



**REPUBLIC OF KENYA**

**THE JUDICIARY**

**OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**APPEAL CASE NO. 11 OF 2018**

**TOM TIKOLO.....1<sup>ST</sup> CLAIMANT**

**RAJESH PATEL.....2<sup>ND</sup> CLAIMANT**

**SUKHBANS SINGH.....3<sup>RD</sup> CLAIMANT**

**VERSUS**

**SPORTS REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**HARPAL SIGNH SEHMI.....2<sup>ND</sup> RESPONDENT**

**RAVI KAUL.....3<sup>RD</sup> RESPONDENT**

**DAVID OBUYA.....4<sup>TH</sup> RESPONDENT**

**WALTER TRENK.....5<sup>TH</sup> RESPONDENT**

**EDWARD ODUMBE.....6<sup>TH</sup> RESPONDENT**

**OMOLE ASIKO.....7<sup>TH</sup> RESPONDENT**

**AND**

**CRICKET KENYA.....INTERESTED PARTY**

**DECISION**

**Hearing:** 11<sup>th</sup> and 12<sup>th</sup> July, 2018

**Panel:** John Ohaga – Chairperson

Elynah Sifuna – Vice - Chairperson

Gabriel Ouko – Member

### **Appearances:**

For the Claimant: Duncan Anzala, Advocates instructed by Henia Anzala & Associates; For the 1<sup>st</sup> Respondent: Andrew Emacar instructed by the Office of the Attorney General; For the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the Interested Party:

Victor Kariuki, Advocates instructed by Mugeria, Lempaa & Kariuki; For the 4<sup>th</sup> to 7<sup>th</sup> Respondents: Samuel Muthomi, Sports Lawyer, instructed by Nyagah B. Kithinji & Company

### **Introduction**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Claimants describe themselves as male adults of sound mind and are officials of the Nairobi Provincial Cricket Association which is an affiliate of Cricket Kenya, the Interested Party.
2. The 1<sup>st</sup> Respondent is the Sports Registrar, an office in the public service created pursuant to section 45 of the Sports Act, while the 2<sup>nd</sup> to 7<sup>th</sup> Respondents are male adults residing in Nairobi.
3. The matter herein arises out of the Claimants' Notice of Motion ('**the application**') and Statement of Claim both dated 29<sup>th</sup> May, 2018. The application was brought under the provisions of Section 58(c) of the Sports Act, 2013.
4. At the outset we need to make clear that whilst the Tribunal commenced by hearing arguments with respect to the application, it became clear at the conclusion of those arguments that a determination of the issues premised only on the application would not in fact resolve the underlying dispute between the parties. The Tribunal therefore decided, with the consent of the parties, to hear the substantive matters in dispute and allowed further arguments from all parties and this decision therefore relates to the matters arising from the Statement of Claim and the supporting affidavits filed on behalf of the Claimants in support of the application all of which have been treated as part of the Claimants' case in support of the Statement of Claim as well as all the replying and supplementary affidavits filed by the Respondents in reply to the application which have been treated by the Tribunal as setting out the Respondents' position in response to the Statement of Claim.
5. The written submissions filed on behalf of each party and supplemented by the extensive oral arguments put forward by Counsel appearing have also been taken to consideration.

### **A. Factual background**

6. The genesis of the dispute herein can be traced to the resignation at a meeting held at 17<sup>th</sup> February, 2018 of Ms. Jackie Janmohammed who was the Chairperson of Cricket Kenya. The minutes of the meeting record that following the resignation of Ms. Janmohammed, Raja Sarker also handed in his resignation which was also followed by those of Rajesh Patel, Tom Tikolo, Sanjay Patel and Upesh Patel.
7. There is some controversy concerning the resignation of these other officials as it was the 2<sup>nd</sup> to 7<sup>th</sup> Respondents' position that their resignation was inoperative to the extent that they had not resigned in writing as required under the Constitution of Cricket Kenya.
8. Be that as it may, the minutes record that following these resignations it was resolved to have a fresh election to fill these now vacant positions for the remainder of the tenure until June 2019 and for this purpose a Special General Meeting (SGM) was to be held on 24<sup>th</sup> March 2018 and the General Manager was to send out a notice on 1<sup>st</sup> March 2018.
9. For reasons for which are not integral to the Tribunal's determination of this matter, the SGM did not take place and there have been accusations and counter accusations between the Claimants and the 2<sup>nd</sup> to 7<sup>th</sup> Respondents as to why the SGM did not proceed.
10. It is instructive, however, that by a letter dated 2<sup>nd</sup> March, 2018 addressed to Cricket Kenya, various persons describing themselves as *proponents* and *stakeholders* of the game of cricket in Kenya gave notice of a dispute in which they set out various grievances relating to the governance of Cricket Kenya and demanded an immediate halt and suspension of the provisional delegates elections scheduled for Saturday 3<sup>rd</sup> March, 2018 and the national election that were to be called as a result of the

resignation of the chairperson and director.

11. After setting out their demands, which included demands that the Cabinet Secretary do require the Sports Registrar to inspect the books of account of Cricket Kenya, Nairobi Cricket Association, Rift Valley Cricket Association, Coast Association and Central Province Cricket Association and that a Caretaker Committee be established to oversee the affairs of cricket in Kenya until a new board had been elected and taken office, the proponents also expressed their willingness to engage in amicable settlement talks to resolve the dispute.

12. This letter was copied to, *inter alia*, the Cabinet Secretary for Sports (hereinafter the ‘CS’) and the Sports Registrar (hereinafter ‘the Registrar’).

13. In the course of hearing oral arguments, the Tribunal’s attention was also drawn to a letter dated 15<sup>th</sup> March, 2018 from an entity called Obuya Cricket Academy addressed to the CS setting out numerous allegations of mismanagement in the affairs of cricket in Kenya.

14. The letter was signed by Messrs. Charles Obuya, Kennedy Obuya, David Obuya and Omole Asiko and endorsed by a number of other individuals most of whom had signed off the letter of 2<sup>nd</sup> March, 2018 as proponents. This letter was copied to the International Cricket Council and was drawn by one Samuel Muthomi Gichunge who described himself as a ‘sports lawyer’.

15. In the course of the hearing, it became clear that whilst Mr. Muthomi was appearing for counsel for the 4<sup>th</sup> to 7<sup>th</sup> Respondents, he was also intimately aware of the genesis of this matter and had been involved at every stage of the interaction between the parties and while the Tribunal found Mr. Muthomi’s exposition of the factual issues illuminating, it was also greatly troubled by the clear professional conflict he placed himself in by having effectively been a party to the matters in dispute whilst also appearing as counsel and the Tribunal duly expressed its misgivings with respect to this position.

16. At the centre of the contest is a Memorandum from the CS addressed to cricket stakeholders and Cricket Kenya officials, by which the CS summoned an urgent meeting to be held at the Ministry’s boardroom on 4<sup>th</sup> April, 2018 at 10:00 am for the purpose of addressing the following agenda:

- i. Setting up of an Interim Board;
- ii. Registration of Cricket Kenya;
- iii. Status and funding of cricket;

17. The memorandum was also copied to the PS, State Department for Sports, the DA State Department for Sports Development and the Registrar.

18. The evidence shows that the persons present at the meeting were as follows:

Ministry of Sports and Heritage

- i. Ms. Rose Wasike – Sports Registrar

Cricket Kenya

- ii. Harpel Singh

- iii. Ravi Kaul

- iv. Josephat Muritiithi – General Manager

Nairobi Province Cricket Association

v. Jasbir Singh

vi. Mansukh Hirani

vii. Tom Tikolo

viii. Charles Nyaberi

ix. Rajesh Patel

Person representing themselves as stakeholders

x. Tariq Iqbal

xi. Kennedy Obuya

xii. Edward Odumbe

xiii. Walter Mukinginyi

xiv. Omole Asiko

xv. David Obuya

xvi. Silas Mugeria (Harpal Singh's Lawyer)

xvii. Samuel Muthomi (Stakeholder's Lawyer)

19. The evidence also shows that after initial discussions, the CS left the meeting and directed the Registrar to conduct the meeting. The Registrar has stated in her replying affidavit that the CS requested her to arbitrate '*the dispute between the parties*' and that the matters resolved at the meeting were in fact the outcome of such arbitration.

20. At the conclusion of the meeting, an interim committee consisting of 2 members from the Interested Party, members from Nairobi Province Cricket association and 4 members from the stakeholders present was formed and on 5<sup>th</sup> April, 2018 the Claimants were invited to the Office of the Registrar where they were to sign a consent to the resolutions arrived at during the meeting held on 4<sup>th</sup> April 2018.

21. The Tribunal pauses here for a moment to observe that it was the submission of Mr. Samuel Muthomi that the urgent meeting convened by the CS was in fact triggered by the letter dated 15<sup>th</sup> March 2018 addressed to the CS from Obuya Cricket Academy. Indeed Mr. Muthomi handed to the Tribunal a booklet titled "**Kenya Cricket Holders Convention: Status Report of Kenya Cricket 2018**" which he assured the Tribunal was the document that was handed to the CS and indeed bears the stamp of the Ministry as having been received on 20<sup>th</sup> March, 2018.

22. The Claimants say that they did not attend at the office of the Registrar on 5<sup>th</sup> April or sign the consent to the resolution on the grounds that they were inconsistent with the Constitution of Cricket Kenya and therefore illegal.

23. Meanwhile, the 2<sup>nd</sup> to 7<sup>th</sup> Respondents proceeded to take office and have been acting as the Interim Committee of Cricket Kenya pursuant to the meeting held at the Ministry and have indeed taken up administrative functions.

24. On 6<sup>th</sup> May, 2018 a consultative meeting was held between certain officials of the International Cricket Council (ICC), the

Interested Party, Nairobi Province Cricket Association and stakeholders of cricket in the country. The parties at the meeting passed a resolution to hold elections for the positions of Chairperson and Development Directors of the Interested Party in terms of the provisions of the Constitution of Cricket Kenya; they also resolved to review Cricket Kenya's constitution and the review was to be undertaken by a sub-committee to be co-chaired by the 1<sup>st</sup> Claimant.

25. The review process has so far been inconclusive with the only progress being a draft constitution that the Claimants object to on the grounds that they were not consulted nor invited to take part in the review process.

26. The Claimants being aggrieved with the decisions and actions of the Respondents instituted this matter before the Tribunal.

27. The Tribunal heard the matter in on 11<sup>th</sup> and 12<sup>th</sup> July 2018.

28. While the parties filed extensive affidavits and numerous documents, the Tribunal has only set out those facts which it considers to be germane to the determination of the dispute presently before it.

### **B. The respective parties' arguments**

29. In their written and oral submissions, the parties addressed the issues for determination as set out below.

#### **I. Claimants' Case**

30. Mr. Duncan Anzala who batted for the Claimants pegged the success of their case on two key grounds. The first ground was whether the Sports Registrar has the power to set up an interim committee on behalf of the Interested Party while the second ground was whether the interim committee had been properly constituted in terms of the Constitution of the Interested Party.

31. In addressing the first ground Mr. Anzala began by pointing out that the Sports Act, 2013 does not donate any power to the Registrar to interfere with the organizational structure or appoint to office any persons to run and administer a Sports organization in Kenya. He stated that the Cabinet Secretary is only empowered under the Fourth Schedule to the Sports Act to form an Interim Management Committee for Sports Kenya which is a body established under Section 3 of the Sports Act.

32. To further this point, Mr. Anzala submitted that the Interested Party's Constitution does not provide for an interim committee and further that Article 12.2 clearly states that the members of the executive committee shall only take office after being validly elected at an Annual General Meeting by the twenty delegates of the Interested Party's council as specified in Article 11.1.1 of the Constitution.

33. It is on this basis that Mr. Anzala laid his claim that the interim committee comprising of the 2<sup>nd</sup> to 7<sup>th</sup> Respondents does not have any legal basis for its formation and thus is an illegality that warrants the Tribunal's interference to ensure that the Interested Party complies with the rule of law.

34. On the second ground, Mr. Anzala argued that the interim committee was constituted in a manner that is inconsistent with the Interested Party's constitution. He highlighted the fact that Articles 12.2 and 12.3 of the Constitution were very particular as to the composition of the executive committee by providing for four elected positions and eight members nominated by the Provincial Associations with each association nominating two members to the committee.

35. Mr. Anzala stated that the interim committee founded at the meeting held on 4<sup>th</sup> April 2018 was not properly constituted as no elections were held for the positions of Chairperson, Vice-chairperson, Treasurer and Women's Representative as required under Article 12.2 of the Constitution. Furthermore, he pointed out that the Rift Valley and Coast Cricket Associations were neither involved nor consulted in the nomination of members to the interim committee and thus the committee was improperly constituted when one has regard to the provisions of Article 12.3 of the Interested Party's constitution.

36. Mr. Anzala pointed out that on 6<sup>th</sup> May, 2018 a consultative meeting was held between the members of the International Cricket Council (ICC), the Interested Party, Nairobi Province Cricket Association and stakeholders of cricket in the country. The meeting was fruitful, and resolutions were made with regard to initiating a review of the Interested Party's constitution, conducting elections

to fill the vacant Chairperson and Vice-chairperson slots and determining how the Interested Party's funds should be managed and used.

37. Mr. Anzala stated that the Respondents reneged on all these resolutions and opted not to hold elections to fill the vacant positions. The Respondents also undertook the constitutional review whilst excluding the 1<sup>st</sup> Respondent from the process.

38. Mr. Anzala wound up his submissions by stating that the Registrar had no power to appoint officials to Cricket Kenya and that the members of the interim committee were therefore not bona fide officials of the Interested Party and were thus acting illegally.

39. The Claimants case was concluded by asking the Tribunal to make orders declaring the interim committee as improperly constituted as well as orders prohibiting the 2<sup>nd</sup> to 7<sup>th</sup> Respondents from undertaking any actions as purported officials of the Interested Party.

## **II. First Respondent's Case**

40. The 1<sup>st</sup> Respondent, who was previously the appointed umpire in the dispute and whose decision was now challenged, found herself in vey unfamiliar position of having to bat at number one and this was evident from the brief nature of Mr. Emacar's submissions.

41. It was Mr. Emacar's opening submission that the Registrar had the requisite authority to institute the formation of the interim committee. Furthermore, the Registrar's intervention was necessary to ensure that the Interested Party does not become non-compliant and subsequently face sanction from International Cricket Council.

42. In conclusion, Mr. Emacar stated that the Registrar is of the opinion that it is to the Interested Party's benefit that the Tribunal dismisses the matter brought before it by the Claimants.

## **III. Second and third Respondents Case**

43. Batting at number two, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, through their advocate Mr. Kariuki began by pointing out that the Interested Party was not a registered sports organisation under the Sports Act. He therefore was of the opinion that this matter does not fall under the jurisdiction of the Tribunal.

44. Furthermore, it was pointed out that the Interested Party's constitution was not aligned to the requirements of the Sports Act and the ICC. Mr. Kariuki argued that in the absence of a compliant constitution, a proper application could not be lodged by the parties.

45. On the issue of the resignations by the officials of the executive committee of the Interested Party, Mr. Kariuki submitted that, save for Ms. Janmohammed and Mr. Sarkar, all the officials had not resigned as required under the provisions of Article 12. 10 of Cricket Kenya's constitution as they had not given written notice of their resignation to the Secretary. It is therefore only the positions of Chairperson and Development Director that were vacant and that there was at all times a valid executive committee of Cricket Kenya.

46. Mr. Kariuki rebutted the Claimants submission that the 2<sup>nd</sup> Respondent indefinitely postponed the elections to fill the two vacancies. Additionally, he pointed out that a SGM should have been called on 17<sup>th</sup> March, 2018 in line which Article 12.11 of the Interested Party's constitution which provides that an election to fill a vacancy in the executive committee should be held within 30 days of the resignation. He further stated that a notice of the SGM had been issued on 3<sup>rd</sup> March 2018 and had requested members of the Interested Party's council to nominate the replacement delegates in satisfaction of Article 12.3.

47. Mr. Kariuki stated that the meeting did not take place as the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents notice was frustrated by the Claimants who refused to appoint delegates to take part in elections called to fill the vacant positions. This grounded the operations of the Interested Party. According to Mr. Kariuki, the inability of the Interested Party to carry out its duties prompted the intervention of the CS and the eventual meeting to create the Interim Committee.

48. Mr. Kariuki stated that the Claimants were part of the interim committee created by the consent under the direction of the Sports

Registrar and therefore cannot challenge the committee's discussions. He further stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents initiated negotiations with the Claimants with regard to the constitutional review process resulting in a consent signed by the parties on 6<sup>th</sup> May 2018 which created the review sub-committee. He argued that the Constitution amendment process has not been completed due to the Claimants' refusal to participate in the process and the effect of all this is that the International Cricket Council (ICC) is threatening to suspend the Interested Party's membership for non-compliance.

49. In conclusion, Mr. Kariuki prayed that the Tribunal dismiss the Claimants' prayers since if such orders were granted they would cripple the operations of the Interested Party making it non-compliant with the ICC.

#### **· Fourth to seventh Respondents Case**

50. Mr. Muthomi for the 4<sup>th</sup> to 7<sup>th</sup> Respondents was clearly in the middle order and set out to bat forcefully and with great conviction.

51. He began by arguing that the Tribunal has no jurisdiction to entertain the matter and stated that right forum for the dispute between the parties herein is the ICC. He submitted that the matter is of an international nature due to the involvement of the ICC and that the dispute should be referred to the ICC mediation team in the first instance and not the Tribunal.

52. He also challenged the claim made by Mr. Anzala that the 4<sup>th</sup> to 7<sup>th</sup> Respondent had refused to adhere to the terms of the consent recorded by the parties on 6<sup>th</sup> May, 2018. He argued that it was the Claimants and not the Respondents who have been frustrating the Constitutional review process by not attending meetings regarding the review process.

53. Mr. Muthomi took the Tribunal through numerous documents to show the genesis of the matter and obviously had a good grasp of the factual issues. Unfortunately, the Tribunal formed the view that his involvement in the dispute clouded his ability to take a dispassionate position and eventually hampered his ran rate.

54. Mr. Muthomi concluded by submitting that the interim committee was validly constituted and should therefore be allowed to proceed with its administrative duties as well as the constitutional review process.

#### **C. Determination**

55. Having taken into account the pleadings, written and oral submissions of Counsel, the Tribunal is now in a position to more clearly formulate the issues for determination. The issues are as follows:

- i. Whether the Tribunal has the requisite jurisdiction to hear and determine the matter the matter at hand.
- ii. Whether the Sports Registrar had the power to constitute the interim committee
- iii. Whether the interim committee has been properly constituted.

#### ***a) Whether the Tribunal has the requisite jurisdiction to hear and determine the matter the matter at hand.***

56. It is a fundamental principle of law that for any judicial or quasi-judicial body to undertake the process of entertaining and determining a dispute before it, such an institution must be clothed with the appropriate jurisdiction.

57. This position has been set out in the classic case of **The Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited (1989) KLR 1** where Nyaragi J stated that jurisdiction is everything and without it, a Tribunal, a court or a panel has no power to make one more step.

58. It is therefore essential for this Tribunal to determine whether it has the jurisdiction in this matter before it proceeds to make a determination on the pertinent issues raised by the parties.

59. Counsel for the 3<sup>rd</sup> to 7<sup>th</sup> Respondents raised an objection to the jurisdiction of the Tribunal on grounds that the appropriate forum to determine matter is the International Cricket Council.

60. The Tribunal whilst analysing this objection referred to the Sports Act from which it derives its powers. The Tribunal also extended its analysis and considered the rules and regulations of the International Cricket Council with regards to the appropriate forum to hear the dispute.

61. To begin with the Tribunal draws its jurisdictional powers from section 58 of the Sports Act which provides the circumstances through which any matter may be determined by the Tribunal.

62. In the suit herein, the Tribunal's arbitral jurisdiction flows from firstly from the fact that what is before the Tribunal is a challenge to the alleged decision of the Sports Registrar with respect to the formation of the interim committee. Under section 58 (c) of the Sports Act, the Tribunal has jurisdiction to determine appeals from decisions of the Register under the Act. To the extent that the Registrar purported to exercise jurisdiction under the Sports Act in arbitrating the dispute that was referred to her by the CS, the Tribunal has the requisite jurisdiction to determine the matter.

63. Secondly, Section 58(b) of the Sports Act allows the Tribunal to hear all sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear.

64. From the reading of section 58(b) it is clear that jurisdiction is established through a three-stage process, that is, the matter must be a sports dispute in nature, the parties must agree to refer the matter to the Tribunal and the Tribunal must agree to hear the matter. This position is was stated by the Tribunal in its decision in **Dennis Kadito vs. Sofapaka Sports Club** and affirmed by the High Court (Mwita J) in **Dennis Kadito v Office of The Sports Disputes Tribunal & another [2017] eKLR**.

65. In this suit, all three criteria have been met as the dispute regarding Cricket Kenya is entirely a sports dispute in nature while all the parties through their express consent and implied conduct agreed to have the matter referred to and determined by the Tribunal. Furthermore, the Tribunal has agreed to hear and determine the dispute.

66. The Tribunal has also considered Mr. Muthomi's submission with regards to the ICC being the appropriate forum to hear the matter.

67. Upon reading the ICC Dispute Resolution Committee's terms of reference, in particular Clause 1.2, it is apparent that the committee has limited jurisdiction to resolve matters.

68. The scenarios through which the committee may exercise its jurisdiction is set out in Clauses 1.2.1 to 1.2.5 are read as follows:

***1.2 Subject always to paragraph 1.3, below, the Committee shall have jurisdiction to decide the following disputes by arbitration in accordance with these Terms of Reference:***

***1.2.1 disputes between Members;***

***1.2.2 disputes between any Member and the ICC or any Associated Company (or any director, committee member or officer of the ICC or any Associated Company);***

***1.2.3 disputes between the ICC or any Associated Company (or any director, committee member or officer of the ICC or any Associated Company) and any Player, Player Support Personnel, Match Official or Match Official Support (or any other person who has agreed, or agrees after the dispute arises, to submit to the Committee's jurisdiction);***

***1.2.4 disputes which are expressly referred to the Committee pursuant to any rules or regulations of the ICC or any contractual agreement binding upon the parties to the dispute; and***

***1.2.5 any dispute or question between any two or more persons or entities under the jurisdiction of the ICC (including, for the purposes of these Terms of Reference, the ICC itself) that concerns:***



**1.2.5.1 the validity or interpretation of the ICC's Memorandum and Articles of Association and/or any of the rules or regulations of the ICC as may be in force from time to time and/or the effect of any resolution of the Board of Directors or Members' Resolution or Associate Members' Resolution that has been passed; and/or**

**1.2.5.2 the lawfulness of a decision of the ICC or any decision-making body established under the ICC's Memorandum and Articles of Association and/or under any of the rules or regulations of the ICC as may be in force from time to time (including, without limitation, any bodies exercising any disciplinary or judicial function)**

69. Therefore, the dispute before the Tribunal involving the competing interests of the members and stakeholders of Cricket Kenya does not fall into any of the categories envisioned in clause 1.2 and the dispute does not fall under the scope of the ICC Dispute Resolution Committee.

70. In light of the forgoing, this Tribunal holds that it has the requisite jurisdiction to hear and determine the matter before it.

**b) Whether the Sports Registrar had the power to constitute the interim committee**

71. The parties in this suit have raised divergent arguments as to the Registrar's capacity to decide on or oversee the formation of the interim committee and the appointment of persons to that committee.

72. For the Tribunal to determine whether the Registrar had the capacity to constitute the interim committee it is paramount to first determine the powers accorded to the Registrar under the Sports Act.

73. It is trite law that an executive body or authority has no inherent power. Such powers must be conferred by statute and cannot be a matter of implication.

74. This position has been reiterated in the case of **Republic v The Cabinet Secretary Hassan Wario Arero & another Ex-Parte Kipchoge Keino & 2 others [2017] eKLR** where Odunga J stated:

*"Where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies or executive authorities. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and Tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them."*

75. With regard to the present dispute the Office of the Sports Registrar is a creation of the Sports Act and all its authority must flow from the Act. Any action beyond the confines provided by this statute are ultra vires and must be regarded as an illegality.

76. The powers of the Registrar are expressly set out at section 45 of the Act which goes further and limits these powers to matters involving the registration and regulation of sports organizations. The Tribunal further recognizes the Registrar has power under section 52 to carry out inspections on sports organisations. However, the Act does not afford the Registrar the power to intervene in a sports organizations administrative structure or appoint its officials as alluded to by the Respondents.

77. Under the Act, it is only the CS who has the power to interfere in the management of a sports organisation. However, this power is limited to circumstances where an organisation fails to comply with the recommendations of an inspection.

78. This position was also adopted by the High Court in **Republic v The Cabinet Secretary Hassan Wario Arero & another (Supra)**.

79. In the present circumstances, there is no basis under the Sports Act for the Registrar or the Cabinet Secretary to intervene in the

Interested Party's management structure or facilitate the creation of the interim committee and the Tribunal finds that the Registrar had no capacity to constitute the interim committee pursuant to the meeting convened on the 4<sup>th</sup> April, 2014.

80. And even if the outcome was reached by agreement of the parties in the course of the Registrar arbitrating over the dispute, it became clear during the hearing that the Registrar infact had no knowledge of the nature of the dispute between the parties or what triggered the urgent meeting called by the CS. Mr. Muthomi stated that the meeting was triggered by the report on the Status of Kenya Cricket submitted by Obuya Cricket Academy and the Tribunal accepts this to be the case. The question that clearly therefore arises is how could the Registrar arbitrate over a dispute she knew nothing about.

81. The Tribunal is further struck by the coincidence between the outcome of the meeting and the matters set out in the agenda provided to the parties by the CS. The fact that the outcome was very closely aligned to the agenda propels the Tribunal to the inescapable conclusion that the Registrar was merely implementing the directive from the CS and did not infact undertake any arbitration or mediation.

82. In answer to the suggestion that the parties had since embraced the Interim Committee and agreed to work together in terms of the resolution reached with the assistance of the ICC, the Tribunal need only remind the parties of Privy Council case of Mcfoy –vs- United Africa Co. Ltd (1961) 3 All E R 1169 and the celebrated quotation of Lord Denning at page 1171 -1172 when he sought to explain the distinction between an act which was void and one which was merely voidable. He stated thus:

*The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. **If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.***

83. The formation of the interim committee was void and no subsequent meetings, proceedings or consensus between the parties could breathe life into it. It is void and a nullity.

***c) Whether the interim committee has been properly constituted.***

84. The question with regards to the composition of the interim committee is moot in light of the Tribunal's finding above. We will, however, address it.

85. In determining this issue, the Tribunal found it prudent to examine the Interested Party's constitution from which the rules regarding to the formation of the interim committee are derived from.

86. Of particular interest to the Tribunal is Article 12 of the Interested Party's constitution which provides for the formation, constitution and functions of the executive committee.

87. From the reading of Article 12.1 of the constitution it is evident that executive committee will comprise of twelve members subject to the conditions at Article 12.2 and 12.3.

88. According to Article 12.2 of the constitution it is clearly stated that the positions of Chairperson, Vice-chairperson, Treasurer and Women's Representative shall be required to be elected at elections held at the Annual General Meeting for the Association amongst the twenty delegates of the council as specified in Article 11.1.1, provided that the candidates for these positions had satisfied the nomination requirements set in Articles 15.3 and 15.4. Additionally, Article 12.3 states that the remaining eight positions on the executive committee shall be nominated by the four Provincial Associations specified in Article 6.2.1 with each association nominating two members from amongst the rest of its delegation to the council as specified in Article 11.11 provided that the nominees for these positions had satisfied the nomination requirements set in Articles 15.3.

89. In this matter, the members of the interim committee fall short of the requirements in Articles 12.2 and 12.3.

90. To begin with, no election was held by the Interested Party to facilitate the election of the Respondents to the positions of

Chairperson, Vice-chairperson, Treasurer and Women's Representative of the committee. This is clear violation of Article 12.2 and therefore these officials have no basis to be in office.

91. Furthermore, the process of nominating members to the interim committee was not inclusive as the Rift Valley Cricket Association and Coast Province Cricket association were neither consulted nor part of the meeting convened to set up the committee. This is contrary to the provisions of Article 12.3.

92. Also of note is that the nomination of members to the interim committee does not comply with the requirements of Articles 15.3 and 15.4 of the Interested Party's constitution in that the nominees were neither nominated nor elected by the Provincial affiliates and that the nominations were not countersigned by the officials of the Provincial Affiliates.

93. Furthermore, having examined the Interested Party's constitution at length the Tribunal has determined that there is no provision for the formation of an interim committee in the constitution and such the Respondents are purporting to act as the bona fide members of a committee that has no existential basis under the laws of Cricket Kenya.

94. The Tribunal takes cognizance that the committee's duties are necessary to ensure the functions of the Interested Party run smoothly and more so to ensure that it complies with the requirements of the Sports Act and the International Cricket Council.

95. However, as much as the Tribunal empathizes with the plight of the Interested Party it must ensure that the rule of law is maintained and that the procedural rules of the Interested Party are adhered to, failure to which the Tribunal will be absconding from its duty to be the bastion of justice and fairness in the sports fraternity.

96. It is evident the provisions of the Interested Party's constitution do not support the formation of the interim committee.

97. The Tribunal is further troubled by the persons forming the interim committee in view of the allegations as to the mismanagement of cricket Kenya as set out in the letter of 15<sup>th</sup> March 2018 addressed to the Cabinet Secretary from Obuya Cricket Academy.

98. In light of the grave allegations of mismanaging of Cricket Kenya including allegations of financial dishonesty and bringing the game into disrepute, the Tribunal fails to understand why members of the Executive committee of Cricket Kenya would continue to serve in the interim committee one of whose purposes would have been to investigate and rectify the alleged misdeeds.

99. Another allegation made was that of discrimination against Obuya Cricket Academy and again it would be difficult from the standpoint of independence and transparency to justify the inclusion of officials of Obuya Cricket Academy in the interim committee because this would appear to validate the allegations of discrimination without undertaking any investigation.

100. Overall therefore, the Tribunal finds that the formation of the interim committee has no foundation in law, the committee in any event was not properly constituted and as such cannot be sustained.

## **Conclusion**

101. This matter goes back to the fundamental facets of governance of any body. These must be found in the Constitution of the body. Accordingly, having reached the conclusion that it has, the Tribunal consequently directs as follows:

1. The Interim Committee is void and is disbanded with immediate effect;
2. The Executive Committee of Cricket Kenya shall with immediate effect commence the process of calling an SGM to replace the vacant positions.
3. This process shall be closely supervised by Tribunal and the matter shall be mentioned on 4<sup>th</sup> September 2018 at 2.30 pm for further directions;
4. The costs are reserved.

Dated at Nairobi this 31<sup>st</sup> day of July, 2018

Signed:

**John M Ohaga FCIArb**

**Chairman, Sports Disputes Tribunal**

Signed:

Elynah Shiveka (Mrs)

Gabriel Ouko



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