



**REPUBLIC OF KENYA**

**THE JUDICIARY**

**OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**APPEAL NO. 40 of 2016**

**MOSES WANGOME.....1<sup>ST</sup> PETITIONER**

**CHARLES NYABERI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**KENYA VOLLEYBALL FEDERATION.....RESPONDENT**

**DECISION**

**Hearing: 4<sup>th</sup> October, 2016**

**Panel: John M Ohaga Chairperson**

Peter Ochieng' Member

Gabriel Ouko Member

**Appearances:** Mr. Kamwaro instructed by Kabathi & Co. Advocates for the Petitioner

Mr. Mungai instructed by Mungai Kalande & Co. Advocates for the Respondent

**The Parties**

1. The 1<sup>st</sup> Petitioner, Moses Wangome is an adult male of sound mind. He is the Secretary of the Nairobi Secondary Schools Sports Association.

2. The Respondent is the Kenya Volleyball Federation which is the national sports organization in charge of the sport of volleyball and of P.O Box 61106-00200, Nairobi.

**Background**

3. The Petition dated 18<sup>th</sup> August, 2016 was filed on 19<sup>th</sup> August, 2016 together with the Supporting Affidavit of Moses Wangombe Mbuthia.

4. The Respondent filed its Replying Affidavit on 14<sup>th</sup> September 2016 and subsequently filed their Further Affidavit also on the

30<sup>th</sup> September, 2016.

5. The matter then proceeded to full hearing on the 4<sup>th</sup> October, 2016.

### **The Dispute**

6. The Petitioner describes himself as the Secretary of the Nairobi Secondary Schools Sports Association and thus a stakeholder in the running of volleyball in the Country. He was a contestant in the elections carried out by the Respondent at its Annual General Meeting on the 26<sup>th</sup> April, 2014.

7. In his pleadings, the Petitioner argues that the aforementioned elections were flawed with procedural and substantive illegalities and prays that they be declared a nullity.

8. The particulars of procedural and substantive illegality of the elections are as set out in the Petitioner's Supporting Affidavit dated 18<sup>th</sup> August, 2016.

9. The Petitioner further submits that being a result of flawed elections the current office holders of the National Executive Committee of the Respondent are not bona fide members of the committee and have thus have been holding office illegally.

10. In addition, the Petitioner submits that the Respondents are in numerous breach of constitutional and statutory provisions and therefore there is an urgent need to reconstitute its National Executive Council.

11. The alleged particulars of breach of the new constitution include;

a. The committee has not met the threshold of gender balance as provided for in Article 36 (2) & 38 of the Respondent's Constitution and Article 27 of the Constitution of Kenya, 2010.

b. The elections conducted on the 26<sup>th</sup> April 2014, did not meet the requirements of Article 38 (4) of the Respondent's Constitution.

c. The Respondent was in breach of Article 60, 61(4) of the Respondent's Constitution by failing to keep proper books of account and submitting the same at the Annual General Meeting.

12. The Petitioner therefore seeks the following prayers in his Petition:

a. *The current office holders of the Respondent be declared to hold office illegally.*

b. *The Honourable Tribunal does constitute a caretaker committee for the Respondent.*

c. *The Respondent be directed to hold elections to fill the various offices within sixty (60) days.*

d. *The costs of this Petition be borne by the Respondents.*

e. *Any further order as this Honourable Court may grant.*

### **The Respondent Arguments**

13. The Respondent entered a reply to the Petition vide their Replying Affidavit dated 14<sup>th</sup> September, 2016 and Further Affidavit dated 29<sup>th</sup> September, 2016.

14. The Respondent submitted that the Petition filed before this Honorable Court is malicious and only aimed at tainting its image.

15. He submitted that the Petitioners are guilty of indolence as the challenged elections were conducted in 2014 being at least two years ago.

16. The Respondent further submitted that although the new Constitution was approved by members on 1<sup>st</sup> March, 2014 the same is yet to be endorsed and registered with the office of the Registrar of Sports so as to become fully operational under the law.

17. The Respondent submitted that the Office of the Registrar only registered the Constitution recently and issued the Interim Certificate of Registration on 29<sup>th</sup> July, 2016. He added that the Respondent was ready and willing to comply with the Constitution and had called for a meeting on Saturday, 17<sup>th</sup> September, 2016 so as to implement the letter and spirit of the Constitution.

### **Issues for Determination**

18. Having read the pleadings filed and listened to the advocates for the parties herein, the Tribunal finds the following as the issue for its determination:

#### **i. Whether the Petitioner is entitled to the prayers sought.**

### **Discussion**

19. The jurisdiction of this Tribunal in respect of this dispute is conferred upon it by Section 58 (a) of the Sports Act, 2013 which stipulates 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...**

#### **The doctrine of laches**

20. The Respondents pleaded that the Petitioner is not entitled to any of the remedies sought because he has approached the Tribunal way too late, late in this instance being two years since the cause of action arose on the part of the Petitioner and submitted that equity does not aid the indolent.

21. Mr Kamwaro Advocate for the Petitioner replied as follows on this issue:

- a. An illegality is an illegality;
- b. Unless the action is barred by statute, it remains a valid action; and
- c. It is the Respondent who delayed in complying with the law.

22. The Petition was filed on 19<sup>th</sup> August, 2016 which is at least 2 years and 3 months since the date of the elections, the subject of the Petition herein. The Petitioner has sought orders whose effect would be to declare as illegal the elections held on 26<sup>th</sup> April, 2014, declare the current office holders illegal and pave way for elections within 60 days.

23. Hon. Mr Justice Ole Kantai in **Andrew Omtata Okoiti & 5 Others V Attorney General & 2 Others [2010] eKLR** laid out the test for determining the existence of laches wherein he stated as follows:

*“The Black’s Law Dictionary defines the doctrine of laches as the unreasonable delay in pursuit of ones right of claim. Such a claim is almost always an equitable one, and the doctrine of laches seeks to minimize chances of prejudice on the party against whom the relief is sought. Using this doctrine, the court may deny the party who files a matter in court any relief even where such a claim is justifiable. For such a doctrine to succeed, it must be shown that:*

- i. There has been unreasonable delay;*
- ii. There has been neglect on the part of the claimant to assert his/her right; and*
- iii. The other person against whom the claim is made will suffer damage as a result.*

24. Indeed, a party who wished to enforce his rights before any tribunal must do so within reasonable time and must be prompt. In addition, it would be in the interest of public administration to adjudicate finally in such matters at the earliest time possible.

25. We note that the Petitioner herein lodged complaints with various bodies protesting the manner in which the elections were conducted. These averments are contained in the Petitioner's Supplementary Affidavit filed on 21<sup>st</sup> September, 2016. The correspondence to this effect have been attached to the said affidavit and we note that the Kenya National Sports Council upon receiving these complaints held a 'Consultative/Arbitration' Meeting on 25<sup>th</sup> April, 2014. The Minutes indicate that Mr Mbuthis, the Petitioner herein attended the said meeting and was represented by Counsel. In particular, his grievances were:

- a. Notice of Branch election scheduled for 5<sup>th</sup> April, 2014*
- b. KVF national elections on 26<sup>th</sup> April, 2014.*
- c. Nairobi KVF Branch elections of 25<sup>th</sup> April, 2014.*
- d. Participation of 15 national KVF affiliated clubs in Branch elections.*

26. The decision of the Kenya National Sports Council was recorded as follows:

- a. The Notice of the Branch elections held on 5<sup>th</sup> April, 2014 was legal.*
- b. The national elections slated for 26<sup>th</sup> April, 2014 should go on as arranged.*
- c. ...*
- d. ...*

27. On 28<sup>th</sup> April, 2014 the Petitioner herein wrote to the National Olympic Committee of Kenya (NOCK) and the Registrar of Societies disputing the legality of elections.

28. The Petitioner further wrote to the NOCK on 11<sup>th</sup> June, 2014 and a reply emanated from NOCK on 9<sup>th</sup> July, 2014 requesting for further particulars to be supplied so that NOCK initiates appropriate action. The Petitioner neither furnished the Tribunal with the reply to NOCK's letter neither did he indicate whether a reply was made to NOCK. In the absence thereof, we take the considered view that the Petitioner did not invoke all dispute resolution mechanisms at his disposal to agitate his grievances.

29. Article 37(3) of the Respondent's Constitution stipulates as follows:

*'Elected members shall hold office for a term of four (4) years from the closing of the General Meeting at which they were elected until closing of the general meeting held in the 4<sup>th</sup> subsequent year PROVIDED that they shall only be eligible for re-election for only one further term of four years.'*

30. Inordinate delay in respect of this dispute must be examined from the fact that the current office holders serve a four-year term in office and were elected at least 2 years and 3 months prior to the filing of this Petition.

31. Further, the Tribunal takes cognizance of the mandatory injunction sought to compel the Respondent to conduct fresh elections to reconstitute the members of the National Executive Committee. Mr Kamwaro did not give any substantive reason for the

inordinate delay in filing this Petition.

32. On this issue, it is our finding that the delay in filing the Petition is inordinate and inexcusable.

33. In any event the Tribunal finds it necessary to make a determination on the issues raised by the Petitioner should we have found the Constitution to be valid and operational as follows:

***a. Validity of Elections conducted on the 26<sup>th</sup> of April 2014"***

34. The Petitioner alleges that the elections conducted on the 26<sup>th</sup> of April 2014 were marred with flaws and violations of Article 38 of the constitution and ought to be declared a nullity ab initio. Article 38 provides as follows:

***38: General Principles for Elections***

***The electoral system shall comply with the following principles:***

***1) Freedom of citizens to exercise their political rights under Article 38 of the Constitution of Kenya, 2010.***

***2) Not more than two – thirds of the members of NEC shall be of the same gender***

***3) Universal suffrage based on the aspiration for fair representation and equality of vote; and***

***4) Free and fair elections, which are:***

***i. By secret ballot***

***ii. Free from violence intimidation improper influence or corruption***

***iii. Conducted by an independent body***

***iv. Transparent; and***

***v. Administered in an impartial, neutral, efficient, accurate and accountable manner.***

35. The Petitioner alleged that the elections were not conducted through secret ballot, the body conducting it was not independent, it was not transparent and fails to meet the requirements established in the above section. We note that the Respondents have further done little to rebut these astounding allegations.

36. However, the common legal precept is that he who alleges must prove. The question of burden of proof in election disputes has been a subject well elucidated. In the widely cited Tanzanian case, of **Mbowe -vs- Eliufoo (1967) EA 240**, the Court held that:

*“There has been much argument at the meaning of the term ‘proved to the satisfaction of the court. In my view it is clear that the burden of proof must be on the Petitioner rather than the Respondents because it is he who seeks to have this election declared void.”*

37. In **Joho -vs- NYANGE & ANOTHER** (2008) 3 KLR (EP) 500, Maraga, J. (as he then was) said:

*“The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election. While the proof has to be done to the satisfaction of the Court, it cannot be said that the standard of proof required in election petitions is proof beyond reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences a very high degree is required.”*

38. This has also been replicated in other sports jurisdictions as in **Men-yen Chu & Chinese Taipei Olympic Committee -vs- International Olympic Committee (IOC)** where it was expressed as follows:

*“With respect to the burden of proof, the Panel finds that the general rules apply in order to determine which party should bear the consequences of the failure to prove its allegations.*

*In such respect the Panel notes that pursuant to Article 8 of the Swiss Civil Code:*

*“Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu’elle allègue pour en déduire son droit”*

*[“Unless the law provides otherwise, each party shall prove the facts upon which it relies to claim its right”].”*

39. The Petitioner ought to have produced as evidence particulars of the alleged infringement of the election process, this would have included testimony of persons who participates in the elections, pictures of the open voting process, evidence of the partiality of the returning officer among others. The Tribunal determines that the petitioner has not met the standard of proof required for the tribunal to declare that they were a nullity.

#### **b. Filling of Audited Financial Statements**

40. The Petitioner further alleged that the Respondents were in breach of Article 61 of the Constitution by failing to send the accounts to eligible members fourteen days before the presentation of accounts and failing to cause its accounts to be audited and presented to the General Meeting held on 26<sup>th</sup> April 2014 and which was the end of the financial year of the Respondent and thus should lose their positions as per Article 61(5) which provides:

#### **Article 61 (5)**

***Where the federation fails to cause its accounts to be audited and presented to the General Meeting the official(s) found responsible shall automatically lose their positions on the National Executive Committee unless the failure was due to circumstances beyond their control.***

41. The Petitioner does not particularize which members are guilty for the noncompliance and from his pleadings it is evident that he refers to the entire National Executive Committee to be guilty in this instance.

42. We hold that the National Executive Committee appointed in the AGM of 26<sup>th</sup> April 2014, being the current NEC would not have the capacity to face the guillotine as per Article 61 (5) for presentation of accounts for a time period that they were not in office.

43. Additionally, it is not in contention that the Respondents caused to be prepared and presented to members the financial statements later by calling a Special General Meeting on the 30<sup>th</sup> of August 2016. General Meetings are defined under Article 28 of the Constitution to include the Annual General Meeting and the Special General Meeting.

44. We also note that after the filing of this Petition, the Respondent took steps to further comply with the provisions of its Constitution in respect of the gender rule by co-opting 4 women into the NEC. At the hearing Mr Kamwaro contested the actions of the Respondent claiming that they were in contravention of the Respondent’s Constitution.

45. Article 36(2) of the Respondent’s Constitution stipulates as follows:

*The Federation shall have a National Executive Committee elected by and from the members and shall consist of no less than 13 members as follows;*

....

*(2) Provided that the National Executive Committee shall have the discretion to co-opt extra committee members to address gender in minority issues.*

46. It is the finding of this Tribunal that the co-option of women into the NEC is in accordance with the Respondent's Constitution.

#### **Orders**

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

- i. The Petition dated 18<sup>th</sup> August 2016 and filed in 19<sup>th</sup> August is dismissed in its entirety;
- ii. The Tribunal makes no orders as to cost.

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

**DATED and DELIVERED** at **NAIROBI** this 18<sup>th</sup> day of **October, 2016**.

Signed:

**John M Ohaga, FCI Arb**

Chairperson, Sports Disputes Tribunal

In the presence of:

1. \_\_\_\_\_ Member
2. \_\_\_\_\_ Member.



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