



REPUBLIC OF KENYA

THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

APPEAL NO 6 OF 2018

MAQBULL ABDI KARIM.....APPLICANT

-versus-

GOR MAHIA FOOTBALL CLUB.....RESPONDENT

(SUED THROUGH THE CHIEF EXECUTIVE

OFFICER LORDVICK ADUDA)

DECISION

Hearing: 22nd May, 2018

Panel:

1. John M Ohaga, FCI Arb; CI Arb – Chairperson
2. Ms. Mary N Kimani - Member
3. Gabriel Ouko – Member

Appearances

1. The Applicant was represented by Ms. Linda Otieno, Advocate instructed by the firm of Wambilianga, Majani & Associates;.
2. The Respondent is represented by Mr. Ezekiel Munyua, Advocate instructed by the firm of Rachier & Amollo;.

A. PARTIES

1. The Claimant describes himself as a male adult of sound mind and a professional footballer applying his trade in Kenya.
2. The Respondent is a football club established in Kenya which participates in the Kenya Premier League and other authorized

leagues as may be from time to time.

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. The following matters are not in dispute:

a) The Respondent employed the Claimant vide a player agreement contract for a period of 4 years commencing on 12th January, 2017;

b) From June 2017, the Respondent sent the Claimant out on loan to various clubs being Wazito FC, Nakumatt FC, Coast Stima FC and Modern Coast FC;

c) At the conclusion of the loan spells a dispute arose between the Claimant and Respondent with regard to the Claimant's playing time and attendance for training;

d) The matter has been filed at the Player's Status Committee under the Football Kenya Federation ('**FKF**') but to date no hearing has been conducted by the Committee.

C. PROCEDURAL HISTORY

5. On 11th April, 2018, the Claimant filed his claim against the Respondent on the grounds that he had been the subjected to discriminatory acts by the Club. This, he stated, was due to the fact that he had limited playing time in the team and being isolated from the rest of the team.

6. He also claimed that the Respondent violated the terms of the contract by denying him his salary for the months of January to April 2018 as well prematurely terminating the contract.

7. The Claimant prays that the Tribunal finds that the Respondent breached the terms of the player agreement contract and directs that he be paid the sums owed to him.

8. On 15th May 2018 the Respondent filed its Memorandum of Response rebutting the claims raised against it. The Respondent stated that the Claimant was indisiplined and had absconded his duties as required under the terms of the agreement thus necessitating the termination of the contract.

9. The Respondent further filed its Notice of Preliminary Objection challenging the Tribunal's jurisdiction.

10. The Tribunal considered the Preliminary Objection and ruled that the same will be heard together with the merits of the matter at the hearing.

11. The matter was heard on 22nd May, 2018. Both parties presented their oral submissions and called one witness each. The Tribunal adjourned the matter to deliberate the matter and make a conclusive decision.

D. PARTIES SUBMISSIONS

12. In their written and oral submissions, the parties addressed the issues for determination. The Parties' submissions, in essence, may be summarised as follows;

· The Petitioners case

13. Ms. Otieno made the oral submissions on behalf of the Claimant.

14. She began by stating that the claim was for breach of the player agreement contract that was fixed for a 4-year term beginning 12th January, 2017.

15. She submitted that during the 2017-2018 season, the player had been denied the opportunity to train and also denied his dues as set out in the contract. She further stated that the Respondent provided no reasons for these acts.

16. She submitted that the Respondent's Chairperson was informed of the Claimant's complaints through a letter dated 14th February, 2018 but no action was taken.

17. With regard to the preliminary objection, Ms. Otieno conceded that clause 15 of the contract provides for any dispute between a player and the club to be resolved through arbitration or in terms of the FIFA Regulations on the Status and Transfer of Players.

18. She, however, submitted that the Tribunal had jurisdiction as the Claimant had exhausted all the other remedies available to him.

19. The Tribunal was informed that the Claimant had filed a complaint with the Player Status Committee (hereinafter referred to as 'the Committee') on 8th March, 2018 as this is the dispute resolution entity recognized by FIFA and Football Kenya Federation (FKF).

20. She stated that this Committee was inoperative and as such could not provide an avenue for the resolution of the dispute.

21. Ms. Otieno asked that the Tribunal be guided by its decision in **Timothy Wanyonyi vs AFC Leopards** where it was held that in the absence of a dispute resolution mechanism in the FKF framework, such a dispute would be resolved by the Tribunal.

22. She further submitted that the FIFA regulations prohibit a dispute between a player and a club from being referred to a civil court and as such she averred that the Tribunal was the only avenue available to the Claimant.

23. Ms. Otieno proceeded to also call the Claimant, Maqbull Abdul Karim, as a witness. The Claimant adopted his affidavit of 23rd April, 2018 and this was adopted as his evidence in chief.

24. The Claimant was then cross examined by Mr. Munyua. During cross examination the following points stood out from the Claimant's responses:

- i. He admitted to being signed as a right fullback in January 2017;
- ii. He did not understand the expectation placed on him by the contract at the time of signing;
- iii. He did not read the contract; he alleges he was not given time to go through it before signing;
- iv. He stated that he was never given a chance to play for the Respondent Club;
- v. He did not spend more than two days at the various clubs to which he was sent out on loan;
- vi. He stated that he was still a player of the Respondent as his contract had not yet been terminated.

25. During re-examination, the Claimant stated that the contents of the contract were not explained to him by the Respondent. He also reiterated that he always attended training up until December 2017 when the Respondent began withholding his dues.

· **Respondent's Case**

26. The Respondent's submissions were made by Mr. Munyua who began making his submission in support of his preliminary

objection by stating that the Tribunal has no jurisdiction to hear this matter.

27. He submitted that the matter should be resolved by arbitration or the mechanisms outlined in the FIFA regulations as outlined in clause 15 of the contract.

28. He averred that the Claimant has not submitted any evidence to show that it has exhausted the avenues provided in Clause 15. He further submitted that the Claimant has not made any efforts to pursue the matter at the Player Status Committee after it filed its case.

29. Mr. Munyua further stated that Section 58 of the Sports Act does not provide default jurisdiction to entertain the matter and therefore the Tribunal has no jurisdiction to hear the matter.

30. He then called one witness, Mr. Jolawi Okello, who was the team manager of the Respondent. Mr. Okello adopted his replying affidavit dated 22nd May, 2018 as his evidence in chief.

31. During cross examination, he stated that as team manager he is the link between the players and the executives of the club. He also stated that the club currently has 27 players and maintaining discipline is integral to the performance of the club.

32. He stated that the Claimant's case was one of indiscipline on the part of the player as he missed training sessions and refused to go on loan resulting in the termination of his contract.

33. Mr. Okello stated that it was made clear to the player that he would only play if he matched the standards and expectations placed on him by the Respondent in terms of the contract.

34. He stated that the Claimant did not meet these standards and further refused to go on loan to improve on his skills. Adding the fact that the Claimant has refused to train the Respondent had no other option but to terminate the contract.

35. During cross examination he stated that the Claimant had failed to meet the standards expected of him in training and after being assessed by the coaches it was deemed that his development would be best served by going out on loan.

36. He further stated that despite being afforded a chance to redeem himself by going out on loan, the Claimant squandered his opportunities by refusing to train and play for the teams he was loaned out to.

37. Mr. Okello stated that due to the Claimant's indiscipline and failure to attend training sessions, the Respondent had no alternative but to terminate the Claimant's contract as per Clause 16 of the agreement.

38. He also stated that it was the Respondent's policy that players are only paid if they attend training. Since the Claimant last attended training in December 2017, he was not entitled to any payments from January 2018 to the date his contract was terminated.

39. During re-examination, Mr. Okello stated that there is no automatic right of entry to the first team as the best team was selected by the coaches according to the player's performance during training.

40. Mr. Munyua concluded his submissions by reiterating his averment that the Tribunal had no jurisdiction to hear the matter and that the claim had no merit and should therefore be dismissed.

E. DETERMINATION

41. Having taken into account the parties' pleadings and submissions, the Tribunal is now in a position to clearly formulate the issues for determination as will be discussed hereinunder.

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

42. The Tribunal's jurisdiction to entertain this matter was challenged through the Respondent's preliminary objection dated 4th May 2018.

43. The Tribunal, with the parties' consent, decided to determine the preliminary objection at the hearing together with the merits of the matter.

44. To begin with, the Tribunal is alive to the resounding principle of law that without jurisdiction, a dispute resolution body such as this Tribunal acts in vain.

45. This position was pronounced by the classic Court of Appeal in the case of **The Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited (1989) KLR 1** where Nyarangi J stated that:

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

46. This position has been reiterated in In **Kakuta Maimai v. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal stated as follows:

'So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue is a desideration imposed on courts out of decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul-de-sac.'

47. It is on this basis that the Tribunal will interrogate the Respondent's preliminary objection to determine whether it is clothed with the appropriate jurisdiction to hear this matter.

48. The focal point of the Respondent's objection to the Tribunal's jurisdiction was based on the aversion that the Claimant had not exhausted the dispute resolution avenues stipulated at Clause 15 of the contract.

49. Clause 15 of the contract reads:

"Any dispute on this contract is to be settled by Arbitration in accordance to the Arbitration Act 1995 or any statutory modification or re-enactment therefore for the time being in force or in accordance with FIFA Regulations for the Status and Transfer of Players"(Emphasis ours)

50. The Respondent submitted that the Claimant had not initiated any arbitral proceedings with regard to this matter. It was further submitted that the Claimant had not exhaustively prosecuted its case before the Player Status Committee.

51. The Respondent also argued that in the event that the Claimant exhausted the avenues provided under Clause 15 of the contract, the Tribunal would still not have been the appropriate forum to hear the matter as the issue in contention is an employment dispute which does not fall under the Tribunal's jurisdiction as per Section 58 of the Act.

52. It is the Respondent's submission that if the forums under Clause 15 of the contract had indeed been exhausted the matter should be then heard by the Employment and Labour Relations Court (hereinafter referred to as the 'ELRC').

53. The Respondent submitted that the rationale for this argument is that all employment disputes fall under the jurisdiction of the ELRC as set out in section 12(1)(a) of the Employment and Labour Relations Court Act which states:

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance

with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including:

(a) disputes relating to or arising out of employment between an employer and an employee:

54. In response to the Respondent's preliminary objection, the Claimant submitted that it had exhausted the forums available to it under Clause 15 of the contract.

55. This was due to the fact that he had initiated proceedings before the Player Status Committee which has not issued any directions or communication since the matter was filed on 8th March, 2018.

56. It was the Claimant's submission that as the committee has failed in its mandate to adjudicate on the matter, the only avenue for redress available is a decision by the Tribunal on the dispute.

57. It was further submitted that the FIFA regulations prohibit a dispute between a player and a club from being referred to civil court and as such the Claimant argued that the Tribunal was the only avenue available to him.

58. Considering the parties submissions, the Tribunal holds that it has requisite jurisdiction to determine this matter.

59. The Tribunal, being a creature of statute, must derive its jurisdiction from the Sports Act. This position has been established by the Supreme Court in **Samuel Kamau Macharia -vs- Kenya Commercial Bank Limited & 2 Others**, where it was stated that:

'A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.'

60. Section 58 of the Sports Act sets out the jurisdiction of this Tribunal 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.

61. From the reading of the Act, the Tribunal finds that it has appropriate jurisdiction as provided under section 58(b) of the Act given that the dispute herein is arises from a sporting contract.

62. Furthermore, the parties do not have other avenue of recourse therefore the Tribunal is justified in taking conduct of this matter and resolving this dispute.

63. In this respect, the Tribunal reiterates its holding in **Dennis Kadito -vs- Sofapaka FC**^[1] in respect of Section 58(b) of the Sports Act where it stated that:

"However, a reading of Section 58(b) demonstrates that it is not sufficient that the matter before the Tribunal should be a 'sports-

related dispute’; the parties to the dispute must also agree to refer the matter to the Tribunal and the Tribunal must agree to hear the matter. It is clear that there is therefore a three (3) stage process for establishing the jurisdiction of the Tribunal under Section 58(b). Each limb of the three (3) stage process must be satisfied and each stage depends on a positive answer to the prior stage.”

64. In **Jacob Mutungi & Others vs. Gor Mahia Football Club**, the Tribunal had the opportunity to render a considered decision on a similar preliminary objection and in doing so traversed its various decisions in order to discern the philosophy and jurisprudence that the Tribunal has sought to develop in construing objections of this nature.

65. So, in **Williamson versus Football Kenya Federation**, the Tribunal had this to say:

‘The obligation upon the Tribunal is to ensure that where there is absence of a mechanism for legal redress, the Tribunal acts as the avenue subject to the provisions of the Sports Act, where legal redress can be sought.

Bearing in mind the provisions of Article 159(2), Article 48 of the Constitution as well as section 59 of the Sports Act, and in light of the absence of a valid arbitration clause, we find that this Tribunal has jurisdiction over the dispute herein.’

66. And in **Peter Omwando versus Football Kenya Federation**, the Tribunal in dismissing a similar preliminary objection expressed itself as follows at paragraph 38:

‘The Tribunal has declared severally its strong preference for sporting organizations to resolve their disputes within local structures first before approaching this Tribunal. The Tribunal, however, noted in this instance that the pathway to having the dispute resolved within the local committee was not clearly defined.’

67. **Jonathan Mwaniki versus Chemilil Sugar** also concerned a dispute relating to the termination of employment contract for a football player. The Tribunal stated as follows in dismissing the preliminary objection:

*‘Admittedly, Section 58(b) is more problematic because it effectively requires the parties to confer jurisdiction upon the Tribunal. The Tribunal discussed Section 58(b) at some length in the case of **Dennis Kadito vs Sofa Paka Sports club** and again in the case of **Bernard Ogutu vs Gor Mahia FC...***

In this case, the FIFA Regulations on the Status and Transfer of players becomes material. Those regulations are required to be incorporated into the constitutions of football governing bodies worldwide and apply to players participating in organized football either as amateurs or professionals...

Once resort to the ordinary courts of law is excluded then the remedy suggested by counsel for the Respondent which is resort to the Employment and Labour Relations Court ceases to be available and therefore is not an efficacious alternative...

The Tribunal does not consider that it is in the interest of justice to leave such a party without a remedy and for this reason the preliminary objection is declined. The Tribunal will proceed to hear the merits of the claim.

68. The thread that flows through all these decisions is the Tribunal’s undoubted view that where a remedy provided to an athlete is ineffective or ineffectual or involves resort to a municipal court, the Tribunal will accept jurisdiction in order not to leave an athlete or sportsman without a remedy or otherwise offend the principles which most international sporting organizations have put in place which prohibits sporting disputes from being ventilated in courts of law.

69. The Tribunal also has regard to the Second Schedule to the Sports Act, 2013 (‘the Act’) which *inter alia*, requires sporting organizations to designate the Tribunal as the dispute resolution forum for sporting disputes. The Respondent is undoubtedly a sports organization as defined under Section 46 of the Act and is required under the Second Schedule to the Act to put in place a constitution which conforms to the requirements set out in the Sports Disputes Tribunal policy and ‘*rules for sports disputes resolution*’. It goes without saying that this is a statutory edict which would override any contractual provisions entered into by the parties.

70. The Tribunal therefore finds that it must exercise its jurisdiction in this matter as a matter of necessity in order to maintain order

and justice in the sporting fraternity.

71. We take cognisance of the fact that the Respondent has voiced opposition to this matter being handled by the Tribunal. Whilst rebutting this position, the Claimant submitted that the Tribunal ought to accept jurisdiction on the basis that he had exhausted all available internal dispute resolution mechanisms

72. Upon considering the parties submissions, the Tribunal has concluded that the avenues of arbitration and resolution under the FIFA Regulations for the Status and Transfer of Player have been exhausted by the Claimant.

73. The Tribunal finds that FIFA and by extension the Player's Status Committee has limited jurisdiction to only deal with disputes between clubs and international players as stated in Regulations 22 and 23 of the FIFA Regulations for the Status and Transfer of Player.

74. Therefore, as the matter for determination is a dispute between a national club and a domestic based player, the FIFA regulations do not take effect.

75. The Tribunal is aware that the FKF dispute resolution committee is designated as a body competent to take conduct of disputes between clubs and players as stipulated in Article 52 of the FKF constitution which states that:

"The Players' Status Committee shall set up and monitor compliance with transfer regulations in accordance with the FIFA Regulations for the Status and Transfer of Players and determine the status of Players for various competitions of FKF."

76. However, the Claimant has provided this Tribunal with sufficient evidence to demonstrate that this Committee is ineffective and the whilst the Respondent has failed to demonstrate the efficacy of the Committee as a competent dispute resolution forum for resolving the dispute or the assertion that the Committee is non-existence.

77. In the absence of a clear, distinct and reasonable avenue for dispute resolution being available to the Claimant, this Tribunal finds that it is in the interest of justice that it determines this matter.

78. It is important to note that that this Tribunal does not merely sit to hear and determine matters placed before it, but its ultimate purpose is to ensure that in its decision-making processes, sports are harnessed for development, and that it strengthens the administrative structures established in the sports sector.

79. It is on this basis that the Tribunal finds that it has jurisdiction to hear and determine the merits of this case.

ii. Whether the Claim has any merit

80. The Claimant submitted that the Respondent owed it Kshs. 2,340,000.00 plus training allowances being unpaid dues and lost income as a result of the premature termination of the contract.

81. This claim is based on the allegation that the Claimant was subjected to discriminatory treatment which included being denied an opportunity to train with the team as well having his contract being unjustly terminated.

82. The Respondent, through the testimony of its Team manager Mr. Jolawi Okello rebutted the claims made against it.

83. The Tribunal learnt from Mr. Okello's testimony and sworn affidavit that the monthly payments and allowances were subject to the player attending training and matches as required by the coaching staff.

84. It also came to light that the Claimant had failed to perform to the expected standards and as a result he was sent out on loan during the 2017 season to improve his skills and further his development.

85. At the various loan clubs the Claimant was indisciplined and failed to perform which led the loan clubs not retaining him in their

squads. When he was dismissed from Modern Coast FC, his last loan club, the Claimant absconded his duty by failing to attend training sessions and vanished without any communication to the Respondent only to resurface at the start of the 2018 season demanding to be included in the squad.

86. In light of the Claimant's misconduct and indiscipline the Respondent terminated the Claimant's contract under Article 6 of the Player Agreement Contract which states:

"If the player is guilty of any serious and persistent misconduct and continued poor performance in the field of play, he shall be liable for suspension or termination of the contract sighting grounds of supporting just cause" (FIFA Article 15 – Regulation of Status and Transfer of Players)."

87. Given the Claimant's failure to attend training sessions or utilize his loan chances whilst disagreeing with the coaching staff and management of the Respondent club, the Tribunal finds that the Claimant's insubordination and misconduct is fertile grounds upon which termination of the contract took place under Clause 6 aforesaid. Every sportsman must appreciate that discipline is at the core of every sporting endeavour and in the absence of such discipline, there is no basis upon which a sporting contract can be sustained.

88. It is on this basis that the Tribunal finds that the Respondent was justified in terminating the Claimant's contract.

F. CONCLUSION

89. Accordingly, having reached the conclusion that it has, the Tribunal consequently issues the following orders:

- a) The Preliminary Objection dated 15th May, 2018 is disallowed;
- b) The Tribunal finds that the Respondent did not breach the player agreement contract by terminating the agreement;
- c) The reliefs sought in the Statement of Claim dated 11th April, 2018 are denied;
- d) Each party shall bear its own costs.

Dated at Nairobi this 20th day of *November, 2018*

John M. Ohaga, Chairperson

Ms. Mary N. Kimani, Member

Gabriel O Ouko, Member

[\[1\]](#) Sports Disputes Tribunal Appeal No. 23 of 2016



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