



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

JUDICIAL REVIEW NO. 5 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF AN APPLICATION BY MOSES ADAGALA,
JAMES ORUNDU AND MAURICE OTIENO OCHIRO (suing as officials of
MUHORONI YOUTH FOOTBALL CLUB) FOR LEAVE TO APPLY
FOR ORDERS OF JUDICIAL REVIEW IN THE
NATURE CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF THE SPORTS DISPUTES TRIBUNAL

AND

IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, 2014

AND

IN THE MATTER OF THE EMPLOYMENT ACT

Ex-parte

MOSES ADAGALA

JAMES ORUNDU

MAURICE OTIENO OCHIKO

(suing as officials of MUHORONI

YOUTH FOOTBALL CLUB).....APPLICANTS

VERSUS

THE SPORTS DISPUTES TRIBUNAL.....RESPONDENT

AND

ANDREW SEKA YOMBYA.....1ST INTERESTED PARTY

KEVIN OLANGO.....2ND INTERESTED PARTY

JUDGMENT

Pursuant to leave granted by this court on 16th June 2017 to the Ex-parte applicant Muhoroni Youth Football Club, the ex parte applicant filed the motion herein seeking the following reliefs –

1. An order of judicial review in the nature of a certiorari to remove into the Employment and Labour Relations Court and quash the decision of the Sports Dispute’s Tribunal Order dated 22nd March 2017 in Sports Dispute’s Tribunal case number 9 of 2017.
2. An order of prohibition directed at the Kenyan Premier League Limited (KPL) prohibiting it from implementing the order of the Sports Dispute’s Tribunal dated 22nd March 2017 in Sports Dispute’s Tribunal case number 9 of 2017.
3. The applicant further seeks that if leave is granted the same to operate as a stay of the adoption and/or implementation of both the sports disputes tribunal orders of 22nd March 2017 and 25th May 2017.

The grounds upon which the reliefs are sought are that the respondent acted ultra vires by proceeding to hear and determine a dispute between the ex-parte applicant and the Interested Parties who are its employees, that the respondent determined the dispute against the rules of natural justice without giving audience to the ex-parte applicant, that the decision of the respondent infringes on the rights of the ex parte applicant and that it is in the interest of justice to grant the reliefs sought.

The respondent was served but did not enter appearance or file a response to the application. The respondent was further served with hearing notice but failed to attend court for the hearing of the application on 19th October 2017.

The Interested Parties filed a replying affidavit of VICTOR OMUNE, the 3rd Interested Party. He states that he has authority of the 1st and 2nd Interested Parties to swear the affidavit on their behalf. He opposes the application and states that the ex-parte applicant was served but failed to appear before the respondent for hearing of the dispute filed by the Interested Parties against it, that the respondent made a determination on the dispute which the applicant failed to comply with, that the applicant’s application dated 24th April 2017 set aside the respondent’s decision was dismissed following the ex-parte applicant’s failure to attend court on 25th April 2017 when it was scheduled for hearing.

OMUNE deposes further that the ex parte applicant’s application dated 15th June 2017 does not plead the court’s jurisdiction, a material error that is fatal to the application, that the ex parte applicant has come to court with unclean hands and does not deserve the equitable remedies sought in its application, that the application is brought in bad faith, is an abuse of the court process and intended to frustrate or block the Interested Parties from enjoying the fruits of the judgment of the Sports Tribunal. He prays that the motion be struck out in its entirety.

Hearing

The motion was heard on 19th October 2017. Mr. Odeny appeared for the ex parte applicant while Ms. Ayieko appeared for the Interested Parties. There was no appearance for the respondent.

Mr. Odeny submitted that the Sports Disputes Tribunal acted ultra vires by hearing a dispute without jurisdiction. That it is trite law that once a court or tribunal notes that it lacks jurisdiction it should down its tools. He relied on the decision of the Court of Appeal in **OWNERS OF VESSEL LILLIAN ‘S’ -V- CALTEX OIL (KENYA) LIMITED [1989] KLR 1653**. Mr. Odeny submitted that the Sports Disputes Tribunal is a creature of statute established under Section 56 of the Sports Act with its jurisdiction set out in Section 59 of the Act.

He submitted that employment matters are not part of the disputes set out in Section 59, that employment matters are handled by the Employment and Labour Relations Court as established under Article 162 (2) (a) of the Constitution. He submitted that parliament in exercise of its mandate passed the Employment and Labour Relations Court Act whose preamble states that it is for employment disputes and connected purposes.

He submitted that Section 2 of the Employment and Labour Relations Court Act provides that the court has exclusive original and appellate jurisdiction and that the Sports Disputes Tribunal is statutory while the Employment and Labour Relations Court is a constitutional body.

Mr. Odeny further relied on the case of **SAMUEL MACHARIA & ANOTHER -V- KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2012] eKLR** in which the Supreme Court found that a court’s jurisdiction flows from the constitution, legislation or both. He submitted that under Section 2 of the Employment and Labour Relations Court Act the court handles employment disputes while under Section 59 of the Sports Act the Tribunal handles disputes arising from management and administration of sports generally.

Mr. Odeny submitted that there was an attempt to subject the jurisdiction of the Sports Tribunal to court’s interpretation in the case of **KENYA RUGBY UNION -V- REGISTRAR OF SPORTS & 11 OTHERS [2015] eKLR** and the court stated that the Sports Tribunal can only handle matters set out in Section 59 of the Sports Act. He submitted that the contracts in the present dispute are employment contracts subject to this court’s exclusive jurisdiction.

Mr. Odeny further relied on the case of **RUTH NDUNI MWITHUI -V- MOMBASA LINER & ANOTHER [2012] eKLR** where the court asked the question when jurisdiction is conferred and answered that when a suit is without jurisdiction it is a nullity. He submitted that the decision at the Tribunal was a nullity. He urged the court to find that the decision of the Tribunal was ultra vires and infringed on the

constitutional right of the ex-parte applicant, allows the appellant and quashes the findings of the Tribunal. He further prayed that costs be awarded to the applicant.

For the Interested Parties, Ms Ayieko relied on the replying affidavit of the VICTOR OMUNE filed on 11th October 2017 and documents filed therewith.

She submitted that Section 59 of the Sports Act states that The Sports Tribunal has jurisdiction to determine sports related disputes that parties agree to refer to the Tribunal and the Tribunal agrees to hear. She submitted that after this matter came before the Tribunal for hearing and after the Tribunal entered judgment the ex parte applicant filed a certificate of urgency in which it was agreeable to the decision of the Tribunal but only disagreed with the amount awarded.

She submitted that the ex parte applicant annexed a statement of defence in which it admitted the jurisdiction of the Tribunal at paragraph 9 and was only seeking the setting aside of the orders so that it can be heard. She submitted that when the Tribunal did not grant the orders sought by the ex parte applicant it moved to this court. She posed the question whether the ex parte applicant would have come to this court had the Tribunal granted its appellant.

Ms. Ayieko referred the Court to Appendix VO‘1’ of the replying affidavit where at paragraph 22 (2) of the employment contract between the ex parte applicant and VICTOR OMUNE it is stated –

“22. DISPUTE RESOLUTION

22.1 All disputes arising out of or relating to his contract including disputes as to the meaning or interpretation of any provision of this contract or as to the carrying into effect of any such provisions or as to the termination of consequences of termination shall be referred to Dispute Resolution in accordance with the KPL rules from time to time.

22.2 The parties warrant that in accordance with the football rules, any and all disputes of whatsoever nature shall be determined in accordance with the KPL rules and in the Dispute Resolution Tribunals of the KPL rather than before any court or other tribunal in so far as it is a requirement of FIFA and other footballing rules that the internal dispute resolution mechanisms available in football should be utilized by participants in the game save where the football rules do not provide an appropriate tribunal to determine the dispute.”

She submitted that the Sports Tribunal had jurisdiction and the ex parte applicant only came to this court throwing a tantrum because its application to the Tribunal was not allowed. She prayed that the motion be dismissed and the decision of the Sports Tribunal upheld.

In a rejoinder Mr. Odeny submitted that he understood the Interested Parties to be suggesting that jurisdiction was given to the Tribunal by the parties. He submitted that the defence attached to the ex parte applicant’s application to the Tribunal was a draft annexure but since the application was not granted there was no defence on record. He further submitted that parties cannot confer jurisdiction by consent and that a proper reading of Section 59(b) of the Sports Act is not what counsel for the Interested Parties was proposing to the court. He submitted that if there was a consent by the parties could have been in a formal letter to the Tribunal and no such letter has been exhibited.

Mr. Odeny further submitted that court’s jurisdiction cannot be ousted and given to a tribunal. He submitted that if Section 59 (b) provided for jurisdiction by consent of parties then the Section is unconstitutional relying on Article 2(2) and 162 of the constitution. He submitted that counsel for the Interested Party had misinterpreted the law. He urged the court to grant the prayers in the motion.

Determination

I have considered the pleadings, authorities and submissions of parties. The determination of this application turns on the interpretation of Section 59 of the Sports Act as read together with Article 162(2)(a) of the Constitution and Section 12 of the Employment and Labour Relations Court Act.

Section 59 of the Sports Act 2013 provides as follows –

59. Jurisdiction of the Tribunal

The Tribunal shall determine—

(a) appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including—

(i) appeals against disciplinary decisions;

(ii) appeals against not being selected for a Kenyan team or squad;

(b) other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear; and

(c) appeals from decisions of the Registrar under this Act.

My understanding of the section is that the Tribunal only hears appeals from decisions of national sports organisations or umbrella national organisations whose rules specifically allow for appeals to be made to the Tribunal. Such appeals include appeals against disciplinary decisions and appeals against selection for Kenyan Team or squad.

The other type of appeals under Section 59(a) that the Tribunal may hear are sports related disputes which all the parties have agreed to refer to the Tribunal, under Section 59(b). Under Section 59(c) are appeals against the decisions of the Registrar of Sports. According to the counsel for the Interested Parties, the Sports Tribunal heard the dispute between the ex-parte applicant and the Interested Party under 59(b).

She relies on the fact that the ex parte applicant made an application to the Tribunal for setting aside of its award and that in the application the ex parte applicant annexed a draft defence in which it admitted the jurisdiction of the Tribunal. It is obvious that there was no consent by the parties to refer the dispute therein to the Tribunal. A reaction or response to a dispute filed at the Tribunal cannot be imputed to be a consent to refer a matter to the Tribunal. Such consent must be agreed upon by the parties before a reference of a dispute to the Tribunal and perhaps as pleaded in the pleadings filed at the Tribunal or a copy thereof be filed together with the pleadings. I thus find that there was no consent between the ex parte applicant and the Interested Parties to refer the dispute to the Tribunal.

It is further evidenced from the statement of claim filed by the Interested Parties at the Tribunal that they were well aware that the issue for determination was the termination of an employment contract. They have in the statement of claim listed the issues in dispute as follows –

- i) Malicious suspension from employment contracts/breach of employment contracts.
- ii) Constructive dismissal of the claimants from employment by the respondent.
- iii) Termination of employment contracts with just cause.

Further, paragraphs 4 under “*Facts of the Claim*” and at paragraph (d) “*Submissions*” the interested parties expressly acknowledged that their claim fell under the Employment Act. The same read as follows:-

“Based on the fixed term contracts of service, the respondent employed the claimant on various dates as explained in the scheduled annexed herewith the statement of claims professional footballers.

They were employed by the respondents as explained herein above which employment is founded on the contracts of service. Further details of his employment are clearly outline in the schedule.”

Under the title “*Jurisdiction*” the Interested Parties pleaded as follows–

“The matter falls within the jurisdiction of the Independent Disciplinary and Complaints Committee (IDCC). However the said Committee has no members to ensure its constitution at the moment. Moreover there was a letter from the Secretary General of Football Kenya Federation stating that all matters should be referred to the Players’ Status Committee under the Football Kenya Federation (FKF), which is however also not properly constituted. The matter was filed at both Committees, but no hearing was conducted in either of them.

The court of action herein arose in Muhoroni with the competent jurisdiction of this Honourable Tribunal.”

It is thus further admitted that the Tribunal was only supposed to hear appeals.

The foregoing leave no doubt that what was in dispute was the breach of an employment contract that falls under the Employment Act. Section 87 of the Employment Act provides as follows –

87. Complaint and jurisdiction in cases of dispute between employers and employees

(1) Subject to the provisions of this Act whenever—

(a) an employer or employee neglects or refuses to fulfil a contract of service; or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

(2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).

(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.

Further Section 12 (1) of the Employment and Labour Relations Court Act provides as follows –

12. Jurisdiction of the Court

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

- (a) disputes relating to or arising out of employment between an employer and an employee;**
- (b) disputes between an employer and a trade union;**
- (c) disputes between an employers' organisation and a trade union's organisation;**
- (d) disputes between trade unions;**
- (e) disputes between employer organisations;**
- (f) disputes between an employers' organisation and a trade union; (g) disputes between a trade union and a member thereof;**
- (g) disputes between an employer's organisation or a federation and a member thereof;**
- (h) disputes concerning the registration and election of trade union officials; and**
- (i) disputes relating to the registration and enforcement of collective agreements. (emphasis added)**

The foregoing provisions read with Article 162(2)(a) and (3) of the Constitution make it clear that the Employment and Labour Relations Court has exclusive jurisdiction to hear and determine cases relating to employment and labour relations. The only exception is under Section 29(c) and (4) of the Employment and Labour Relations Court Act which provide as follows –

(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving employment and labour relations in respect of any area of the country.

(4) Subject to Article 169(2)(a) of the Constitution, the magistrates appointed under subsection (3) shall have jurisdiction and powers to handle—

- (a) disputes relating to offences defined in any Act of Parliament dealing with employment and labour relations;**
- (b) any other dispute as may be designated in a Gazette notice by the Chief Justice on the advice of the Principal Judge.**

It is thus expressly manifest that the Sports Tribunal has no jurisdiction to hear employment matters. As was stated in the case of **SAMUEL KAMAU MACHARIA -V- KENYA COMMERCIAL BANK LIMITED & 2 OTHERS** “A court's jurisdiction flows either from the constitution or legislation or both. Thus a court of law can only exercise jurisdiction conferred by the constitution or other written law.”

The Supreme Court further stated that a court cannot expand its jurisdiction through judicial craft or innovation.

I therefore agree with counsel for the ex parte applicant that the Sports Tribunal acted without jurisdiction in hearing and determining the dispute between the ex parte applicant and the Interested Parties. As was stated in **MOTOR VESSEL M. V. LILLIAN 'S'** jurisdiction is everything and without it a court must down its tools. Without jurisdiction a court acts in vain.

Having found that the Sports Tribunal had no jurisdiction, the application herein must succeed. I accordingly issue an order of judicial review in the nature of a certiorari removing into this court the decision of the Sports Tribunal dated 22nd March 2017 in Sports Disputes Tribunal Case No. 9 of 2017 and quash the same.

The ex parte applicant was served with all pleadings of the Sports Tribunal but failed to appear or file its defence. Had it filed a defence and disputed the jurisdiction of the Tribunal, it would not have been necessary to file the application herein, which would have been avoided. I therefore make no orders for costs.

Orders accordingly.

DATED AND SIGNED AT NAIROBI ON THIS 4TH DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 5TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE