



**REPUBLIC OF KENYA**

**OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**APPEAL NO. 26 OF 2016**

**ROBINSON OWITI**

**VERSUS**

**KENYA GOLF UNION**

**DECISION**

**Hearing:** 8<sup>th</sup> April, 2016

**Panel:** John M Ohaga Chairperson

**Appearances:**

**Mr. Samson Mbeche for the Petitioner/Applicant;**

**Mr. Vincent Juma for the Respondent**

**Others:** Robinson Owiti – Petitioner;

Charles Farra - Former National Coach

Richard Wanjalla – Hon. Treasurer, Kenya Golf Union;

Jesse Mungai – Admin Manager, Kenya Golf Union;

David Waweru- Assistant Manager, Kenya Golf Union;

Muchau Githiaka- Vice Chairman, Kenya Golf Union;

**Opening**

1. Following my order of 7<sup>th</sup> April, 2016 requiring the parties to appear before me today, 8<sup>th</sup> April, 2016 10.00 a.m, both parties duly attended and were represented by Counsel. The Respondent had, to its credit, also filed a replying affidavit sworn by its Administrator, Mr. Jesse Mungai.

2. I therefore heard arguments from Counsel of both parties in respect of the competing positions.

3. The prayers sought in the application are already set out in the preliminary decision dated 7<sup>th</sup> April, 2016.

**For the Petitioner**

4. Mr. Samson Mbeche for the Petitioner repeated the facts set out in the Petitioner's affidavit sworn on 6<sup>th</sup> April, 2016 in support of his petition. It was his contention that the Petitioner had accumulated 196.20 points in the 2015 season and was ranked as number 4; that because four (6) players had been selected for the Zone 6 competition in Swaziland, the Petitioner was eligible for selection given his ranking. He further submitted that the Respondent had used some matches played in 2016 to ascertain the rankings and that this was not proper in view of the provisions of the Team Selection Policy and Procedure. It was his contention that only the rankings for 2015 should be taken into consideration when selecting a team for the Swaziland competition.

5. He further argued that the Respondent was taking improper advantage of the Petitioner's challenge to the disciplinary proceedings which were the subject of SDT Appeal No. 15 of 2015 to punish the Petitioner.

6. He therefore urged the Tribunal to include the Petitioner in the team selected to travel to Swaziland for the Zone 6 competition.

7. Upon the Tribunal's inquiry as to which player would be affected if the application was allowed, he identified the player as Geoffrey Kubwa whom he submitted had been ranked as number 8 in the 2015 GOTY rankings and therefore should not qualify for selection.

**For the Respondent**

8. Mr. Juma argued the case for the Respondent. He relied on the replying affidavit filed this morning and in particular identified two (2) issues which in his view precluded the Petitioner for eligibility for selection to the national team.

9. Firstly, he pointed out that the Petitioner was not in good standing with his home club Veterinary Laboratory Sports Club (VetLab) which had suspended him from the Club arising from his indebtedness in respect of two (2) club events and amounts owed to the Pro-Shop at the Club. He drew the Tribunal's attention to two (2) letters dated 11<sup>th</sup> November, 2015, 5<sup>th</sup> February, 2016 and 2<sup>nd</sup> March, 2016 which evidenced the Petitioner's suspension for a six (6) month period from 11<sup>th</sup> November, 2015 to 11<sup>th</sup> May, 2016.

10. Flowing from the suspension, the Petitioner had therefore been precluded from competing in three (3) events at the tail end of 2015 being the Manchester Salver, Uhuru Shield and Nyali Open.

11. The Petitioner's assertion that he had 196.20 points for 2015 was not therefore correct because the points indicated in the rankings annexed to the Petitioner's affidavit were points which the Petitioner had accumulated in the previous year 2014 and could not therefore be credited to him for 2015. In addition, because of the Petitioner's continuing suspension he had not competed in the four (4) tournaments played so far in 2016 being the Sigona Bowl, Mt. Kenya Championship, Muthaiga Open and Windsor Classic.

12. It was therefore Mr. Juma's contention that the Petitioner did not qualify to be considered for selection to the national team.

**Petitioner's Response**

13. In brief response, Mr. Mbeche argued that the suspension of the Petitioner from his home club was a minor issue relating to a debt which had in any event been cleared and should not therefore impede the Petitioner's eligibility for selection.

14. He conceded, however, that the Petitioner did not play in the last tournaments of 2015 and had not played in 2016 because of the suspension. It was his view, notwithstanding the foregoing, that the Petitioner was one of the best golfers in Kenya and that he should be selected in order to strengthen the national team's participation in the Swaziland competition; that the national team had

been performing poorly lately because of the poor selection policy adopted by the Respondent and this should be rectified by the Tribunal.

### **Consideration**

15. Having given consideration to the competing arguments, it must be borne in mind that what is before the Tribunal is an interlocutory application seeking an interim order and that therefore the Tribunal's consideration of the matter is on a *prima facie* basis.

16. There is no doubt that the matter falls within the jurisdiction of the Tribunal. Section 58 of the **Sports Act** provides as follows:

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.

17. The principles for the grant of an injunction or an interim order of any nature must be founded first and foremost on the applicant demonstrating some likelihood of success once the full merits of the case are considered. In this case, the Petitioner is required to satisfy the Tribunal that he is eligible for selection to the national team on the basis of the criteria set out in the Respondent's Team Selection Policy and Procedure.

18. The English decision in **Belcher v. British Canoe Union** (Sport Resolutions, 5 July 2012) is instructive in that it sets out the grounds upon which a selection decision can be challenged. The considerations are as follows:

i. The decision was not in accordance with the selection policy as published;

ii. The policy has been misapplied or applied on no good evidence and/or in circumstances where the application of the policy was unfair (for example, because someone with selectoral authority has given a categorical assurance to an athlete that the policy would not be applied);

iii. The decision-maker has shown bias or the appearance of bias or the selection has otherwise been demonstrably unfair; and/or,

iv. Where the conclusion is one that no reasonable decision-maker could have reached.

19. Further, the decision in **Belcher** accepted that the panel, "...*should not substitute our own judgment on the merits for those of the selectors [...] so long as selectors apply the policy properly, and do so honestly, fairly and reasonably, and take account of relevant factors [...] their decision must be accorded the outmost respect.*"

20. I consider that the principles set out in Belcer provide a good foundation for my consideration of this matter.

21. The Respondent's Selection Policy and Procedure sets out the following criteria:

**The National Team must consist of players who are:**

**a. Kenyan citizens;**

**b. Performing well in KGU and/or KGU approved competitions;**

**c. Kenyans studying/resident overseas and playing golf at a level that the KGU considers an acceptable standard**

**d. Available to play in the event concerned (no conflict with dates or visa requirements)**

**e. Members in good standing with the KGU and their home club and their home club must be of good standing in respect of the affiliation to the KGU.**

22. In light of Mr. Mbeche's concession (after I had allowed a brief adjournment for him to confer with his client) that the Petitioner had indeed been suspended by his home club, it is clear that the Petitioner would not have been eligible for selection notwithstanding his performance or ranking in light of clause ( e) above given his suspension.

23. This factor alone makes it unnecessary for the Tribunal to consider the question of his ranking, but I will do so nonetheless.

24. The Petitioner's argument is that only the rankings for 2015 are to be taken into consideration when determining the national team for a tournament in 2016. When I inquired whether this rule would still apply for a tournament taking place in October 2016, Mr. Mbeche responded in the affirmative. This of course cannot be the spirit of the criteria whose objective must be to ensure that the players selected to the national team represent the best players available at the time or as close as possible to the period of the competition in question.

25. The Petitioner has conceded that he did not play in the last three (3) tournaments of 2015 and has also not played in the first four (4) tournaments of 2016 because of his suspension. Clearly therefore the entire basis for the confidence exhibited in his application as to his standing and form is flawed.

26. Based on the facts placed before the Tribunal, it is apparent that the Petitioner has been unable to surmount the requirement to demonstrate a likelihood of success and the Tribunal is unable to accede to the prayers set out in his application of 6<sup>th</sup> April, 2016. The application is therefore dismissed.

27. I have given consideration to the question of costs and have been reluctant to impose an order of costs on the Petitioner whom, as I observed in the Preliminary Decision, was merely an athlete seeking to realize his aspirations to compete for his country. However, I am concerned that the Petitioner did not disclose or otherwise recognise that the issue of the suspension by his own club was material and would therefore have disqualified him from consideration by the Respondent for selection to the national team. If he had recognised this, it would have become self-evident that his application was doomed to fail. Instead, however, the Tribunal has had to sit on an emergency basis to hear the application and has required the Respondent to respond to the application at very short notice.

28. There must be some consequence and sanction imposed on a party who fails to give proper consideration to his own case before bringing it to a forum such as the Tribunal. For this reason therefore I am impelled to order that the Petitioner be condemned to pay the Respondent's costs in respect of the present application.

**DATED at NAIROBI this 8<sup>th</sup> day of April , 2016.**

Signed:

**John M. Ohaga**

## Chairperson, Sports Disputes Tribunal



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