



REPUBLIC OF KENYA

THE JUDICIARY

THE SPORTS DISPUTES TRIBUNAL

APPEAL NO. 19 OF 2018

EDWIN MURUAH.....1ST PETITIONER

CAROLINE WANJIRA.....2ND PETITIONER

-VERSUS-

JORAM WAMUGU.....1ST RESPONDENT

ELIJAH MWANDIHL.....2ND RESPONDENT

PETER OLOO.....3RD RESPONDENT

DORIS ATIENO.....4TH RESPONDENT

LENAH NYABOKE.....5TH RESPONDENT

BEATRICE OCHOLA.....6TH RESPONDENT

ALFRED BARASA.....7TH RESPONDENT

BENARD ONG'ONDO.....8TH RESPONDENT

HELLEN OTIENO.....9TH RESPONDENT

RAJAB ABDALLA.....10TH RESPONDENT

WHEELCHAIR & AMPUTEE SPORTS ASS.....11TH RESPONDENT

DECISION

Hearing: 10th October, 2018

Panel: John M Ohaga Chairperson

Gichuru Kiplagat Member

GMT Ottieno Member

Appearances Edwin Muruah and Caroline Wanjira (in person)

Jennifer Kamande (Interested Party); Joram Wamugu (in person) E Rombo for the 11th Respondent

Doris Atieno

The Parties

1. The Petitioners are members of the 11th Respondent and were vying for the positions of Secretary General and Committee Member of the 11th Respondent in elections held on 31st August, 2018.
2. The 1st and 2nd Respondents are alleged to have conducted the said elections that declared the 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents as validly elected.

Background

3. The Petitioners have filed an appeal to the Tribunal vide a Petition under a certificate of urgency dated 17/09/18 laying out their claims against the Respondents.
4. The Petitioners have filed this appeal against the Respondents after the return of results where they participated as candidates for the positions of Secretary General and Committee Member of the 11th Respondent in the elections that were held on 31st August, 2018 at Kasarani National Stadium.
5. The Tribunal was invited to make the following orders among others:
 - a) The elections of the 3rd -10th Respondents be declared null and void.
 - b) Quash the alleged fraudulent list of the Mombasa and Nyanza Branches and order fresh elections of those branches.
 - c) Declaration that the elections of 31st August, 2018 be declared null and void and fresh elections ordered within 21 days as per the 11th Respondent's constitution and other enabling laws.
 - d) Declaration that the 1st and 2nd Respondents are unfit to oversee the elections on account of impartiality, incompetence, unprocedural appointment and non-adherence to the 11th Respondent's constitution and other enabling laws.
 - e) Postponement of the elections by Kenya National Paralympics Committee elections pending the determination of this case.
 - f) Costs of the application be in the cause.
6. The matter was heard on 16th October, 2018.

The Petitioners' Case

7. The Petitioners relied on the Petition and affidavits all dated 17/09/18.
8. The Petitioners stated that on the material date of voting they received a list of independent candidates who did not have voting rights yet the 11th Respondent's constitution and by-laws provide that nominees for elective positions must be voting delegates of branches/regions and/or associate member.

9. That on scrutinizing the by-laws the Petitioners noticed that Clause 1.6 of the by-laws allowed such independent candidates to vie for elections. They further noted that the members of the 11th Respondent were never consulted when this provision was amended thus occasioning an illegality.

10. The Petitioners note that on 31.08.18 when they arrived for elections at Kasarani National Stadium at 8:30am for the AGM and the elections that were set to commence at 10.00am, there was confusion as the elections delayed for another 3 hours and that some delegates were missing from the list of delegates.

11. The election venue and timing were again changed to 2.00 pm but without sufficient notice to all delegates as all communication was verbal and by mobile phone, the Petitioners noted.

12. The Petitioners also stated that the Association had no physical address making it difficult for members to seek audience or help. The 1st Respondent gave an example of where he paid nomination fees to the 2nd Respondent in cash and no receipt was given to him.

13. They noted that the *bona fide* delegates list from Nyanza and Mombasa regions were not allowed to access the meeting room. The Petitioners further stated that despite numerous points of order by the delegates to scrutinize the delegates list before the elections commenced, the 1st and 2nd Respondents objected and threatened to eject them using armed security officers.

14. The Petitioners also note that the election venue was not disability friendly as delegates would were not able to access the venue fully including the ballot boxes. They also noted that the returning officer (1st Respondent) and the election officials did not introduce themselves to the delegates.

15. They further stated that there were no observers from the Registrar of Sports or the Ministry of Sports.

The Response

16. The 4th Respondent filed a replying affidavit dated 01/10/18 on behalf of 1st -11th Respondents.

17. The 4th Respondent noted that she contested for the position of 1st Vice Chair in the elections of 31.08.18 and won.

18. She also contended that the 1st Respondent was engaged to conduct the said elections and was supplied with a list of candidates and delegates and that from the outset the Petitioners make allegations on behalf of parties from Nyanza and Coast branches and both do not disclose incapacity suffered by delegates from the said branches that stopped them from coming on their own behalf.

19. The 4th Respondent stated that the 11th Respondent held a meeting on 30/08/18 allowing aggrieved delegates to present their concerns before the governing council but none of those who had a list of reservations presented themselves.

20. She noted that the Petitioners went ahead to subject themselves to the elections held on 31.08.18 where they were allowed to vote, received votes but did not carry the day.

21. The 4th Respondent also noted that no delegate who was allegedly locked out as per her sworn affidavit.

22. Indeed, she noted that the Petitioners have cherry-picked respondents to sue as not all persons who were elected have been enjoined here as such any adverse finding against them would be akin to being condemned unheard.

23. The 4th Respondent concluded that the elections of the Board of Governing Council of the 11th Respondent held 31.08.18 was above board.

24. The 11th Respondent relied on the affidavit of Ronald Milare its Chairperson dated 15/10/18.

25. Mr. Milare stated that a notice was sent out to the membership on 09/08/18 notifying them of the elections that would be held on

31/08/18 and that the Petitioners are not members representing Coast and Nyanza branches.

26. He noted that a meeting was held on 28-08-18 by the Governing Council under Article 16.3 of the 11th Respondent's constitution to amend the constitution election by laws to allow for independent candidates to attend with no voting rights as long as they pay a subscription fee of Kshs.2,000/=.

27. That in the said meeting it was agreed that Joram Wamugu the 1st Respondent would be the returning officer for the elections.

28. Mr. Milare stated further that contrary to the claims by the Petitioners, the election was as attended by at least two observers namely Joel Atuti from the Department of Sports and Charles Wamugu.

29. He also noted that various claims and orders have been sought against the Kenya National Paralympics Committee (KNPC) yet they are not parties in the proceedings.

30. He concluded by asserting that the elections were above board and that the suit should be dismissed with costs.

Discussion

31. The issue that comes up for determination by the Tribunal is whether the elections of 31/08/18 at Kasarani National Stadium were free, fair and procedural.

32. This Tribunal is guided by a body of law that includes the Constitution of Kenya, the Sports Act, the Constitution of the Respondents and past decided cases or settled law.

33. The Tribunal has analyzed all the oral submissions from all parties as well as the pleadings filed with us.

34. Article 4.2 of the Respondent's Constitution outlines one of the objects of the Respondent to include:

....coordinating governing body for the proper conduct of the annual national events coming within the jurisdiction of the Association.(Emphasis Ours)

35. Article 81 of the Constitution of Kenya states that the electoral system shall comply with the following principles:

a)

b)

c)

d) universal suffrage based on the aspiration for fair representation and equality of vote; and

e) free and fair elections which are

i. by secret ballot;

ii. free from violence, intimidation, improper influence or corruption;

iii. conducted by an independent body;

iv. transparent; and

v. administered in an impartial, neutral, efficient, accurate and accountable manner.

36. In Morgan v. Simpson (1975) 1 Q.B 151, Lord Denning summarized the essence of Section 37 of Britain's Representation of the People Act, 1949 in three propositions:

a) **If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.**

b) **If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls-provided that it did not affect the results of the election.**

c) **But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls- and it did affect the result- then the election is vitiated.**

37. While expounding the import of Article 81 of the Constitution of Kenya, the Supreme Court of Kenya in the case of Peter Munya v. Dickson Mwenda Kithinji and 3 Others, Petition No.2B of 2014:

“These two Articles (81 and 86) establish the constitutional threshold against which the conduct of elections is to be measured, to determine whether it meets established standards of a democratic franchise. Article 88 (5) of the Constitution, on the other hand, provides that the Independent and Electoral Boundaries Commission, as the agency charged with the mandate of managing the conduct of elections, is to exercise its powers and perform its functions in accordance with this Constitution and national legislation.

38. A number of issues come to fore with regard to the conduct of the elections of 31/08/18. After constant prodding, the returning officer who is the first Respondent here admitted that the venue of the elections was not disability friendly. By failing to ensure a suitable venue that is disability friendly, this was callous behaviour from him on the election date that should not escape our admonition.

39. The returning officer's and other election officials including the 2nd Respondent's conduct indeed disenfranchised many members from exercising their rights to participate in the elections either as voters or candidates. This affected the integrity of the election results, indisputably.

40. That cannot amount to “proper conduct of a national event” which we submit includes national elections coming within the jurisdiction of the 11th Respondent's constitution as noted above and certainly not anywhere close to the threshold limits of Article 81 of our national constitution.

41. Secondly, it is not clear how independent candidates participated in the elections yet Article 5 of the 11th Respondent's constitution only makes reference to three (3) categories of membership namely: ordinary member, associate member and honorary member. Nowhere does the 11th Respondent's Constitution admit independent candidates or members.

42. As much as the elections were conducted under the 11th Respondent's by-laws it was not possible to determine where that authority was hinged or derived from against the 11th Respondent's Constitution. Furthermore, the 11th Respondents was not able to explain how the amendment to Clause 1.6 of the by-laws was effected to introduce independent candidates given the lack of general acceptance by members.

43. It appears to us that a number of members of the 11th Respondent were unaware of the said amendment and how this was introduced to the by-laws. The 11th Respondent did not convince us otherwise despite all attempts made.

44. We also fail to understand for what benefit an independent candidate would bring to the sports fraternity given that he has no constituency. Elections are conducted so that suitable candidates can sell their agenda and champion the rights of a wider audience or constituency.

45. Therefore, the introduction of independent candidates in our view went a great way into besmirching the conduct of the elections

of 31/08/18.

46. Furthermore, there was clearly no compliance with the Sports Registrar's Regulations, 2016. Part VI of these Regulations deal with Elections and provide as follows as Regulation 20:

- (1) An organization shall hold election in accordance with the Rules provided in its constitution.**
- (2) Notwithstanding paragraph (1), a sports organization seeking to hold an election shall—**
 - (a) appoint an independent panel consisting of at least five members to conduct the election;**
 - (b) include observers from at least one umbrella sport organization, the Ministry responsible for matters related to sports and the Registrar's office;**
 - (c) observe the principle of non-discrimination as provided in their Constitution;**
 - (d) inform the Registrar at least four weeks prior to the expected date of the elections;**
 - (e) conduct the election in an open, free and fair environment;**
 - (f) ensure that the nominated candidates obtain clearance from the Directorate of Criminal Investigation, the Kenya Revenue Authority; the Ethics and Anti-Corruption Commission, the Credit Reference Bureau and the Higher Education Loans Board; and**
 - (g) ensure that the office of the chairman or president, secretary and treasurer are reserved for Kenyan citizens only.**
- (3) An observer in an election and the returning officer shall, within seven days of the election, submit a separate report to the Registrar on the credibility of the elections.**
- (4) The sports organization shall, within twenty-one days, notify the Registrar of the newly elected office bearers in the Form R set out in the First Schedule.**
- (5) The Registrar may register a newly elected office bearer, if satisfied with the election and the election process.**
- (6) The newly elected office bearers shall hold office for a period of four years and may be elected for one further term.**
- (7) A person who is dissatisfied with the results of an election may appeal to the Tribunal within thirty days of the election.**

47. We have discerned from the evidence adduced that there was no independent panel, there was no observer from the Sports Registrar' Office and even Mr. Atuti from the Ministry of Sports says he was there in his personal capacity.

48. It is for this reasons that we agree with the Petitioners that the elections of 31/08/18 were not conducted in accordance with the Constitution of Kenya, the Sports Act and regulations made thereunder and the Respondent's Constitution.

49. We now turn to the issue as to whether parties that were not enjoined in the current suit can have orders made against them *in personam* by this Tribunal.

50. In House of Lords case of **Ridge v. Baldwin [1964] AC 40** the court stated that the rules of natural justice, in particular right to fair hearing applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. Lord Hodson at identified three features of natural justice as:

- a) the right to be heard by an unbiased tribunal.

b) the right to have notice of charges of misconduct

c) the right to be heard in answer to those charges.

51. In **Judicial Service Commission v. Hon. Justice Mbalu Mutava & Anor.** Court of Appeal Civil Case Appeal No.52 of 2014, the Court said that.

“The right to fair hearing as a rule of natural justice, a part of the common law, has in modern times been variously described as “fair play in action”, justice of the common law”; “common fairness” “fairness of procedure” or simply as “duty to act fairly.”

52. These sentiments are also clearly embedded in Article 50 of the Constitution of Kenya on the right to fair hearing that requires adequate notice of the claim and adequate time and facilities to prepare a defence.

53. We note that without joinder of parties we will offend these provisions of the law exemplified by the court decisions above if we make any adverse orders against them without their participation in the present proceedings.

54. Our constitutional and statutory mandate as a Tribunal is to steer the sporting industry and we therefore direct that the Federation shall undertake all measures to ensure that for all future elections proper and elaborate rules guiding the exercise including disqualification rules shall be published. This document shall have legal force and shall be presented for approval at the General Meeting of the Federation.

Conclusion

55. In these circumstances, the following orders commend themselves to the Tribunal:

a. The Appeal is partly allowed;

b. The elections held on 31st August, 2018 at Kasarani National Stadium relating to the 1st Vice-Chairperson, 2nd Vice Chairperson, Secretary General, Treasurer, Assistant Treasurer, Organizing Secretary and Committee Member are nullified;

c. The Federation shall conduct fresh elections to fill the vacancies for these positions within thirty (30) days;

d. The Federation shall prepare for discussion amongst its stakeholders and publish a document that provides for elections of officials including a conclusive list of *bona fide* delegates and such disqualification thereof for adoption at the next General Meeting;

e. The 1st and 2nd Respondents are barred from conducting the repeat elections.

f. The Kenya National Paralympics Committee (KNPC) be duly notified of this Tribunal decision and the return/results of the repeat elections be communicated soon thereafter to KNPC.

g. This matter shall be mentioned on **27th November, 2018** to confirm the steps taken towards compliance and for issuance of further directions;

h. Each party shall bear its costs attendant to this appeal.

i. Orders accordingly.

56. The Tribunal thanks all the parties and all those summoned for their extremely helpful contribution and the cordial manner in which they conducted themselves.

Dated and delivered at Nairobi this day of 6th day of November, 2018.

Signed:

John M Ohaga

Chairperson, Sports Disputes Tribunal

Signed:

Gichuru Kiplagat

Member, Sports Disputes Tribunal

Signed:

Gilbert MT Ottieno

Member, Sports Disputes Tribunal



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