



**REPUBLIC OF KENYA**

**THE JUDICIARY**

**OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**APPEAL NO. 10 OF 2018**

**KENYA PREMIER LEAGUE LIMITED.....APPLICANT/PETITIONER**

**-versus-**

**NICK MWENDWA.....1<sup>st</sup> RESPONDENT**

**PETRA DORIS.....2<sup>nd</sup> RESPONDENT**

**ROBERT MUTHOMI.....3<sup>rd</sup> RESPONDENT**

**FOOTBALL KENYA FEDERATION.....4<sup>th</sup> RESPONDENT**

**DECISION**

**Hearing:** 23<sup>rd</sup> May 2018

**Panel:** John M Ohaga, FCI Arb - Chairman

Njeri Onyango - Member

E Gichuru Kiplagat - Member

**Appearances:** Ms. Mary Bonyo instructed by the firm of Obura Mbeche & Co. Advocates for the Petitioner

Mr. Murunga and Ms. Matasi instructed by the firm of Simba & Simba Advocates for the Respondent

**Parties**

1. The Petitioner is affiliated to the 4<sup>th</sup> Respondent.
2. The 1<sup>st</sup> Respondent is the President of the 4<sup>th</sup> Respondent.
3. The 2<sup>nd</sup> Respondent is the Deputy President of the 4<sup>th</sup> Respondent.

4. The 3<sup>rd</sup> Respondent is the Chief Executive Officer of the 4<sup>th</sup> Respondent.
5. The 4<sup>th</sup> Respondent is the governing body that runs and manages football in Kenya.

### **Background**

6. The Application is brought under a Certificate of Urgency and a Notice of Motion dated 22<sup>nd</sup> May 2018 supported by the Affidavit of Jack Oguda.
7. The Application is brought against the backdrop of the interference of the scheduled international friendlies between the National Team against Swaziland on 25<sup>th</sup> May 2018 and the National Team against Equatorial Guinea on 28<sup>th</sup> May 2018 with the derby between Gor Mahia FC and AFC Leopards FC which was scheduled for 26<sup>th</sup> May 2018 at Bukhungu Stadium in Kakamenga County.
8. In response, the Respondent's filed and served their Replying Affidavit dated 23<sup>rd</sup> May 2018 sworn by the 1<sup>st</sup> Respondent.

### **The Petitioner's case**

9. The Petitioner sought to have an order of injunction issued against the Respondent's restraining them from interfering with, postponing, cancelling or in any other way preventing the Petitioner's 2018 season matches proceeding on 26<sup>th</sup> May 2018 and 27<sup>th</sup> May 2018 in different parts of the Republic of Kenya.
10. Their complaint is premised on the duty of both the Petitioner and Respondents to mutually agree on changes relating to the calendar of the football season through the auspices of the Joint Executive Committee (JEC) at least one full season prior to their implementation as provided for in the agreement dated 24<sup>th</sup> September 2015.
11. On 18<sup>th</sup> May 2018, the Respondents wrote a letter informing the Petitioner that they had called to camp the Senior National Team popularly known as '*Harambee Stars*' effective 21<sup>st</sup> May 2018 in preparation for 2 friendly matches against Swaziland on 25<sup>th</sup> May 2018 and Equatorial Guinea on 28<sup>th</sup> May 2018 and a Four Nation International Tournament in India from 1<sup>st</sup> June 2018 to 10<sup>th</sup> June 2018 which would necessitate postponement of key matches.
12. The Respondents actions sought to interfere with the Petitioner's calendar season by having the National team participate in friendlies outside the FIFA International Calendar.
13. They referred to a letter dated 13<sup>th</sup> January 2018 where CAF communicated an expectation that the current league concludes mid-October and as such the Petitioner's Clubs already have a very congested match schedule.
14. The Petitioner replied through a letter dated 21<sup>st</sup> May 2018 informing the Respondents of their inability to postpone any more League fixtures to accommodate matches outside the FIFA Co-ordinated International Match Calendar.
15. Despite the communication, the Respondents went ahead and issued a press conference on 21<sup>st</sup> May 2018 confirming the friendlies and thereby calling for postponement of various Respondents matches slated over the same period.
16. The Petitioner relied on the Tribunal's Decision in **Petition No. 41 of 2016** between the parties where the Tribunal issued a permanent injunction restraining the Respondents from interfering with the Petitioner's right to manage the Kenyan Premier League during the currency of the Agreement dated 24<sup>th</sup> September 2015.

### **The Respondents' case**

17. The Respondents averred that the 4<sup>th</sup> Respondent has a mandate as the affiliated association to both FIFA and CAF to run and manage association football in the Republic of Kenya and as part of its mandate, the 4<sup>th</sup> Respondent organizes matches for the

national teams.

18. The 4<sup>th</sup> Respondent is answerable to CAF and FIFA for the matches played locally including those delegated to other entities such as the Kenyan Premier League.

19. The 1<sup>st</sup> Respondent pointed out that the 4<sup>th</sup> Respondent has recently appointed a new coach for the 'Harambee Stars' and the coach requested for several build up matches before resuming the competitive fixtures for the Africa Cup of Nations (AFCON) in which Kenya is scheduled to play Ghana National Men's Team in September, 2018. Due to this, they entered into several agreements with various National Associations which include Swaziland, Equatorial Guinea and A Four Nation Invitational Tournament in India.

20. The 1<sup>st</sup> Respondent proceeded to state that the 4<sup>th</sup> Respondent notified FIFA and CAF who duly approved the matches between Harambee Stars and Swaziland and A Four Nation Invitational Tournament in India through a letter dated 13<sup>th</sup> May 2018 and 22<sup>nd</sup> May 2018 respectively. They later on informed the Petitioner of the approval and rescheduling and postponement of the matches through a letter dated 21<sup>st</sup> May 2018.

21. The 1<sup>st</sup> Respondent reiterated that the match between AFC Leopards and Gor Mahia are usually classified as high risk matches and the choice of the venue for the match had not met the approved security standards to host the match as stated in the affidavit of Mark Ouma, a certified match advisor. They also stated that AFC Leopards SC has since confirmed the fears of the 4<sup>th</sup> Respondent, that adequate security arrangements had not been made in this high risk feature as evident in a letter dated 23<sup>rd</sup> May 2018 addressed to the Petitioner.

22. The 1<sup>st</sup> Respondent stated that the 4<sup>th</sup> Respondent is an interested party in the security arrangements of the local matches as consequences may flow from the same that may affect it.

## **Evidence**

23. Due to the short notice in service of the Replying Affidavit of the Respondents', Ms. Bonyo who is counsel for the Petitioner requested the Tribunal to examine Mr. Jack Oguda, the CEO of the Petitioner, to respond and have an opportunity to reply to the affidavit by the 1<sup>st</sup> Respondent. There was no objection to it and they proceeded with the examination.

24. The witness was sworn and stated that matches are scheduled by the Governing Council at its first meeting in January. These matches are shared with the 4<sup>th</sup> Respondent because they need to consider their engagement in terms of CAF and also the National Team's engagement as stipulated in the FIFA Calendar. He went on to state that the friendlies scheduled on 25<sup>th</sup> and 28<sup>th</sup> May 2018 are not in the FIFA International Match Calendar.

25. The witness referred to the FIFA International Match Calendar 2018-2024 and stated that friendlies can be fixed during this window. They take into account those windows while drawing up the Petitioners fixtures and do not put in any League matches during that window.

26. The witness read the letter dated 18<sup>th</sup> May 2018 which required the Petitioner to postpone various matches and stated that he received the letter on Friday via email at 8:40 p.m. for the first time. He later on responded through a letter dated 21<sup>st</sup> May 2018 showing their inability to postpone any more League fixtures. He also referred to a letter by CAF dated 13<sup>th</sup> January 2018 forwarded by the 4<sup>th</sup> Respondent for them to consider to complete the League by mid-October. He stated that he did not receive any previous requests from the 4<sup>th</sup> Respondent for postponement.

27. With regard to safety concerns, the witness proceeded to state that the Petitioner has a safety and security committee which has passed the venue as secure. He indicated that AFC Leopards and Gor Mahia had played on January 28<sup>th</sup> 2018 and May 1<sup>st</sup> 2018 in Afraha Stadium in Nakuru.

28. He referred to a letter dated 23<sup>rd</sup> May 2018 which he received at around eleven o'clock this morning requesting the postponement of the AFC Leopards SC v Gor Mahia Match to be played on 26<sup>th</sup> May 2018 at Bukhungu Stadium in Kakamega. He further referred to a Press Release dated 21<sup>st</sup> May 2018 by AFC Leopards confirming the match to be played at Bukhungu Stadium

and in light of this they would not release their players for the Harambee Stars friendlies.

29. He proceeded to refer to Rule 3.6 of the Rules of Kenyan which requires that a request for postponement be advised at least seven days prior to the match. He stated that since he received the letter today it is about 3 days to the match.

30. He went on to state that according to their register, Gor Mahia FC has 29 registered players and AFC Leopards has 28 registered players. He then referred the register of players for the Kenya v Swaziland and Equatorial Guinea match in which there are five players from Gor Mahia while AFC Leopards has 4 players in the Harambee Stars Camp. There was no need for the postponement of the matches even if players were released and that the friendlies can still go on without disrupting the League.

31. The witness referred to The FIFA Regulations on the Status and Transfer of Player particularly in Release of players to association teams under principle no. 2 and stated that regarding the friendlies under consideration it is not mandatory for players to release players by the clubs because it is not a FIFA Integrated Match Date.

32. Upon cross examination by Mr. Murunga, the witness stated that this is not the first match that has been postponed and that the Petitioner is not opposed to the Harambee Stars from playing these friendly matches. He also stated that he is aware of matches played outside the international calendar for example the match between Nigeria and Athletico hence it is not unusual for football matches to be played outside the FIFA International Calendar.

33. He then stated that the issue of security is very important and would be taken into account by the Petitioner. He stated that the first security meeting was last week and he could not confirm whether the security meeting took place today.

34. He confirmed that it is the responsibility of the hosting club to make security arrangements. He also stated that the Petitioner has not incurred any costs in relation to this match.

35. The Respondents produced the 1<sup>st</sup> Respondent as their witness who was sworn and examined. He stated that in football there are several classes of matches and in Kenya the match between Gor Mahia and AFC Leopard FC is a class A fixture which means it is of utmost importance in terms of security and execution because of the rivalry and the expected number of people who might want to attend the game.

36. He stated that the Respondents are not satisfied with the fixture proceeding because they invited CAF to inspect Bukhungu Stadium and declined to approve it for Class A matches because of several security concerns.

37. He pointed out the incident in 2010 at Nyayo Stadium to which the 4<sup>th</sup> Respondent received a reprimand and a ban so that the stadium could not be used again but later on they got an approval to use it.

38. He stated that the Respondents became aware of the venue about three weeks ago and that the Respondents have not sanctioned Gor Mahia and AFC Leopards FC to proceed at Bukhungu Stadium.

39. Upon cross examination, the witness stated that he was aware of the windows in the FIFA Calendar. He stated that FIFA has approved these friendly matches. He confirmed that it is not mandatory for players to be released during the window and clubs have a prerogative to release players.

40. He stated that they were aware of the match between Gor Mahia and AFC Leopards by the time we were scheduling the international friendly. He confirmed that they knew that the international friendly would interfere with the League.

41. The security issues regarding the match are the sitting of the fans are not meant to be together, the seating arrangement is for about five thousand people while the attendance is for thirty thousand and the entry and exit are for different areas for example there are only three gates as opposed to the recommended seven gates in such a match. It is a combination of structure and the fans and players that may clash.

42. He confirmed that Gor Mahia and AFC Leopards have previously met and there have been no security incidents.

43. He confirmed that he was aware of the decision in **Petition No. 41 of 2016** in which the Tribunal stated that Petitioner had the right to manage the teams without interference.

44. He stated that he has been talking with the Chairman of the Petitioner that they needed to reorganize that match prior to the Petitioner filing this Application.

45. He confirmed that there was no mention of the issue of security in the letter dated 18<sup>th</sup> May 2018.

Mr. Muruga highlighted its submission as follows:

46. The issue is the match between AFC Leopards and Gor Mahia and security is the only concern of the 4<sup>th</sup> Respondent in relation to this match hence it is the sole reason as to why the 4<sup>th</sup> Respondent sanctioned the match.

47. He urged the Tribunal to be mindful of the issues of security and that it should take cognizance of the security of the venue.

### **Discussion**

48. The Tribunal has this afternoon been treated to the sequel of the long running feud in the fractious relationship between the Kenya Premier League Limited and Football Kenya Federation (FKF).

49. The latest conflict arises from the directive by FKF in its letters dated 18<sup>th</sup> May 2018 addressed to KPL in which FKF requested the postponement of various Kenya Premier League matches scheduled for 26<sup>th</sup> and 27<sup>th</sup> May 2018 in order to allow the National Team, '*Harambee Stars*' to play two friendly matches against Swaziland and Equatorial Guinea on 25<sup>th</sup> and 28<sup>th</sup> May respectively.

50. The Kenya Premier League Limited in response and relying on the FIFA Regulations with respect to the release of players to association teams pointed out that these international friendlies were not within the FIFA Co-ordinated International Match Calendar and for that reason they were unable to accede to the request to postpone any League fixtures. It was KPL's position therefore that the League matches would have to proceed if KPL was to complete the League Calendar by mid October 2018 as required by CAF.

51. On 21<sup>st</sup> May 2018, FKF wrote again to KPL but this time narrowed its focus to the game between AFC Leopards vs Gor Mahia FC and required that this match which was scheduled for Saturday, 26<sup>th</sup> May 2018 be postponed to a later date. The reason given for the postponement was to enable the National Team to honour the international friendly matches.

52. Aggrieved by what was no longer a request but now was a demand, KPL filed proceedings before the Tribunal whose effect was to seek to challenge the requirement by FKF that various matches in the League be postponed to accommodate the two international friendly matches. In its response before the Tribunal, FKF has raised for the first time the issue of security with respect to the proposed venue, which is the Bukhungu Stadium in Kakamega and this issue has taken center stage in the interrogation of the two witnesses who testified before the Tribunal. Mr. Jack Abuda and Nick Mwendwa testified in Court.

53. In the Tribunal's considered view, the matter before it is one of principle, which principle is premised on the relationship between KPL and FKF. In **Petition No. 41 of 2016**, between the same parties, the Tribunal explored at length the structure of the agreement between the KPL and FKF with respect to the running of the Kenya Premier League. The Tribunal established that FKF had delegated to KPL the responsibility of running of the Kenya Premier League and the Tribunal determined that such responsibility could not be interfered with during the currency of the agreement between the parties. If we accept that that is one pillar of the relationship which governs the running of football in Kenya we must also recognize that another pillar is the calendar published by FIFA which allows certain windows to facilitate activities of the National Team.

54. Outside of the designated windows, the KPL, FKF and Clubs relate on the basis of agreement, negotiation and good faith so that if FKF wish to schedule an international friendly match for which it no doubt requires clubs to release players, then this must be on a voluntary basis; if it requires KPL to postpone league matches this must also be negotiated and agreed between the relevant parties. This means that outside the formal instruments which regulate the structure of football in Kenya, no party can impose on the

other and it is for this reason the agreement between KPL and FKF requires the two parties to collaborate closely and indeed sets out a Joint Executive Committee at which forum the two parties are required to discuss and agree.

55. Having set out the foregoing, the Tribunal has come to the conclusion that the issue of security is a feigned issue brought in conveniently to justify the postponement of the Derby between Gor Mahia and AFC Leopards. This is not to say that the issue of security is not important. It is of the gravest importance because life and limb have been lost arising from inadequate security arrangements in other matches as this particular one. However, in this particular case it is not for the Tribunal to determine whether the security arrangements are inadequate because there are specialized agencies whose responsibility it is to assess and decide this issue. The Tribunal's role is to restate the contractual position entered into by the parties themselves which is that FKF has delegated to KPL the responsibility for the running of the League. It is therefore KPL's responsibility to determine whether or not this match should proceed or be postponed taking into consideration the stated objective of preparing the National Team, the security concerns that have been raised in respect to Bukhungu Stadium and the time frame within which the League must be completed. The determination of this question by KPL does not in any way impede the needs of the National Team because the two clubs are well able to decide whether or not they can honour the fixture while still providing the best players to the National Team. In the result, FKF will await KPL's final decision having taken into consideration the factors identified above and any other factors.

Having come to this conclusion no. h of the Notice of Motion dated 22<sup>nd</sup> May 2018 is granted.

The Applicant is awarded costs.

**Dated at Nairobi this 23<sup>rd</sup> day of May 2018**

**Signed:**

**John M Ohaga FCI Arb**

**Chairman, Sports Disputes Tribunal**

**Signed:**

**Njeri Onyango**

**Gichuru Kiplagat**



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