



REPUBLIC OF KENYA

THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

APPEAL NO. 22 OF 2018

ATHMAN MOHAMMED FAHAMUNI

CHRISPINE PETER ONYANGO

HELLEN MUGA MBOYA..... PETITIONERS

(SUING IN THEIR CAPACITY AS

OFFICIALS OF MOMBASA COUNTY BOXING ASSOCIATION)

VERSUS

JOHN KAMETA

P.B MUNG'ORI

GEORGE ONYANGO AUNDO..... RESPONDENTS

(SUED AS OFFICIALS OF THE BOXING

ASSOCIATION OF KENYA)

AND

SPORTS REGISTRAR.....INTERESTED PARTY

DECISION

Hearing: 16th October, 2018

Panel: John M Ohaga CIArb – Chairperson

Ms. Mary Kimani - Member

E. Gichuru Kiplagat – Member

Appearances

The Petitioners are represented by Messrs. Nicholas Weru Munyoro and Mbanda, Advocates instructed by Obura Mbeche & Company; the Respondents are represented by Mr. Daniel Kiraithe and Ms. Veronica Kimiti instructed by Kimiti & Associates;

A. PARTIES

1. The Petitioners describe themselves as adults of sound mind and are the Chairman, Secretary and Treasurer respectively of the Mombasa County Boxing Association (MCBA).
2. The Respondents are described as adults of sound mind and are officials of the Boxing Association of Kenya (BAK).

B. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence are set out, where relevant, in connection with the legal discussion that follows.

4. While the Tribunal has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, the Tribunal in its Decision refers only to the submissions and evidence it considers necessary to explain the reasoning for supporting the Decision.

5. The following matters are not in dispute:

- a) The term of the association's executive committee members began on 25th May 2013, which term expired on 25th May 2017.
- b) That no election, to date has been held to elect new officials into the executive committee of the BAK.
- c) The Respondents have scheduled an election for 16th November 2018.

C. PROCEDURAL HISTORY

6. The Petitioners had approached the Court under a certificate of urgency dated 20th September 2018 seeking interim orders to stop a planned council meeting to be held on 26th September 2018. The matter found its way to the Tribunal by way of an order issued on 25th September 2018 by Hon. Justice J.K. Sergon transferring HCCC No. 229 of 2018 from the Honourable Court to this Tribunal.

7. The Certificate of urgency filed by the Petitioners dated 20th September 2018 contained two affidavits sworn by Chrispine Peter Onyango and Albert Matito. They had also filed a Plaint dated 20th September 2018, a further affidavit dated 5th October 2018 sworn by Albert Matito and two further supplementary affidavits dated 15th October 2018 and sworn by Albert Matito and Chrispine Peter Onyango and Petitioner's list of authorities dated 16th October 2018.

8. The Respondents filed a replying affidavit dated 11th October 2018 sworn by Paul Bundi Mung'ori.

9. The matter was first mentioned before the Tribunal on 25th September 2018, when the Tribunal directed that the petitioners enjoin the Sports Registrar as an interested party and that all relevant documents be served on the Sports Registrar.

10. The matter was then mentioned on 2nd October 2018, and the Petitioners were granted leave to file supplementary affidavits by 5th October 2018.

11. The matter came up for hearing on 16th October 2018.

12. At the conclusion of the hearing, the Chairperson directed that the decision on the matter would be delivered on 6th November

2018 at 4.00 pm.

D. PARTIES SUBMISSIONS

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

The Petitioners' Case

14. BAK is the umbrella body responsible for the sport of boxing in Kenya and comprising of various affiliate association representing different areas of the country. Prior to the enactment of the Sports Act, 2013, the affiliate associations were organized into six (6) regional associations; Rift Valley, Central, Nyanza, Eastern, Coast and Nairobi and four (4) service boxing associations; Kenya Police, Kenya Prisons, Kenya Administration Police and Kenya Defence Forces.

15. Their main contention was that the Respondents are illegally in office. The Petitioners argue that Members of the Executive Committee of the BAK were elected on 25th May 2013, and pursuant to clause 8.2 of its Constitution, were to hold office for a term not exceeding four (4) years, which term was to expire on 25th May 2017.

16. The Petitioners submitted that Section 46(5) as read together with Schedule II of the Sports Act, 2013 states that officials should hold office for a term not exceeding four years.

17. They further contended that Registration issued to the BAK by the Sports Registrar on the 24th May 2018 was on condition that they organization complies with the provisions of the Sports Act, 2013 ; reviews its constitution to ensure compliance with the Sports Act, 2013, and that elections be held in accordance with the Sports Act, the Sports Registrar's Rules and Regulations and the organization's international sports discipline statute within ninety days from the registration, all of which was yet to be done.

18. It was their contention that as they are illegally in office, all their actions are nullities.

19. Counsel referred to the decision in the case of **Mohammed Omar – Suing as Chairman & Treasurer of K.F.F Coast Branch vs Maina Kariuki Hussein Swaleh Mohamed M. Hatimy – sued as national officials of KFF (2004) eKLR** where the Learned Judge eloquently stated that you must follow the constitution which governs the body.

20. The Petitioners posed the second issue for determination by the Tribunal as the validity of the Constitution of BAK. It was their submission that Section 46(2) of the Sports Act mandated organizations to change their registration from regional associations to county sports associations, and that they had one year to do so from the enactment of the Act. They further submitted that despite the delays in registration, some bodies had duly registered under the Sports Act, and that the Mombasa County Boxing Association is a good example.

21. Counsel, at the hearing emphasised that their exclusion from BAK is illegal as they are in fact duly registered, and that they were in fact part and parcel of BAK. Counsel stated that the MCBA had previously been issued with notices inviting them to council meetings, and because of this, that there was a legitimate expectation that they were now a part of BAK, and that BAK was now estopped from denouncing the association.

22. He stated that they were invited into a meeting but were kicked out; that it was at that meeting that it was agreed that they would proceed with regional associations, and not county associations, thereby giving precedence to unregistered associations to registered associations.

23. He brought it to the attention of the Tribunal that the BAK had in fact admitted to not complying with the Sports Act, by failing to amend its constitution and recognizing affiliates which were not duly registered.

24. Mr. Weru submitted that the minutes of the meeting held on 24th August 2018 shows new delegates who are unknown. He stated that the BAK was recognizing affiliates based on personal preference, and that there was no predictable basis for such recognition.

25. He further contended that the MCBA were actively involved in boxing both locally and in East Africa and was not a busy-body

association formed solely for the purpose of elections.

26. Counsel further stated that they had not only excluded them, but had also arbitrarily banned Mr. Albert Matito for filing the present suit with the Tribunal. He stated that Mr. Matito has been boxing from 1965 and has only the interests of boxing at heart.

27. He further stated that the election contemplated for 16th November 2018 will be a nullity as it will violate Regulation 20 (2) of the Sports Registrar Regulations, which requires that the Sports Registrar is informed of the election at least four weeks prior to the expected date of elections, which was yet to be done. Further, Chapter 8 of the AIBA By-laws require that a federation must inform AIBA at least one month before the election, which information shall be reviewed and approved before the election can take place.

28. Further, the Petitioners submit that BAK has violated their constitutional right against discrimination and their right of association by refusing to recognize them as members of the association and allowing them to participate like other affiliate members.

29. They Petitioners case was concluded by asking the following of the Tribunal:

i. To issue a permanent injunction restraining the Respondents, their servants, agents and/or any persons acting on their behalf or however from conducting any meetings or business of the Boxing Association of Kenya;

ii. To appoint a caretaker committee to take over the affairs of the Boxing Association of Kenya pending a free and fair election;

iii. General damages;

iv. Costs of the suit plus interest.

The Respondent's case

30. Ms. Kimiti, in response to the Petitioners claim to the legitimacy of the office bearers, stated that the BAK elections were in fact to be held in 2017 but were delayed due to lack of finances and challenges of transition after the enactment of the Sports Act, 2013. She stated further, that in addition to these, there were wrangles within the association and the aim was to move away from the wrangles and organize for an election in 2018.

31. It was the Respondent's contention that the legal basis for the officials continuing to remain in office was provided for in the AIBA statutes, but the same could not be located in the said statutes. They averred that the AIBA statutes do not provide for interim offices.

32. It was the Respondent's contention that Mr. Albert Matito had been part of the Executive Committee and was therefore also responsible for ensuring compliance with the Sports Act.

33. It was the Respondent's submission that the Council meeting held on the 24th August 2018 was the first step in ensuring compliance. Mr. Kiraithe stated that regarding the petitioner's allegation that they had been kicked out of the meeting was only because six delegates had showed up to the meeting, while the BAK Constitution allows only for three delegates. He stated that it was up to the Petitioners to decide which three delegates

34. Ms. Kimiti stated that MCBA was not an affiliate of the BAK, and that they had never presented their documents before the BAK. It was their submission that they first learnt of their status when they came before this Tribunal.

35. With regard to the suspension of Mr. Matito, Ms. Kimiti stated that he has been facing disciplinary action because he had convened a meeting on 24th July 2018 for the purpose of taking over the running of BAK. He expressed no faith in BAK and stated that he sees no future in BAK. She further stated that he is in fact from Kisumu, but is swearing an affidavit on Mombasa matters.

36. She further stated that he came to court knowing that there were internal mechanisms in place and that his actions were in bad faith. She stated that he is the architect of any disputes bedeviling BAK.

37. Mr. Kiraithe was emphatic that the dispute before this Tribunal is not a dispute regarding the welfare of the BAK, but a dispute entirely on elections.

E. DETERMINATION

38. Having taken into account the parties' pleadings and submissions, the Tribunal is now in a position to clearly formulate the issues for determination:

- i. Whether the Tribunal has the requisite jurisdiction to hear and determine the matter the matter at hand;
- ii. Whether the officials of BAK are legally in office;
- iii. The elections of new officials into the BAK.

i. Whether the Tribunal has the requisite jurisdiction to hear and determine the matter the matter at hand;

39. 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.

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

41. 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.

42. To begin with the Tribunal, established by section 55 of the Sports Act draws its jurisdictional powers from section 58 which provides the circumstances through which the matter may be determined by the Tribunal.

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

44. In the suit herein, the Tribunal's arbitral jurisdiction flows from section 58(b) of the Sports Act which 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.

45. 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.

46. This position is was stated by the Tribunal in its decision in **David Kadito v Sofapaka Sports Club** and also affirmed by the High Court (Mwita J) in **Dennis Kadito v Office of The Sports Disputes Tribunal & another [2017] eKLR**.

47. In this matter, at all three criteria have been met as the dispute is sports related in nature, the parties through their express consent and implied conduct have agreed to have the matter determined by the Tribunal and that the Tribunal has agreed to hear and determine the dispute.

48. The Tribunal therefore finds that it has competent jurisdiction to hear and determine this petition.

ii. Whether the officials of BAK are legally in office

49. Section 46(5) as read with Schedule II of the Sports Act, 2013 dictates that office bearers of sports organizations, such as BAK should hold office for not more than 4 years. Regulation 20 (6) of the Sports Registrar Regulations, 2016 provides that office bearers may hold office for a term of four years. Further, the BAK Constitution at Article 8.2.2 provides that the chairperson and any other

official shall hold office for a term not exceeding four years.

50. The Tribunal, in making its determination, is guided by the decision in **Mohammed Omar – Suing as Chairman & Treasurer of K.F.F Coast Branch vs Maina Kariuki Hussein Swaleh Mohamed M. Hatimy – sued as national officials of KFF (2004) eKLR** where Hon. Mwera J. stated

There is no great fun or pride in having a constitution, whatever the body, that cannot be adhered to. Such conduct merely breeds chaos as now seen in KFF for whatever reason or motive. The culture of being governed by a groups own rules and regulations as required and mandated must be seen and nurtured in any facet of a community's activities.

51. It is not in dispute that it has been over 4 years since the last election.

52. The Tribunal agree with Counsel for the Petitioners that even if the present executive council were to proceed with the resolutions arrived at including the promulgation of a new Constitution, this would be an act in futility given the status of the executive committee. The Tribunal need only remind the parties of the 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.***

iii. The elections of new officials into the BAK.

53. Regulation 20 (2) of the Sports Registrar Regulations requires that the Sports Registrar is informed of the election at least four weeks prior to the expected date of elections, which is yet to be done. Further, Chapter 8 of the AIBA By-laws requires federations to inform AIBA at least one month before the election.

54. It is not in dispute that the Respondents are yet to notify AIBA and the Sports Registrar as required.

55. The election contemplated for 16th November 2018 will therefore not be in compliance with the above, and will therefore be an exercise in futility.

F. CONCLUSION

56. The Tribunal is, however, alive to the challenges faced by Sports Organizations in organizing for elections such as financial constraints and the challenges encountered in transition to the Sports Act, 2013. It is therefore in consideration of this, as well as the parties' submissions that the Tribunal makes the following orders:

- a. The Respondents are prohibited from making any further decisions for BAK except those that relate to convening the elections;
- b. There shall be no elections held on 16th November 2018;
- c. A special general meeting shall be convened with immediate effect to plan for elections, to be held no later than sixty (60) days from today;
- d. The matter shall be mentioned on 4th December 2018 to monitor compliance with these orders and for further directions;
- e. Costs are reserved.

Dated at Nairobi this 6th day of November, 2018

Signed:

John M Ohaga CIArb

Chairman, Sports Disputes Tribunal

Signed:

Mrs. Mary Kimani

Mr. Gichuru Kiplagat



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