



**REPUBLIC OF KENYA**

**THE JUDICIARY**

**OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**PETITION No. 25 OF 2016**

**PETER OMWANDO suing as the secretary of SHABANA FC.....PETITIONER**

**VERSUS**

**NICK MWENDWA & ROBERT MUTHOMI being sued as President &**

**CEO OF**

**FOOTBALL KENYA FEDERATION.....RESPONDENT**

**DECISION**

**Hearing:** 5<sup>th</sup> April, 2016

**Panel:** Mr. John M Ohaga Chairperson

Mrs. Njeri Onyango Member

Ms. Maria Kimani Member

**Appearances:** Mr. Wahome Njagi for the Petitioner

Ms. Mitei for the Respondent

**The Parties**

1. The Petitioner, Peter Omwando filed this Petition on 10<sup>th</sup> March, 2016 under certificate of urgency. He states that he brings the suit as the Secretary of Shabana Football Club ('**Shabana**'). Shabana is stated to be a member of the Respondent organization that participated in the 2015 season FKF National League.

2. The Respondent is the organization in charge of running the affairs of football in the country. The Respondent is guided by *inter alia* its own Constitution, the FIFA Statutes and the Rules of Kenyan Football.

**The Petitioner's Case**

3. The Petitioner seeks orders as follows:

- i. Shabana FC be reinstated back to the National Super League;
  - ii. A permanent injunction be issued to the Respondents restraining them from relegating Shabana FC from the National Super League;
  - iii. Any other relief the Tribunal may deem fit to grant.
4. The Petition was filed together with a Notice of Motion dated 9<sup>th</sup> February, 2016 which prayed for orders similar to those in the Petition. The Petition and application are supported by the annexed Affidavit of Peter Omwando sworn on the 9<sup>th</sup> February, 2016. By leave of this Tribunal a supplementary affidavit by Peter Omwando sworn on 4<sup>th</sup> April, 2016 was also filed.
5. At the first hearing of this matter on 15<sup>th</sup> March, 2016, Ms. Mitei for the Respondent raised a preliminary objection in regard to the Petition on the grounds of lack of jurisdiction by the Tribunal on the basis that the Petitioner had not exhausted available internal mechanisms of appeal before filing this Petition and that the Tribunal under the provisions of Section 58 of the Sports Act is an Appellate body. The objection was heard on 22<sup>nd</sup> March, 2016 and the Tribunal rendered its decision dismissing the objection on the same date. A written decision setting out the reasoning was served upon the parties on 5<sup>th</sup> April, 2016. The Petition was heard on the same date.
6. The Petitioner argues that it participated in the 2015 National Super League and finished at position 10 of the 18 team league. It relies on the annexure PO-1b. The table dated 12<sup>th</sup> November, 2015 under the FKF Premier League letterhead sets out the teams-standing in that League, showing the games played, the points earned and final standing. Shabana Football Club is at No. 10. The last three teams are Moyas, St. Josephs and Finlay's.
7. Further, the Petitioner argues that according to annexure PO-2 (the Agreement between FKF and the clubs regarding participation in the FKF Premier League dated 23<sup>rd</sup> February, 2015) at clause 5 (b), the FKF has the power to relegate three (3) teams from the KPL League and promote three (3) teams from the second tier league. The grounds for removal from the FKF Premier League are set out at clause 5(e) as follows:
- a. Relegation;
  - b. Bankruptcy; or
  - c. Bringing the game into disrepute as per the Laws of the Game.
8. The Petitioner referred the Tribunal to Clause 2.4 of the Rules of Kenyan Football approved by the FKF NEC on 18<sup>th</sup> February, 2015 (**'the Rules of Kenyan Football'**). It stipulates as follows:
- 2.4. Failure to Play Matches A club which fails to honor three league matches in the same season without providing written explanations acceptable to the committee will be suspended for the rest of the season, will be relegated to a lower league for the next season and may face other disciplinary action.'**
9. In respect of the above mentioned clause, the Petitioner thus argues that it did not flout any of the foregoing and it is not aware of the grounds of its relegation and therefore its purported relegation is illegal and had no justifiable cause.
10. In support of its assertion of illegal relegation, the Petitioner argued that it was not granted a hearing before the decision was taken contrary to FKF Rules of Kenyan Football. This is despite its letter of 26<sup>th</sup> February, 2016 ('PO-4') to FKF where they asked for a confirmation of rumors in social media regarding the relegation of Shabana FC and asked for reasons for the relegation within reasonable time.
11. The Petitioner further states that it received a letter dated 2<sup>nd</sup> March, 2016 addressed to all secretaries of National Super League, National Division 1 and Division 2 clubs to attend a meeting on 8<sup>th</sup> March, 2016 at the FKF goal project at Moi Stadium Kasarani. The Agenda thereof *inter alia* touched on the 2016 season, Protests/Appeals and other disciplinary matters as well as promotion and relegation.

12. The Petitioner informed the Tribunal that it understood the above invitation to be an opportunity for it to be heard in regard to its grievance in respect of rumours of relegation. However, it was stated in the submissions that the Petitioner's representative, Peter Omwando was prevented from entering the meeting venue both in the morning and afternoon. Thus they argued, they were unfairly denied audience as they had hoped to discuss the issue of relegation and present their protest.

13. Regarding the grounds for relegation, the Petitioner submitted that contrary to the contents of the letter of 18<sup>th</sup> February, 2016, it did not fail to honor 3 matches but conceded to missing 2 matches only. The Petitioner pleaded that the FKF Competition Commission ordered a replay on 8<sup>th</sup> November, 2015 but St. Joseph FC boycotted the replay and as such Shabana FC was awarded the game points.

14. In response to the allegation of financial difficulty set out in the letter of 18<sup>th</sup> February, 2016 the Petitioner at paragraphs 9 and 10 of the supplementary affidavit the Petitioner states that the allegation is unfounded and that it is indeed financially able to sustain itself through the league. Indeed Mr. Wahome argued in regard to the 2015 season, Shabana F.C honored 34 out of 36 matches. He further argued that if the failure to honour the matches was the main reason for the relegation, the log of standing at annexures PO-5 in the supplementary affidavit correctly shows that Shabana F.C failed to honour 2 matches while various teams are seen to have failed to honour as many as 4 matches. At least 10 teams failed to honor 3 to 4 matches, yet they have not been relegated, such as Zoo Kericho FC and Ligi Ndogo FC, who are still in the league. Thus, he argued that the Respondent is acting unfairly in applying the rules selectively as all teams which did not honor three matches are still playing in the National Super League.

15. Further, Mr. Wahome submitted that the Petitioner is ready and willing to make good all required payments and compliance documents save for the confusion as to which league it is affiliated to

16. The Petitioner prays that this Tribunal orders its reinstatement to the FKF National Super League.

### **The Response**

17. The Respondent in opposition to the Petition, relied on the Replying Affidavit of Robert Muthomi sworn on the 21<sup>st</sup> March, 2016 and the Further Replying Affidavit of Robert Muthomi sworn on the 29<sup>th</sup> March, 2016.

18. The Respondent's Counsel also relied on the Rules of Kenyan Football, the FKF Constitution and the relevant FIFA Statutes.

19. In reliance on the Tribunal's decision in **Sports Disputes Tribunal Appeal No. 16 of 2015- Ligi Ndogo vs FKF & KPL**, the Respondent's counsel argued that the annexures PO-2 (the Agreement between FKF and the clubs regarding participation in the FKF Premier League dated 23<sup>rd</sup> February, 2015) is not binding as regards FKF as it is an agreement between the teams concerned. It was not a valid FKF document.

20. Relying on the FKF Rules and annexures to the affidavits referred to, it was argued that it is not only the act of failing to honor the 3 matches that was considered by the League Management Committee but rather the financial ability of the Petitioner and all other teams. That in the interest of bringing order to the FKF National Super League and to avoid truancy experienced in the 2015 league, the clubs were invited to show their financial ability to participate in the 2016 League. The failure to attend the said meeting by the Petitioner despite invitation led the Committee to decide to relegate the Petitioner.

21. It was submitted that in the 2015 league the Petitioner failed to honour matches and also frequently sought for rescheduling or postponement of fixtures due to financial constraints.

22. That a notice to show cause as per annexures RM1 was given which was sufficient notice and accorded the Petitioner a chance to be heard, which was not taken. Further, the grounds for relegation are as indicated in annexure RM-2 attached to the replying affidavit, the match against St. Joseph's FC at Awendo Stadium failed to take off by reason of breach of the Rules of Football particularly Article 3.5 by the Petitioner by the Petitioner failing to secure the grounds and provide equipment including an ambulance which was the responsibility of Shabana FC as the home team.

23. Ms. Mitei submitted that the Petitioner's financial incapacity can also be seen in its failure to pay the requisite 2016 dues, e.g. annual subscriptions, affiliation fees for 2016 and the League dues and player registration for which they have notice, thus clearly

the Petitioner is experiencing financial problems and cannot effectively participate in either the National Super League or the Nation Wide League.

24. It was further submitted that the Kasarani meeting for 8<sup>th</sup> March, 2016 was not an appeal session regarding the relegation but it intended to and did discuss other matters set in the Agenda of the notice for the meeting.

25. The Respondent also challenged the legality and admissibility of the annexures P-2 and P-5(b) of the supplementary affidavit of Peter Omwando. It was sated that the authenticity of the said documents was questionable and could not be relied on. In regard to this objection, the Tribunal directed that the Petitioner avails the Competition's Manager, an employee of the Respondent for cross examination on 19<sup>th</sup> April, 2016 on those documents.

### **Petitioner's Reply**

26. In a short reply to the issues raised in the Respondent's submissions Mr. Wahome for the Petitioner remarked as follows:

a) All the communication regarding the order to replay the match against St. Joseph's were in e-mail correspondence and the current FKF president was among the recipients thereof;

b) The letter to show cause annexure RM-1 and the subsequent letter of relegation annexure RM-2 were not received by the Respondent even though the address indicated, being P.O Box 384 Kisii belongs to for the Petitioner, Shabana FC, but all letters addressed to it and remitted via e-mail were received;

c) The Petitioner was barred from the Kasarani meeting and was thus not able to discuss its relegation as it had hoped and cannot pay affiliation fees as it is not known as of now which league it will be paying for as the two leagues attract different charges. It cannot also register players as players need to know what league they are being registered for. Further, many would not agree to be registered in the Division 1 League as they wish to play in the National Super League. Having also filed this matter at the Tribunal, they need not pay before the matter is determined;

d) That there was no evidence of request for re-scheduling of matches based on financial constraints or any evidence of financial problems. Additionally, no request to demonstrate financial ability has been made to the Petitioner by the Respondent.

### **Issues for determination**

27. Having listened to the parties and reviewed the competing arguments and factual positions as set out in the affidavits filed herein the issues that present themselves for determination are as follows:

i. What were the rules/regulations for relegation/promotion in regard to the 2015 FKF National Super League (NSL);

ii. Whether or not the Petitioner failed to abide by those rules and was due for relegation;

iii. Whether or not the Petitioner was granted a fair hearing before a decision to relegate it was made;

iv. What would be the fair order to make in the circumstances"

### **Analysis**

28. Regarding the rules for the 2015 League, the best we have as a guide to the same is annexure PO-2 being the standard MoU signed by the Clubs and which was relied upon by the Petitioner. The provisions of Rules 2.4, 2.5 and 2.6 the Rules of Kenyan Football approved on 18<sup>th</sup> February 2015 also give a good reference.

29. The MOU provided that three teams would be relegated to the lower league, while 3 teams from that lower league would be promoted. Rule 2.6 of the Rules of Kenyan Football regarding promotion and relegation provides that before the start of each season

the League Management Committee must decide and announce the criteria to be used and the number of clubs to be promoted and relegated at the end of the season.

30. In this instance, the Petitioner says that the 'Agreement' annexure PO-2 provides the basis for relegation. They concede that they missed 2 matches and despite that, they came out 10<sup>th</sup> on the final standing. This standing has been challenged and will be discussed below.

31. In the absence of any other criteria provided by the parties, it would be safe to state, based on Rule 2.5 of the Rules of Football, that promotion ought to be based on the team or teams declared as winners in terms thereof, and equally relegation would be based on such standing. Indeed, it would appear that such was the basis of the decision to promote Kakamega Homeboyz SC and Posta Rangers SC to the KPL Premier League, and the relegation of Finlays SC and St Joseph's SC to the Division 1 League.

32. The Respondent has submitted that the relegation had more to do with financial ability than the number of matches not honored and that the letter to show cause was sent out to all the teams in that League (NSL) due to the obvious truancy noticeable in the missed games in 2015. With respect, the Tribunal finds that that position can only affect the 2016 League and cannot be a condition used to determine promotions and relegations of teams in the 2015 League. Financial ability has not been shown to be one of the applicable criteria to determine the relegation or promotion of 2015 teams. It may be a condition for 2016. It cannot however apply retrospectively.

33. Further it cannot be shown that Shabana FC received a notice to attend before the committee for review on 24<sup>th</sup> February, 2016. The Notice to Show Cause addressed to the Petitioner's Secretary General at P.O. Box 384, Kisii has not been shown to have been duly served. The Petitioner in its submissions stated that it did not receive that Notice and the subsequent letter of 2<sup>nd</sup> March, 2016 notifying it of its relegation. Indeed, to its credit there is a letter annexure PO-4 dated 26<sup>th</sup> February, 2016 addressed to the Respondent from the Petitioner asking for clarification of the rumours regarding the Petitioner's relegation for which the Tribunal has no benefit of a response from the Respondent or comment in the submissions. It is unlikely that the Petitioner would have written this letter if it had received the letter of 24<sup>th</sup> February 2016.

34. It has not been shown by the Respondent how the letter asking the Petitioner to show cause was transmitted and that a similar notice was sent to the other teams as alleged. In various High Court decisions, the Court has held that letters sent by ordinary post will be presumed to have been received seven (7) days after the date of postage. In the absence of information on the mode and /or date of postage it is not possible to make any presumptions as to whether it was posted and the date of receipt. Suffice to say that the notice, if posted, could not have been received by the 24<sup>th</sup> February, 2016 presuming the seven (7) days postage period from the date of the letter being 18<sup>th</sup> February, 2016.

35. Further that show cause letter does not specifically call on the recipient to provide proof of financial capacity but merely asks for proof of ability to honour fixtures. These can only be in relation to the 2016 fixtures. No evidence has been tendered to show that any other team or teams that missed matches in the 2015 season were similarly called upon to show cause in the same way that the Petitioner was required to, that they in fact attended and did provide proof of financial ability so as to be allowed to play in the 2016 League. The Petitioner's complaint of discrimination would thus, in this circumstances, be valid.

36. To the Tribunal's mind, it is double speak to seek to relegate the Petitioner from the NSL on grounds of failure to show financial ability but at the same time allow it to play in the Division 1 League without proof of such financial ability.

37. The letter of 2<sup>nd</sup> March 2016 giving the decision to relegate the Petitioner to the Lower Division League cites the Petitioner's failure to honour fixtures of 2015 '*and having habitually sought postponement of matches in the 2015 FKF NSL season and in view of your inability to honour a number of matches on financial grounds.....*'

38. Rule 2.4 relating to failure to play matches requires a team to provide a written explanation acceptable to the Committee on its failure to play matches. No written explanation has been provided for the missed matches either of the Petitioner or any other affected team. The Tribunal in any event has only been shown and accepts that the Petitioner missed 2 matches which it admits. If the Petitioner missed the alleged matches or sought various postponements, it can only be presumed that it was in writing and sanctioned or accepted by the Committee, but none of these postponements have been exhibited. Again it is safe to presume that none exist, or were sanctioned and thus the provisions of Rule 2.4 have not been flouted, therefore the contents of Annexure RM -2 dated 2<sup>nd</sup> March, 2016 are unsubstantiated.

39. The said letter of 2<sup>nd</sup> March, 2016 being annexure RM- 2 is highly prejudicial to the Petitioner. At paragraph 2 thereof it shows that a decision was made on financial ability of the Petitioner which, as held above was unsupported. Yet at the penultimate paragraph, the Petitioner is granted two (2) days from the date of the letter to lodge an Appeal to the IDAC. There is no proof of the manner of transmission of the letter to the Petitioner in order to allow for the 2 days (or 48 hours) to run. It would appear therefore that the Petitioner was condemned unheard.

40. Regarding the log on league standing and the email correspondence that are stated to have been initiated by the Competitions Manager, the Respondent's Counsel has objected to the same and challenged their admissibility citing Section 68 (Proof of Documents by Secondary Evidence) and Section 69 (Notice to Produce a Document) of the Evidence Act (Chapter 80).

41. The Tribunal in exercise of its powers and in order to resolve the matter expeditiously in the interest of justice elected to summon the said Mr. Samson Cherop before it for cross examination.

42. Mr. Cherop appeared on 19<sup>th</sup> April, 2016 and upon cross examination by the parties' respective counsel and the Tribunal, the Tribunal holds as follows:

- i. ...
- ii. ...
- iii. ...

43. The Tribunal has been asked in the Further Replying Affidavit of Richard Muthomi to refer this matter back to the FKF constituted IDAC to hear the matter in the first instance now that it is in place having appointed persons to preside over matters filed before it. We note, however, that the Tribunal has not been made aware of the Rules of Procedure of this Committee and emphasizes on the need for this further step to be taken. With respect, therefore, that would not be an appropriate action to take at this point. The Tribunal is well seized of the matter in view of its previous decision on the same. Further that action would not at the moment serve the interest of justice and the need for an expeditious decision to allow for the League to run, as well as calming the storm and uncertainty among the Petitioner's players.

44. The Tribunal does not accept the manner in which Rule 2.5 of the Rules of Kenyan Football has been interpreted by the Respondent to the effect that it can set criteria for relegation of NSL 2015 teams in the 2016 season. The effect of this is that rules are applied retrospectively depriving participating teams of the right to fairness and integrity of the sport. In this regard, the Tribunal refers to **FIFA Statutes, Regulations Governing the Application of the Statutes Standing Orders of the Congress**, July 2013 Edition at Article 9.2 (Principles of Promotion & Relegation) which stipulate as follows:

**In addition to qualification on sporting merit, a Club's participation in a domestic league championship may be subject to other criteria within the scope of the licensing procedure, whereby the emphasis is on sporting, infrastructural, administrative, legal and financial considerations. Licensing decisions must be able to be examined by the Member's body of appeal.** [Emphasis added]

45. It appears to this Tribunal that the Respondent was mainly motivated by the alleged financial constraints of the Petitioner in justifying the decision to relegate it. The issue of financial difficulty has been extensively pleaded by Robert Muthomi in his Further Replying Affidavit sworn on 29<sup>th</sup> March, 2016. Sporting integrity demands a high level of certainty in the manner pertinent things such as promotion and relegation are undertaken and reference is made to the principles of promotion and relegation as is set out in the **FIFA Statutes, Regulations Governing the Application of the Statutes Standing Orders of the Congress**, July 2013 Edition at Article 9.1 as follows:

**A Club's entitlement to take part in a domestic league championship shall depend principally in sporting merit.**

46. We urge the Respondent to use its discretion to take the full steps necessary to safeguard the integrity of the competitions that it organizes so that going forward cases such as the present one, are respected as matters falling within its natural sphere of competence.

47. In respect to Ms. Mitei's submission that the Ligi Ndogo decision found that the MOU was not a valid FKF document, the Tribunal states that it did not make a finding on the admissibility or otherwise of the said document but held that the suspension of the league by the Governing Council was illegal as the MOU does not grant powers to the Governing Council to suspend the league. Thus it found the purported termination of the league to be unknown in law and thus invalid.

48. The Tribunal finds that the Petitioner was condemned unheard and was not granted a fair opportunity to present its case or to respond to the accusations levelled against it.

### **Orders**

49. Consequently, the following orders commend themselves to the Tribunal:

i. The decision of the League Management Committee communicated by the letter of 2<sup>nd</sup> March 2016, was invalid as it was premised on matters that were not grounds for consideration in the determination of the promotion or relegation of teams in the 2015 NSL;

ii. The Respondent shall immediately reinstate the Petitioner to the NSL for 2016 and shall provide it with such particulars as will be necessary to enable its compliance and participation in the said league;

iii. The Respondent shall pay the costs of the Petitioner in any event;

The Tribunal thanks the counsels for both parties for their extremely helpful contribution, both written and oral.

**DATED and DELIVERED** at **NAIROBI** this 19<sup>th</sup> day of **April**, 2016

Signed:

**John M. Ohaga**

Chairman, Sports Disputes Tribunal



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