



**REPUBLIC OF KENYA**

**THE JUDICIARY**

**OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**PETITION NO. 41 OF 2016**

**KENYAN PREMIER LEAGUE LIMITED.....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:** 24<sup>th</sup> November, 13<sup>th</sup> December, 15<sup>th</sup> December & 20<sup>th</sup> December, 2016

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

Gabriel O Ouko - Member

Mary N Kimani - Member

**Appearances:** Mr Geoffrey Orao-Obura instructed by Obura Mbeche & Co. Advocates for the Petitioner

Mr Ken Ochieng' instructed by Sila Munyao & Co. Advocates for the Respondents

**Brief Background**

1. The dispute between the Petitioner and the Respondents is relatively simple and straight forward. The issue is whether the Kenya Premier League for the season 2017/2018 should have 16 or 18 teams participating. At the centre of the dispute is the interpretation of the Agreement dated 24<sup>th</sup> September, 2015 ('**the Agreement**') entered into between the Petitioner and the 4<sup>th</sup> Respondent.

**The Parties**

2. The Petitioner is a limited liability company duly incorporated under the provisions of the Companies Act, Chapter 486 of the Laws of Kenya (now repealed) (now Act No. 17 of 2015)(hereafter 'KPL'). It asserts that it has applied for registration under the Sports Act, No. 15 of 2013 but has still not received a decision from the Sports Registrar. The Petitioner's shareholders are the 16 football teams participating in the Kenyan Premier League as well as the 4<sup>th</sup> Respondent which has one special share allotted to it.

3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the President and Vice President respectively of the Football Kenya Federation ('FKF') while the 3<sup>rd</sup> Respondent is the Chief Executive of FKF. The 4<sup>th</sup> Respondent is FKF.

### **The Pleadings and Preliminary Proceedings**

4. This action was commenced by a Statement of Claim dated and filed on 12<sup>th</sup> October, 2016 and duly verified by the Affidavit of Jack Oguda who is the Chief Executive Officer of KPL. Simultaneously with the filing of the Statement of Claim was filed a Notice of Motion dated 12<sup>th</sup> October, 2016 and supported by the Affidavit of the said Jack Oguda by which Motion KPL sought an interim order of injunction restraining the FKF from discussing or concluding any discussions at its 4<sup>th</sup> Annual General Meeting held on 15<sup>th</sup> October, 2015 pertaining to the size of the KPL.

5. Upon considering the Motion on 12<sup>th</sup> October, 2016 the Tribunal duly certified it as urgent and directed that the Statement of Claim and the Notice of Motion be served on the Respondents for hearing on 14<sup>th</sup> October, 2016 at 2.00 pm.

6. On 14<sup>th</sup> October, 2016 the Tribunal after hearing brief arguments from Counsel for the parties which included certain preliminary points raised on behalf of the Respondents, issued orders restraining the FKF from discussing the matters pertaining to the size of the league pending the full hearing of the dispute. The Tribunal also issued directions with respect to the exchange of responses and scheduled the matter for hearing on 8<sup>th</sup> November, 2016.

7. The Respondents filed an extensive Replying Affidavit sworn by Nick Mwendwa on 7<sup>th</sup> November, 2016. In response, the Petitioner filed a Further Affidavit sworn by Jack Oguda on 22<sup>nd</sup> November, 2016. Both the Replying Affidavit and the Further Affidavit contained extensive annexures in support of the respective positions and to which the Tribunal will refer in the course of this decision.

8. When the matter came up for hearing on 8<sup>th</sup> November, 2016 Counsel for KPL was constrained to request an adjournment as he had only just been served with the Replying Affidavit of the Respondents. The matter came up again for mention on 24<sup>th</sup> November, 2016. At the mention on 24<sup>th</sup> November, the parties informed the Tribunal that they were pursuing certain discussions which they hoped would result in an amicable resolution of the matter. They requested further time to allow them conclude these discussions. The Tribunal duly acceded to this but directed that if no resolution had been achieved within the next ten (10) days, then the Tribunal would require the parties to go to formal mediation and for that purpose the Tribunal directed that each party should lodge by Monday, 5<sup>th</sup> December, 2016 a list of the persons who would attend the mediation on behalf of the parties.

9. When the matter next came up on 6<sup>th</sup> December, 2016 the Respondents indicated that they were not prepared to go to mediation and preferred to have the dispute heard and determined by the Tribunal. KPL on its part stated that it was amenable to mediation and had indeed lodged with the Tribunal a letter dated 2<sup>nd</sup> December, 2016 listing its representatives. Having given consideration to the representations of the parties including the Respondents' clear reluctance to go to mediation, the Tribunal scheduled the matter for hearing on 13<sup>th</sup> December, 2016.

### **The Hearing**

10. When the hearing commenced on 13<sup>th</sup> December, 2016 Mr. Obura, Counsel for KPL took the Respondents as well as the Tribunal by surprise when he indicated that he intended to lead oral evidence. This was somewhat surprising because of the extensive affidavits that had been filed and because no prior indication had been given that oral evidence would be led. It is therefore not surprising that Mr. Ken Ochieng' for the Respondents objected to such oral evidence and sought to have the Tribunal direct that the matter should proceed on the basis of the affidavits filed. This objection was, however, overruled by the Tribunal for the simple reason that the Respondents would in any event have had prior knowledge of the case to be advanced by KPL and would have a chance to cross-examine the witness put forward by KPL.

11. Notwithstanding that the affidavits filed on behalf of KPL were all sworn by Mr. Jack Oguda, KPL chose to adduce its oral evidence through its Chairman, Mr Ambrose Otieno Rachier.

12. In his evidence in chief Mr Rachier basically followed the framework of the Supporting Affidavit sworn on 12<sup>th</sup> October, 2016 and the Further Affidavit sworn on 22<sup>nd</sup> November, 2016. He explained that KPL had been organizing and managing the Premier League since 2003. He was at pains to clarify that KPL's mandate to manage the Premier League was with the authority of the FKF and to that extent the KPL was merely an agent of the FKF. He explained the turbulent history of the management of football in Kenya which necessitated the intervention by FIFA.

13. Mr Rachier was extensively cross-examined by Mr Ken Ochieng' at the end of his testimony in chief on 13<sup>th</sup> December, 2016.

14. When the hearing resumed on 15<sup>th</sup> December, 2016 the Respondents, matching KPL's tactics, called Mr Nick Mwendwa to the stand. Mr Mwendwa testified in chief and explained very elaborately FKF's vision for the development of football in Kenya and the rationale for seeking to increase the size of the Kenya Premier League from sixteen (16) teams to eighteen (18) teams. Mr Mwendwa was unable to complete his testimony on 15<sup>th</sup> December, and the hearing resumed on 20<sup>th</sup> December, when Mr Mwendwa's testimony concluded and he was also cross examined extensively.

15. In the course of Mr Mwendwa's testimony he introduced, with the Tribunal's permission, an audio recording of the press conference addressed by Mr Kwesi Nyatkyi, the Ghana FA President on Monday, 23<sup>rd</sup> March, 2015 at the Norfolk Hotel. The Tribunal subsequently requested a transcript of the audio recording which was duly provided and the accuracy of which is not objected to by Counsel for KPL.

16. Although the Tribunal has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present dispute, it refers in this decision only to the submissions and evidence it considers necessary to explain its reasoning.

## **Discussion and Analysis**

### **Preliminary Objection**

17. By a Notice of Preliminary Objection dated and filed on 14<sup>th</sup> October, 2016, the Respondents had sought to advance three points of objection *to wit* that:

- a. The Petitioner is an unlawful sports organization having not registered as required by Section 47 of the Sports Act, No. 5 of 2013 and is hence not allowed to operate as such thus lacks capacity to institute this suit.
- b. The Petition is premature.
- c. This Tribunal lacks jurisdiction to issue the injunctive orders sought.

18. When Mr Ken Ochieng, Counsel for the Respondent sought to advance these points of objection at the hearing of the Motion on 14<sup>th</sup> October, 2016 it became evident that the objections were founded on contested matters of fact. As it is trite that a preliminary objection can only be taken on the basis of an acceptance of the other party's factual position<sup>[1]</sup>, the Tribunal directed that it would be advisable to have the objections heard and determined once the Respondents had filed all their papers in response to the Statement of Claim and the Motion.

19. Having now had the benefit of the various affidavits and the oral testimony adduced on behalf of the parties, the question of KPL's standing as a sports organization can shortly be answered by reference to section 49 of the Sports Act, which is to the following effect:

### **s. 49 Transition of existing sports organizations**

**1. A sports organization, which was duly registered under the Societies Act (Cap. 108) and existing immediately before the commencement of this Act shall be required to apply for registration under this Act within one year after the commencement of this Act.**

**2. A sports organization, which was duly registered under the Societies Act (Cap. 108) and existing immediately before the commencement of this Act shall not be deemed to be an unlawful sports organization before the period prescribed under subsection (1) has expired.**

**3. An existing sports organization that does not apply for registration within the time prescribed in subsection (1) shall not be recognized as a sports organization for the purposes of this Act:**

**Provided that an existing sports organization in respect of which-**

**a. an application for registration has been made by it under subsection (1) and has not been rejected; or**

**b. an appeal has been lawfully made under this Act and remains undetermined, shall continue to be recognized as a sports organization for the purposes of this Act. (emphasis added)**

20. The KPL has exhibited the letter dated 2<sup>nd</sup> March, 2015 addressed to its advocates Macharia-Mwangi & Njeru acknowledging receipt of the papers submitted on its behalf in support of its application for registration as a sports organization.

21. As Mr Obura has correctly submitted, the application for registration entitles the KPL to be recognized as a sports organization for the purposes of the Sports Act pending the decision of the Sports Registrar.

22. The next point of objection relates to the jurisdiction of the Tribunal. The Tribunal does not perceive this to have been seriously contested by the Respondents and indeed has not been addressed in the final submissions. Nevertheless, the Tribunal is required to establish the foundation of its jurisdiction before it can determine the dispute.

23. The primary dispute revolves around the interpretation of the Agreement. Clause 10 of the Agreement deals with dispute resolution and specifically confers on the Sports Disputes Tribunal the jurisdiction to determine any dispute or difference between the parties.

24. Section 58(b) of the Sports Act provides as follows:

**The Tribunal shall determine:**

**b. Other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear.**

25. From the foregoing, it becomes clear that the Tribunal therefore has the requisite jurisdiction to hear and determine this dispute.

#### **Merits**

26. The Tribunal will commence its consideration of the merits by disposing of various secondary arguments which were advanced by the parties and which, while it is the Tribunal's responsibility to address, are not in fact core to the determination of the matter. These issues relate to the validity of the Agreement. The first challenge is to the effect that the Agreement is void *ab initio* because the KPL is an unregistered sports organization under the Sports Act and could not have entered into this Agreement. However, as the Tribunal has already found that the KPL has recognition as a sports organization under the Sports Act by virtue of its application for registration, this argument clearly has no foundation and it is not necessary to address it any further.

27. The next challenge related to the question whether the objects clause of the KPL's Memorandum of Association was sufficient

to enable the KPL to undertake the management and running of the Kenya Premier League. The Tribunal has given consideration to clauses 3(a), (b), (c), (d) and (e) of the KPL's Memorandum of Association which are set out as follows:

The objects for which the company is established are:

- a. To promote and facilitate cooperation among football clubs and other relevant associations for the improvement of Kenyan football;
- b. To ensure proper management and fairplay in Kenyan football competitions;
- c. To ensure the fair and firm application of all relevant FIFA, CAF and Kenyan Football Rules and Regulations;
- d. To promote and undertake other measures for the development and improvement of Kenyan football, to raise funds through membership fees, sponsorship, broadcasting, advertising rights and/or through any other means permissible in law;
- e. To carry on joint activities and projects for the mutual benefits of its member clubs such as:
  - i. Joint purchasing of office and sport equipment;
  - ii. medical insurance for club officials and players;
  - iii. joint bookings for travel and accommodation;
  - iv. joint arrangements to print and distribution tickets;
  - v. joint ventures for improving of stadiums and fields.

28. Having given due consideration to the wording of these provisions, the Tribunal has come to the conclusion that the wording is sufficient to cover the management and organization of football competitions in Kenya including the Kenyan Premier League.

29. The Tribunal has also given consideration to the evidence adduced to the effect that KPL has been managing the Kenyan Premier League since 2003, which is a period of thirteen (13) years.

30. The FKF which is the principal Respondent having allowed the KPL to manage the league for what is no doubt a considerable period cannot pretend that it has only come to its attention that the Memorandum of Association of the KPL does not authorize it to run the league. In any event, the Tribunal takes cognizance of the fact that we are now in the era of a broader construction of company law following the repeal of the Companies Act, Chapter 486 and the enactment of the Companies Act, No. 17 of 2015. Section 33 of the Companies Act, 2015 deals with a company's capacity and provides as follows:

#### **Company's capacity**

**The validity of an act or omission of a company may not be called into question on the grounds of lack of capacity because of a provision in the constitution of the company. (emphasis ours)**

31. For the foregoing reasons the Tribunal concludes that this argument merits no further consideration.

32. The next argument advanced was that the Agreement was entered into without the authority of FKF's membership. This argument has caused the Tribunal some anxiety in view of the competing positions. Clause 12.2 of the Agreement provides as follows:

12.2 All parties warrant that they have the necessary authority and permission from their respective Boards of Directors and or officials to enter into this agreement.

33. *Ex facie* therefore the Agreement seems to have the necessary authority from both parties. The Respondents argue, however, that under the Constitution of the FKF, only the National Executive Committee can authorize the entering into an Agreement of this nature and that the reliance by the FKF on the resolution of the General Meeting held at the Sagret Hotel on 28<sup>th</sup> August, 2015 at the 3<sup>rd</sup> Annual General Meeting of the FKF is inadequate.

34. Minute 11 of that Meeting resolved as follows:

Reinstatement of mandate to KPL Limited

The Annual General Meeting reinstated the mandate to run the top tier league with the FKF Pyramid to Kenya Premier League Limited, with the Company and the Federation directed to sign a Memorandum of Understanding to formalize and define the relationship.

35. And it is on this basis that the KPL argues that the membership of the FKF authorized the signing of the Agreement.

36. The FKF has, however, pointed to various provisions of its Constitution and in particular Article 22 which defines 'Areas of Authority'. The Respondents argue that Article 22 does not contemplate or give authority to the General Meeting to authorize any such agreement.

37. The Tribunal notes that Article 19 of the Constitution expressly provides that the General Meeting is the supreme and the legislative body of the FKF while the National Executive Committee is the executive body. Article 20(1) provides as follows:

The General Meeting is the meeting at which all of the members of FKF regularly convene. It represents the supreme and the legislative authority of FKF. Only a General Meeting that is convened in accordance with these statutes has the authority to make decisions.

38. Article 32 then deals with the composition of the National Executive Committee and Article 34 sets out the powers of the National Executive Committee.

39. The Tribunal has scrutinized carefully the provisions of the Constitution of the FKF.

40. From the preamble to the Constitution, it is clear that the FKF was birthed following a period of turmoil in the running and management of Kenyan football at the centre of which was a contest between Kenya Football Federation (KFF) and Football Kenya Limited (FKL) which sought the right to be the sole organization in charge of the administration, management and running of football in Kenya. It is clear therefore that the Constitution was a negotiated document which had as one of its purposes the resolution of this contest.

41. Without doubt and as expressly provided at Article 19 and 20 of the Constitution, the General Meeting is the supreme authority of FKF. Article 22 while setting out the areas of authority of the General Meeting does not state that such authority is limited to those set out. The Tribunal can therefore see nothing to suggest that the General Meeting could not discuss and resolve as it did at Minute 11 of its 3<sup>rd</sup> Annual General Meeting.

42. The National Executive Committee on its part is a creation of the General Meeting to the extent that its members, except the two representatives of the FKF Premier League and the FKF Division 1 League, are elected by the General Meeting.

43. As we understand it is the Respondents contention that, because Article 34(1)(a) provides that the National Executive Committee '*shall pass decisions on all cases that do not come within the sphere of responsibility of the General Meeting or are not*

*reserved for other bodies by law or under these Statutes*, that therefore any decision with respect to the Agreement between KPL and FKF could only be authorised by the National Executive Committee.

44. We note, however, that under Article 32 the National Executive Committee consists of twelve (12) members including the National Chairman. Article 37 then provides as follows with respect to the National Chairman:

1. The National Chairman represents FKF legally. He is the spokesman, legal representative and chief delegation of the Federation.
2. He is primarily responsible for:
  - i. Implementing the decisions passed by the General Meeting and the National Executive Committee through the general secretariat;
  - ii. Ensuring the effective functioning of the bodies of FKF in order that they achieve the objectives described in these Statutes;
  - iii. Supervising the work of the general secretariat;
  - iv. Relations between FKF and its Members, FIFA, CAF and CECAFA, political bodies and other organisations;
3. ....
4. The National Chairman shall preside over the General Meeting, the National Executive Committee and Emergency Committee meetings and those committees of which he has been appointed chairman.

45. Article 39 then provides as follows:

#### Representation and signature

1. The National Chairman represents FKF legally and is entitled to sign for FKF.
2. The National Executive Committee may set up internal organisation regulations regarding the joint signature of officers in specified situations, and, in particular, in case of the National Chairman's absence and concerning all important business of FKF.

46. From the foregoing, it becomes clear that the National Chairman occupies a central and undisputed position in the decision making structure of the FKF.

47. The National Chairman at the time when the Agreement in question was executed was Mr. Sam Nyamweya. As the Tribunal has noted the Agreement provides at Clause 12.2 that he had the necessary authority and permission to enter into the Agreement. His signature on the Agreement constitutes a representation to both the KPL and third parties that the Agreement is proper and valid and duly authorised by the FKF. As the Tribunal has observed, we can find no limitation under Article 22 on the authority of the General Meeting. The Respondents suggested that they might but did not call Mr. Sam Nyamweya in order to impeach the representation signified by his signature that the Agreement had the full authority of FKF. The onus clearly fell upon the Respondents to demonstrate, both by evidence and legal argument, that the Agreement did not have the authority of the FKF and they have failed to meet the requisite threshold. Accordingly, such argument can only be an attempt to emasculate the clear and unequivocal resolution of the General Meeting which, as expressly provided under the Constitution, is the supreme and legislative body of the FKF. The Tribunal must therefore reject the attempt to impeach the Agreement on this basis.

48. The next argument was that the Agreement violates both the FIFA Statutes and the FKF Constitution. With respect to FIFA Statutes, Article 18 is instructive and provides as follows:

### Status of Leagues and other groups of Clubs

Leagues or any other groups affiliated to a Member of FIFA shall be subordinate to and recognised by that Member. The Member's Statutes shall define the scope of authority and the rights and duties of these groups. The statutes and regulations of these groups shall be approved by the Member.

49. In its letter of 20<sup>th</sup> May, 2005 under the hand of its Deputy General Secretary Jerome Champagne, FIFA stated *inter alia* as follows:

FIFA has the pleasure to inform the KFF that we have reviewed the documents and to confirm the following:

- The decision taken during the meeting held in Nairobi on 14<sup>th</sup> May are in line with Article 18 of the FIFA Statutes, in particular the organization of the Premier League of Kenya under the jurisdiction of the KFF and the change of name from 'KPL' to 'KFF Premier League'.

We request the KFF to formalize with the KFF PL, the working agreement of their relations on the various aspects of the management of the league in the future, and as is stated in Article 18, the scope of the authority, and the rights and duties of the KFF PL.

It is in particular absolutely necessary to set up a permanent joint KFF-KFF PL committee to prepare the next season. this committee based on the example of the SAFA-South African PSL joint committee is crucial for the co-ordination of the activities between both football bodies and the resolution of potential disagreements.

50. By a further letter dated 5<sup>th</sup> October, 2006 FIFA states *inter alia*:

...This is totally in line with the points 17 and 18 of the Cairo Agreement, with the vote by the clubs which took place in June 2005, as well as the general world-wide accepted principles of the organisation of top football, combining the subordination to the federations and the autonomy of management of the leagues. This is widely and a successfully implemented in a lot of countries around the world such as England, Spain, France, South Africa and Ghana, just to name a few, as a key towards success and professionalism.

51. From the foregoing, it would appear that FIFA itself acknowledges that Article 18 of its Statutes allows for the autonomy in the running of leagues and there is nothing therefore to suggest that the Agreement contravenes the FIFA Statutes.

52. The Respondents have also pointed to Articles 10, 13, 29, 78 and 79 of the FIFA Statutes but the Tribunal can find nothing in these Articles which would lead to the conclusion that the Agreement contravenes the FIFA Statutes.

53. The provisions of its Constitution relied upon by the FKF in seeking to impeach the Agreement largely mirror the provisions of the FIFA Statutes, and the Tribunal's comment therefore would be that it does not find that the Agreement offends the FKF Constitution so as to lead to the conclusion that it is void.

54. Indeed, what appears to be instructive is that Article 76 of the FKF Constitution, expressly provides as follows:

#### Article 76 Competitions

1. FKF organises and coordinates the following official football competitions in Kenya:

i. FKF Women Premier League;

ii. FKF Division One (Men);

iii. FKF Division One (Women);

iv. FKF President Cup.

55. Article 76 therefore appears to have deliberately omitted the Premier League from the competitions for which the FKF has been given the mandate to organise notwithstanding that Article 10 expressly recognizes the FKF Premier League clubs as one of the members of FKF. It would appear therefore that the FKF Constitution specifically anticipates that a body other than FKF would be responsible for organising, running and managing the Premier League.

56. Having come to this conclusion, the Tribunal considers that the effect of a finding that the Agreement is in breach of the FKF Constitution would have the unfortunate consequence of eliminating completely from the football landscape the Premier League until such time as a new Agreement was put in place. We do not consider that this could possibly be the intention of the parties and would, in any event, be inimical to the proper running and management of football in Kenya.

58. This conclusion therefore brings us to the last question, which is whether the Tribunal should issue an order of permanent injunction restraining the FKF from 'contemplating, discussing or implementing any decision to expand the national top tier league known popularly as the Kenyan Premier League from its current constitution of sixteen teams without the approval and/or concurrence of the Plaintiff during the currency of the Agreement.'

58. The KPL has cited several authorities relating to the power of a decision making body to re-write, amend or approve an agreement freely entered into between the parties and the Tribunal accepts the thrust of those authorities. In **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another**<sup>[2]</sup>, the Judges of the Court of Appeal stated as follows:

A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regards to the terms of the charge.

59. We accept this proposition as setting out the correct position in the context of the negotiation and conclusion of a contract between two parties dealing at arm's length. In this case, however, the KPL freely acknowledges that it is in the position of an agent organizing, running and managing the Kenyan Premier League under the authority of the FKF. The governing relationship between the FKF and KPL is therefore one of principal and agent. The question therefore is whether the expansion of the league from sixteen (16) teams to eighteen (18) teams requires the 'approval and/or concurrence' of the KPL. In other words, does a principal require the concurrence of its agent to undertake an act; put otherwise, can an agent subvert or otherwise undermine the intention of its principal"

60. To this extent therefore the contentious provision of the Agreement being clause 1.3 comes into sharp focus. Clause 1.3 provides as follows:

The JEC shall be co-chaired by the FKF President and KPL Chairman who shall chair alternate meetings. The FKF CEO/Secretary General and KPL CEO shall serve as joint secretaries of the JEC and also alternate in the same sequence as their President/Chairman. A quorum shall consist of two (2) voting members from each of FKF and KPL. All decisions shall be made by consensus among the voting members present. KPL shall have more votes than the other by way of having additional members present. KPL shall have the casting vote in the event of a tied vote. Written proxies may be given. [Emphasis ours]

61. With respect to the expansion of the league the Agreement provides as follows at clause 1.2(g):

To review and agree at least one full season prior to their implementation on any proposals for approval by the KPL Governing Council regarding any major changes in the league and especially in the calendar of the football season, in the number of teams in the league or in the relegation of two (2) teams from the league and promotion of the two (2) top teams from the FKF National League at the end of each season.

62. The structure of the Agreement with respect to the expansion of the League as can be seen from the foregoing provisions is that

the parties are required to review and agree on this issue one full season prior to implementation and that such decision shall be taken by the Joint Executive Committee; in the event of a tie between the two parties, KPL shall have a casting vote.

63. Having considered all the material placed before it, the Tribunal has come to the conclusion that the provision given the KPL a casting vote necessarily subordinates the FKF to the KPL with respect to the issue in dispute which is the question of expansion of the Premier League. Such subordination contravenes Article 18 of the FIFA Statutes which require that leagues or other groups affiliated to a member of FIFA should be subordinate to that member. It further contravenes Article 17.1 of the FKF Constitution which expressly provides as follows:

Clubs, leagues, branches or any other groups of clubs affiliated to FKF shall be subordinate to and recognised by FKF. These Statutes, rule and regulations made thereunder define the scope of the authority and the rights and duties of these clubs, leagues, branches or any other groups of clubs. Their statutes and regulations must be approved by the National Executive Committee of FKF.

64. FKF is the body recognised by FIFA and CAF as being responsible for the promotion, regulation and control of football throughout Kenya. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents as President and Vice President respectively of FKF have been elected by the members of FKF, which include the shareholders of KPL, to lead the promotion, organization and running of the sport of football in Kenya. Premised on this mandate the President and Vice President have determined that one pillar of their agenda for the promotion of the sport of football in Kenya is to increase the number of teams participating in the league. This is within their remit as the elected leaders of the FKF and it is not within the purview of the Tribunal's jurisdiction to debate the merits or otherwise of such decision and neither do we consider that it is within the mandate of the KPL as agent to second guess the aspirations of the Respondents.

65. The President of the Respondent has further stated in his evidence in chief and on oath that the FKF will make available the necessary resources to finance the expansion of the league and will forego certain revenues flowing from the Agreement in order to achieve this aspiration. The Tribunal takes the view therefore that the KPL, which freely acknowledges its position as an agent, cannot and must not be allowed to subvert these aspirations.

66. As we have stated under Clause 1.1 (g) of the Agreement the parties are required to review and agree any decision relating to *inter alia* the number of teams in the league at least one full season prior to such implementation. KPL argues that it has not received notice from the FKF at least one full season prior to the commencement of 2017 league and that the letter of 7<sup>th</sup> April, 2016 from the FKF which communicated the KPL's decision does not give adequate notice. To its credit, the KPL responded by its letter of 27<sup>th</sup> April, 2016 inviting the FKF to nominate its representatives Joint Executive Committee ('JEC') in order to convene an urgent meeting to discuss the proposed expansion of the league. KPL does not in that letter protest the inadequacy of the notice, and even if it did, the Agreement itself does not require any formal notice with respect to changes in the league such as the increase in the number of teams. Indeed, the material placed before the Tribunal is replete with evidence of the desire to increase the number of teams in the league and such desire was articulated, for example, by Mr. Kwesi Nyatikyi in the Press Conference of 23<sup>rd</sup> March, 2015. We accept the contention by Counsel for the Respondents that the KPL, composed as it is of members of the FKF, and led by the Chairman of a leading football club would have known of those aspirations and must therefore have taken cognizance of the same. Unfortunately, however, the FKF did not see fit to respond to the invitation set out in the letter of 27<sup>th</sup> April, 2016 addressed to it by the KPL to nominate its representatives to the JEC and to that extent therefore the FKF has failed to act in accordance with the provisions of the Agreement which the Tribunal has found to be valid and enforceable save for the provision giving the KPL a casting vote.

## Conclusion

67. Having come to this conclusion, the Tribunal takes the view that the prayer for a permanent injunction to restrain the expansion of the league is without proper foundation. However, as the Agreement remains valid and enforceable, the Tribunal agrees that the FKF cannot interfere with the KPL's right to manage the Kenyan Premier League during the currency of the Agreement.

68. Therefore, for the purpose of managing the proper functioning of the relationship between the parties with respect to the expansion of the Kenyan Premier League the Tribunal makes the following orders and directions:

- i. The FKF shall by close of business on Wednesday, 11<sup>th</sup> January, 2017 nominate and communicate to the KPL its nominees to the Joint Executive Committee for the purpose of discussing *inter alia* the merits, modalities and mechanism for the expansion of the Kenyan Premier League from sixteen (16) to eighteen (18) teams for the 2017/2018 season;
- ii. The JEC duly constituted by the nominees of the KPL and the FKF shall convene a meeting and discuss the merits, modalities and mechanisms for the expansion of the league, which discussions must be concluded by Monday, 16<sup>th</sup> January, 2017;
- iii. The parties shall report on the outcome of their discussions and the decisions made at such meeting(s) at the Tribunal's sitting at 2.30 pm on Tuesday, 17<sup>th</sup> January, 2017.
- iv. The prayer for a permanent injunction restraining the Respondents from contemplating, discussing or implementing any decision to expand the Kenyan Premier League is dismissed;
- v. A permanent injunction is issued restraining the Respondents from otherwise interfering with the KPL's right to manage the Kenyan Premier League during the currency of the Agreement dated 24<sup>th</sup> September, 2015;
- vi. Costs of the Petition shall abide the outcome of the discussions;
- vii. There shall be liberty to apply on notice.

69. The Tribunal commends Counsel and the parties for their very helpful and comprehensive submissions and contributions.

**Dated at Nairobi** this 10<sup>th</sup> day of **January 2017**

Signed:

**John M Ohaga FCIArb**

**Chairman, Sports Disputes Tribunal**

Signed:

Gabriel O Ouko

Mary N Kimani

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[1] See [Mukhisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors Limited](#) [1969] EA 697

[2] [2001] eKLR



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