitution applied to their appointment to the Board of Trustees.

The 3<sup>rd</sup> issue for determination is whether the petitioner is entitled to the remedies as prayed for. The Court has carefully considered the prayers as worded and expressed. The petitioner seeks prayers with respect to an office known as "**organising secretary of Bandari Football Club**". First the Court has perused the 1<sup>st</sup> respondent's constitution and rules as exhibited and that office is not shown to exist at all. In that regard, the Court has already found that the parties were misconceived in relying on and invoking the said 1<sup>st</sup> respondent's constitution. Second, the material before the Court show that the petitioner was appointed to the office of Organising Secretary of Bandari Football Club Board of Trustees and which the Court finds not to be subject of the reliefs sought in the petition. Third, the petitioner's concern is that the position of Organising Secretary of Bandari Football Club Board of Trustees has been abolished (and thereby throwing him out of office) by reason of the letter reference No. HRAM/1/6/28 dated 14.01.2021 signed by Eng. Rashid K.Salim, IEng, IMarEng, Acting Managing Director of KPA. The Court holds that if indeed by failing to mention the office of Organising Secretary in the letter then the office stood abolished, then in that case the Court holds that the right to hold office or have valid claims to hold office or to continue holding office is subject to existence of the office and such right or claims must collapse immediately the office ceases to exist. Thus, if the office has been abolished by the letter then, the Court finds that the petitioner cannot conceivably establish a valid claim to continued holding the office. Fourth, the Court finds that in absence of the trust deed or other instrument establishing the Bandari Football Club Board of Trustees, it is impossible, upon the material on record, for the Court to evaluate the regularity and propriety of the appointment decisions by the KPA Managing Director as conveyed in the letter dated 21.01.2019 by which the petitioner was appointed Organising Secretary (for unspecified tenure) and the letter reference No. HRAM/1/6/28 dated 14.01.2021 where the petitioner and the office of organising secretary was not mentioned at all.

In view of the foregoing findings and holdings, the Court returns that the petitioner has not established a justification for the grant of the prayers made in the petition. The Court further finds that the petitioner has failed to show that the respondents have violated his fundamental rights as enshrined in Articles 41 and 47 of the Constitution of Kenya, 2010 and as was alleged for the petitioner.

To answer the 4<sup>th</sup> issue for determination, the Court returns that taking into account the parties' misconceptions about application of the 1<sup>st</sup> respondent's constitution and in view of all the circumstances of the petition, each party shall bear own costs of the petition. In conclusion, the petition is hereby dismissed and each party shall bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 11TH JUNE, 2021.**

**BYRAM ONGAYA,**

**JUDGE**