REPUBLIC OF KENYA

THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

CASE NO. 7 OF 2020

CHEMELIL SUGAR FOOTBALL CLUB.............................1ST PETITIONER

KENYA PREMIER LEAGUE LIMITED..............................2ND PETITIONER

-VERSUS-

NICK MWENDWA...1ST RESPONDENT

BARRY OTIENO..2ND RESPONDENT

FOOTBALL KENYA FEDERATION..................................3RD RESPONDENT

AND

TUSKER FC...1ST INTERESTED PARTY

ZOO FC..2ND INTERESTED PARTY

ULINZI FC..3RD INTERESTED PARTY

WESTERN STIMA FC...4TH INTERESTED PARTY

KARIOBANGI SHARKS FC...................................5TH INTERESTED PARTY

KAKAMEGA HOMEBOYZ FC..............................6TH INTERESTED PARTY

POSTA RANGERS FC..7TH INTERESTED PARTY

KCB FC...8TH INTERESTED PARTY

KISUMU ALL STARS FC..9TH INTERESTED PARTY

NAIROBI CITY STARS FC...................................10TH INTERESTED PARTY

BIDCO UNITED FC..11TH INTERESTED PARTY

NAIROBI STIMA FC..12TH INTERESTED PARTY

COAST STIMA FC...13TH INTERESTED PARTY

KIBERA ALL STARS FC.....................................14TH INTERESTED PARTY

FORTUNE SACCO..15TH INTERESTED PARTY

MWATATE UNITED FC...16TH INTERESTED PARTY

MT KENYA UNITED FC..17TH INTERESTED PARTY

LIGI NDOGO FC...18TH INTERESTED PARTY

MURLY CHILDREN'S FAMILY............................19TH INTERESTED PARTY

EGERTON FC..20TH INTERESTED PARTY

SILIBWET LEONS...21ST INTERESTED PARTY

APS BOMET FC...22ND INTERESTED PARTY

BUNGOMA SUPERSTARS FC...............................23RD INTERESTED PARTY

DECISION

Hearing: Monday, 7th September 2020 (Via Zoom Platform)

Panel: John M. Ohaga - Chairman

Gabriel Ouko - Member

E. Gichuru Kiplagat - Member

Appearances

Amos Otieno Esq (advocmo24@gmail.com) instructed by CMO Advocates for the Petitioners;

Prof. Tom Ojienda SC (ojiendaandassociates@gmail.com) and Victor Omwebu Esq (victor@litoromwebu.co.ke) instructed by Litoro & Omwebu Advocates for the Respondents;

Japheth Munyendo (jmunyendo@gmail.com) instructed by URBANUS K Associates, Advocates, Advocates for Western Stima FC, Tusker FC, Zoo FC as Interested Parties;

Charles Njenga Esq (cnjenga@mkn.co.ke) instructed by Muchoki Kangata Njenga & Co Advocates for the 7th to 23rd Interested Parties;

Namatsi & Company Advocates appearing for Kakamega Homeboyz FC as the 6th Interested Party.

Abbreviations

FKF Football Kenya Federation

FC Football Club

KPL Kenya Premier League

MA Member Association

Parties

1. The 1st Petitioner is a Kenya Premier League Football Club and is a member of the 2nd Petitioner.

2. The 2nd Petitioner is a Private Company limited by shares and incorporated under the Companies Act (Chapter 486)(now repealed) of the Laws of Kenya and institutes this Petition against the 1st, 2nd and 3rd Respondents in its capacities as a legal person.

3. The 1st and 2nd Respondents are officials of the 3rd Respondent acting in their capacities as the President and Chief Executive Officer respectively.

4. The 3rd Respondent is a national sports organization duly registered by the Sports Registrar under section 47(1) of the Sports Act, No. 13 and is a football Federation recognized by FIFA, CAF and CECAFA.

5. The Interested Parties are members of the 2nd Petitioner and the 3rd Respondent and participate in the Kenya Premier League.

Historical Background

6. On 11th May 2020 the Applicants commenced these proceedings under Certificate of Urgency sworn by the supporting affidavits of Jack Ogunda and Paul Kipngetich Korir seeking the following orders:

i. THAT this matter be certified as urgent and be heard forthwith;

ii. THAT service of this application be dispensed with in the first instance;

iii. THAT the Sports Disputes Tribunal issue STAY ORDERS against the 1st and 2nd Respondents for making the unlawful and unprocedural decision of cancelling the KENYAN PREMIER LEAGUE SEASON 2019/2020 that was individually pronounced and declared by the 1st Respondent and Communicated By the 2nd Respondent through their letters dated 30th April, 2020 and 5th May, 2020 without powers to do so, pending inter parties hearing and determination of this petition;

iv. THAT The Sports Disputes Tribunal to issue prohibition orders to prohibit the 1st, 2nd and 3rd Respondents by themselves, agents, employees or whomsoever from in any manner from interfering with the 2nd petitioners exclusive rights of running and managing The Kenyan Premier League Season 2019/2020 on the grounds set out in this application and supported by the supporting affidavit of JACK OGUDA; The Chief Executive Officer of the 2nd Respondent and PAUL KIPNGETICH KORIR;

v. THAT The Sports Disputes Tribunal to issue an Order of Mandamus, to compel the 1st ,2nd and 3rd Respondents by themselves, agents, employees or whomsoever from frustrating the efforts and exclusive powers and rights of the 2nd Petitioner to run, organize and manage the KENYAN PREMIER LEAGUE SEASON 2019/2020 which has since been lawfully suspended by the 2nd Petitioner due to COVID 19 pandemic in Kenya and the entire sporting world and the 1st,2nd and 3rd Respondents be compelled to offer the 2nd Petitioner an opportunity to exclusively continue running and managing *all the KENYAN PREMIER LEAGUE affairs and activities* without any form of interference from all the Respondents as per the Decision in Order No. V of SDT PETITION NO 41 OF 2016 where the Sports Disputes Tribunal sitting in Nairobi found that *(….A Permanent injunction is issued restraining the Respondents from otherwise interfering with the Petitioner's right to manage the Kenyan Premier League during the currency of*

the Agreement dated 24th September, 2015) dated and signed on the 10th day of January 2017 from HON JOHN M.OHAGA FCIArb, Chairman, Sports Disputes Tribunal;

vi. THAT The Sports Disputes Tribunal to issue an Order of Certiorari against the 1st and 2nd Respondents to bring into this Honourable Court for the purposes of being quashed the unlawful and unprocedural decision whose effect is to cancel THE KENYAN PREMIER LEAGUE 2019/2020 SEASON that was made by the 1st Respondent and communicated to all KENYAN PREMIER LEAGUE CLUB MEMBERS and CAF through the 2nd Respondent's letter dated 30th April, 2020 and 5th May, 2020 wherein the 1st and 2nd Respondents should be found to be in contempt of the SDT ,by intentionally refusing to obey and follow the Tribunal binding Decision in Order No. V of SDT PETITION NO 41 OF 2016 dated and signed on the 10th day of January 2017 from HON JOHN M.OHAGA FCIArb, Chairman, Sports Disputes Tribunal;

vii. THAT The Sports Dispute Tribunal to determine and give Directions and Orders on whether the SDT Ruling in Petition no.41 of 2016 is still subsistence and if so until when;

viii. THAT The Sports Dispute Tribunal to determine and give orders if the 2015 FKF-KPL AGREEMENT signed between KPL and FKF is still valid and whether it has any legal effect upon the 2nd Petitioner and 1st,2nd and 3rd Respondents capable of being enforced by this Tribunal;

ix. THAT The Sports Dispute Tribunal to give Mandatory Compelling Injunction Orders against All The Respondents that allow KENYAN PREMIER LEAGUE LIMITED to continue discharging their duties/responsibilities exclusively and without any interference from the 1st, 2nd and 3rd Respondents and continue running the KENYAN PREMIER LEAGUE SEASON 2019/2020 in strict Compliance with both the 2015 FKF-KPL AGREEMENT and the Legal Binding Ruling in SDT PETITION No.41 of 2016 ruling;

x. THAT the FKF Secretariat (3rd Respondent) to seek the position/status of the Kenyan Premier League Season 2019/2020 from the 2nd Petitioner before making any pronouncement with respect to the KENYAN PREMIER LEAGUE 2019/2020 league season;

xi. THAT the Tribunal to grant Orders Restoring and Sustaining the exclusive powers and mandate of the 2nd Petitioner to exclusively run and manage THE KENYAN PREMIER LEAGUE season 2019/2020 and the 1st ,2nd and 3rd respondents to be permanently stopped from the blatant interference;

xii. THAT the Tribunal to grant Orders Compelling the 1st ,2nd and 3rd Respondents to pay General and punitive Damages to the 2nd Petitioner for intentionally and without care breaching of a valid, subsisting and lawful 2015 FKF-KPL AGREEMENT; and

xiii. THAT cost of the application be borne by the Respondents.

7. On 12th May 2020 upon reading the application made under the provisions of Articles 94 and 169(1)(d) of the Constitution of Kenya 2010, Order 51 Rule 1A, 1B and Section 3A of the Civil Procedure Act, Chapter 21; Section 54 and 58 of the Sports Act, 2013 and Practice Directions and all enabling provisions of the law and upon reading the Certificate of Urgency of Amos Otieno Akoth, Advocate and upon reading the affidavit of Jack Oguda and Paul Kipngetich Korir supported by the annextures thereto and upon considering the material placed before it, the Tribunal through it Chairman John M Ohaga, SC; C. Arb; FCIArb, issued the following orders:

i. This application be and is hereby certifies as urgent and be considered *es-parte* in the first instance due to the nature of the reliefs sought;

ii. Pending the hearing and determination of this application and/or the Petition *inter partes,* the purported decision of the Respondents cancelling the Kenyan Premier League 2019/2020 Season be and is hereby stayed;

iii. The Application, the Petition and this Order be served upon the Respondents within the next three (3) days;

iv. In addition, the Application, the Petition and this Order be served upon all teams participating in the Kenyan Premier League for the 2019/2020 season within the next three (3) days;

v. Service may be effected by such digital medium (WhatsApp of Email) as may be expedient and shall be verified by an appropriate affidavit of service to be filed by the Petitioners;

vi. The Respondents and any teams participating in the Kenyan Premier League for the 2019/2020 season wishing to be joined to these proceedings shall file their responses within seven (7) days from the date of service upon them of the Application, the Petition and this Order;

vii. This matter shall be listed before the Tribunal for mention for further direction on Tuesday 26th May 2020 at 2.30 pm; and

viii. That the costs of this application are reserved.

8. On 13th May 2020 Counsel for the 1st, 2nd, 4th and 5th Interested Parties filed their Memorandum of Appearance together with the respective Replying Affidavits signed by each FC's respective Chairmen.

9. On 16th May 2020 Counsel for the Respondents filed their Notice of Appointment alongside their Notice of Preliminary Objection.

10. On 26th May 2020 the Tribunal mentioned the matter and heard the Parties in the case and issued the following directions:

i. Counsel for the Petitioners has leave to file and serve a Further Affidavit within the next four (4) days from the date of issuance of these directions, that is, on or before Friday 29th May 2020;

ii. Counsel for the Respondents and the Interested Parties shall arrange to serve upon each other their respective Notices of Appointment and Notices of Preliminary Objection not later than Friday 29th May 2020;

iii. Counsel for the Respondents and the Interested Parties shall file and serve their written submissions in support of their respective Preliminary Objections within seven (7) days from date of service of the Petitioners' Further Affidavit, that is, on or before Friday 5th June 2020;

iv. Counsel for the Petitioners shall then file and serve their written submission in response to the Preliminary Objections within five (5) days from date of service of the Respondents and Interested Parties Submissions, that is, on or before 10th June 2020;

v. All affidavits, notices and written submissions shall be filed electronically (sportstribunal@gmail.com) and shall be copied to each member of the Panel at their respective email addresses and shall also be served electronically upon each of the parties at their designated email addresses;

vi. The Panel constituted to hear this matter shall be:

i. John M Ohaga (johaga@tripleoklaw.com) - Chairperson

ii. Edmund Gichuru (montegich@gmail.com) -Member

iii. Gabriel Ouko (gabbyouko@gmail.com) -Member;

vii. The interim orders staying the impugned decision are hereby extended; and

viii. The matter shall come up for hearing on Friday 12th June 2020 at 2.30 pm via Zoom or such other medium as the Tribunal shall determine to hear brief arguments on the preliminary points of objection.

11. On 26th May 2020 Counsel for the Respondents filed Notice of Preliminary Objection.

12. On 27th May 2020 Counsel for the 3rd Interested Party filed Notice of Appointment and Replying Affidavit.

13. On 29th May 2020 Counsel for the 2nd Petitioner filed, with the permission of the Tribunal, a Further Affidavit on Preliminary Objections.

14. On 3rd June 2020 Counsel for the Interested Parties Tusker FC, Zoo FC, Ulinzi FC, Western Stima FC and Kariobnadi FC filed their written submissions on the Notice of Preliminary Objection dated 13th May 2020.

15. On 5th June 2020 Counsel for the Respondents filed with the Tribunal their Written Submissions together with their List of Authorities in Respect of their Preliminary Objection.

16. On 10th June 2020 Counsel for Posta Rangers FC, KCB FC and Kisumu All Stars FC filed Written Submissions as well as List of Authorities on the Notice of Preliminary Objection dated 22nd May 2020 with the Tribunal.

17. On 10th June 2020 Counsel for the 2nd Petitioner filed Written Submissions and List of Authorities opposing the Respondent's Preliminary Objection dated 26th May 2020.

18. On 12th June 2020 the Tribunal heard oral submissions on the various preliminary objections and directed that the matter be listed for ruling on the preliminary issues on 28th July 2020.

19. On 13th July 2020 the Interested Party, *Kakamega Homeboyz FC,* filed Notice of Appointment of Advocate.

20. On 28th July 2020 the Tribunal determined conclusively the matter of the Preliminary Objections raised by the Respondents and Interested Parties and ordered as follows:

a. The preliminary objection by the 1st, 2nd and 3rd Respondents and the Interested Parties is hereby disallowed with costs;

b. The Tribunal shall proceed to entertain the Petition as against the 1st, 2nd and 3rd Respondents;

c. The application for joinder of Kakamega Homeboys FC is accordingly struck out with no order as to costs; and

d. The Tribunal will issue necessary directions for the expedited hearing of the Petition.

21. Further on 28th July 2020, following delivery of the ruling on the Preliminary Objections and upon hearing Counsel for the parties, the Tribunal directed and ordered as follows with respect to the hearing of the Petition on its merits:

i. The Petitioners have leave to file and serve a Further Supplementary Affidavit within the next two (2) days from the date hereof, that is, on or before Thursday 30th July, 2020;

ii. The Respondents and the Interested Parties shall file and serve their responses to the Petition within seven (7) days of service upon them of the Further Supplementary Affidavit; that is to say on or before Thursday 6th August 2020;

iii. The Petitioners shall file a reply to the Respondents and Interested Parties responses within five (5) days of service upon them of the said response; that is to say on or before Monday 11th August, 2020;

iv. The parties shall frame, file and serve skeleton written submissions in respect of their various positions on or before Monday 17th August, 2020;

v. All affidavits and written submissions shall be filed electronically (sportstribunal@gmail.com) and shall be copied to each member of the Panel at their respective email addresses and shall also be served electronically upon each of the parties at their designated email addresses;

vi. The interim orders staying the impugned decision are hereby extended; and

vii. The matter shall come up for hearing on Tuesday 18th August 2020 at 3.00 pm via Zoom or such other medium as the Tribunal shall determine to hear arguments on the merits of the Petition.

22. On 30th July 2020 Counsel for the 2nd Petitioner filed the Supplementary Affidavit of Jack Oguda.

23. On 10th August 2020, the 1st Petitioner filed Notice of Intention to Act in Person and simultaneously filed Notice of Withdrawal of Petition and Supporting Affidavit.

24. On 14th August 2020 Counsel for the 1st – 5th Interested Parties filed an application under Certificate of Urgency supporting by the affidavits of Ken Ochieng' and Robert Bitengo Maoga seeking the following orders:

i. That the suit and/or Petition and Notice of Motion dates 11th May 2020 herein be struck out;

ii. In the alternative and without prejudice to the foregoing the names of the 2nd Petitioner be struck out from the suit;

iii. The *ex parte* orders issued on 11th May 2020 and extended on diverse dates be stayed, vacated, varied and/or set aside pending the hearing and determination of this Application;

iv. The Interested Parties/Applicants be awarded the costs of this application and the cost of the entire suit with interest;

v. This Honourable Tribunal orders that the directors and shareholders of the 2nd Petitioner resolve the issue in dispute within their internal mechanisms; and

vi. This Honourable Court grants any other or further orders as may be deemed fit in the circumstances.

25. On 14th August 2020 Counsel for the 7th, 8th and 9th Interested Parties filed Grounds of Opposition to the Petition.

26. On 16th August 2020 the Respondents through the 2nd Respondent filed Replying Affidavit in opposition to the Petition and Application.

27. The matter came up for hearing on 18th August 2020 when the Tribunal noted that the 1st Petitioner had filed Notice of Withdrawal from the matter which was signed by the Secretary General of the 1st Petitioner.

28. The Tribunal thereafter on 18th August 2020 issued the following Directions:

i. Leave is granted to Counsel for 7th , 8th and 9th Interested Parties, to enjoin new Interested Parties to the suit and thereafter file their Replying Affidavit to the merits of the Petition within 3 days, that is on or before Friday, 21st August 2020.

ii. The 2nd Petitioner shall thereafter file and serve their written submissions within 4 days that is on or before Tuesday, 25th August 2020.

iii. The Respondents and the Interested Parties shall thereafter file and serve their written submissions within 5 days that is on or before Monday, 31st August 2020. The allotted time is to run simultaneously for all Respondents and Interested Parties.

iv. Advance soft copies of all documents to be served and filed are to be transmitted the Tribunal electronically (sportstribunal@gmail.com) and to each member of the Panel at their respective email addresses and shall also be served electronically upon each of the parties at their designated email addresses. Hard copies are thereafter required to be delivered to the Tribunal's Registry.

v. The matter shall be heard on Tuesday, 1st September 2020 at 3.00 pm via Microsoft Teams or such other medium as the Tribunal shall determine for hearing of oral arguments in the matter.

29. On 21st August 2020, Counsel for the 7th to 23rd Interested Parties filed their Replying Affidavit to the Petition.

30. On 31st August 2020, the 2nd Petitioner filed their Written Submissions dated 25th August 2020 in support of the Petition.

31. On 1st September 2020, the Tribunal upon hearing the Parties in the matter issued the following directions:

i. Leave is granted to Counsels for the Respondents to file and serve their respective Written Submissions within 7 days that is on or before close of day Sunday, 6th September 2020;

ii. Advance soft copies of all documents to be filed and served are to be transmitted the Tribunal electronically (sportstribunal@gmail.com) and to each member of the Panel at their respective email addresses and shall also be served electronically upon each of the parties at their designated email addresses. Hard copies are thereafter required to be delivered to the Tribunal's Registry; and

iii. The matter be mentioned on Monday, 7th September 2020 at 3.00 pm via Microsoft Teams or such other medium as the Tribunal shall determine for hearing of oral arguments in the matter.

32. On 5th September 2020 Counsel for the 7th to 23rd Interested Parties submitted their written submissions in opposition to the Petition.

33. On 6th September 2020 Counsel for the Respondents filed their Written Submissions and List of Authorities with respect to the Petition.

34. On 7th September 2020, the Tribunal heard oral submissions of all Parties herein with the exception of Mr. Odongo, Counsel for the intended interested parties who was granted leave to represent several intended interested parties, stating that they wished to focus on matters pertaining to elections. The Tribunal thereafter adjourned to deliberate and issue a considered decision in the matter.

Background

35. This dispute picks up from where SDT Petition No. 41 of 2016 – **Kenyan Premier League Limited vs. Nick Mwendwa & Others** left off. It is a continuation of the struggle for the control of the soul of Kenya football. Evidently, whoever controls the top tier Kenyan Premier League clearly controls Kenyan football.

36. SDT Petition No. 41 of 2016 concerned the expansion of the Kenyan premier league from 16 to 18 teams. The present dispute concerns the announcement of the winner of the Kenyan Premier League for the 2019/2020 season in view of the covid19 pandemic which has led to the premature stoppage of sporting activities globally. Even the Olympics which were to be held in Tokyo, Japan have not been spared.

37. The facts of this dispute are best gleaned from the commencing affidavit of Jack Oguda, the Chief Executive Officer of the Kenyan Premier League Limited sworn on 11th May 2020. The Kenyan Premier League Limited is the 2nd Petitioner in this action.

38. Very briefly, Mr. Oguda depones that by an agreement dated 24th September 2015, the 2nd Petitioner and the 3rd Respondent agreed that the 2nd Petitioner would have the exclusive right to run, organize and manage the Kenyan Premier League and also own and manage all branding and commercial rights of the league.

39. The Tribunal is already familiar with the agreement having determined the dispute in SDT Petition No. 41 of 2016 when, we might add, the Tribunal was the darling of the 3rd Petitioner, having granted it its wish to expand the League from 16 to 18 teams. It is therefore slightly amusing that today, one of the issues that the Panel will have to determine is the allegation that the Tribunal does not have the ingredients of an arbitral tribunal because it has not allowed the 3rd Respondent a proper opportunity to present its case or has not been impartial in its consideration of the Respondents' case.

40. But we digress.

41. Jack Oguda continues to depone that notwithstanding the rights given to the 2nd Petitioner under the Agreement, on 30th April, 2020 at 12.28 pm the 1st Respondent through his twitter handle effectively brought the league to an end by congratulating Gor Mahia by as the champions of the Premier League.

42. The gravamen of the 2nd Petitioner's grievance is that the 1st Respondent did not comply with any of the protocols set out in the 3rd Respondent's own Constitution, in the Agreement or the Rules and Regulations Governing Kenyan Football and that such announcement therefore had no force of law. The 2nd Petitioner contends that it had the sole right to determine the fate of the league and it matters not that it would have come to the same conclusion as that announced by the 1st Respondent.

43. Many other factual issues have been set out by the parties in their respective affidavits and numerous documents referred but we consider the foregoing to be the core facts around which this dispute revolves. We will make reference to such secondary facts as we consider relevant should these be necessary.

44. In the foregoing, the Petitioners' case is that the Respondents are in breach of the Agreement and are therefore liable to pay damages and face censure as set out in the Petitioners' pleadings.

Arguments

A. The Petitioners' Case

45. Arising from the factual matrix set out in its founding affidavit, the the 2nd Petitioner has raised 5 issues for the Tribunal's consideration and determination. These are:

i. Whether the FKF-KPL 2015 Agreement ('the Agreement') is valid;

ii. Whether the Agreement was breached by the Respondents;

iii. Whether the Respondents breached the KPL-FKF 2015 Contract and disobeyed the interim court order;

iv. Whether the 2nd Petitioner has suffered damages and irreparable loss as a result of the breach of contract; and

v. Whether the 2nd Petitioner exhausted internal dispute mechanisms.

46. Concerning the validity of the FKF-KPL 2015 Agreement, the 2nd Petitioner submits that on 24th September 2015, the 3rd Respondent entered into a binding legal agreement with the 2nd Petitioner that granted, among others, the exclusive right to run, organise and manage the Kenya Premier League and also to own and manage all branding and commercial rights of the league.

47. Concerning the 2nd Petitioner's assertion that the Respondents breached the Agreement, the 2nd Petitioner submits that the 1st Respondent made a statement on Twitter that the 2019/2020 season had come to an end and that Gor Mahia FC was the champion of the League on 30th April 2020. The 2nd Petitioner asserts that the decision to cancel the League amounted to a breach of clause 2(a) and (d) of the Agreement as it did not confer such power upon it.

48. The 2nd Petitioner also submits that the 1st and 2nd Respondents had no regard to the interim orders of the Tribunal issued on 12th May 2020 by making various public pronouncements in different radio stations that the 2nd Petitioner's company era of running football in Kenya came to an end, and that the Chair of this Tribunal is an obstacle to the administration and development of football in Kenya.

49. The 2nd Petitioner further submits that it lost sports TV Rights form KTN as well as other prospective sponsorships because the 1st and 3rd Respondents owned and run the new FKF Betking PL.

50. Lastly, it is the 2nd Petitioner's submission that the Respondents were never keen on an internal dispute resolution mechanism because their conduct showed bias. For this reason and by virtue of the findings of the Tribunal in SDT No. 3 and 5 of 2020, the 2nd Petitioner asserts that it is impossible for the joint KPL-FKF Committee to solve the conflict arising from the pronouncements of the

1st Respondent.

B. The Respondents' Case

51. The Respondents submit that the Petition is frivolous, vexatious, bad in law, incurably defective, without merit and an abuse of the Tribunal process for want of both substance and form for reasons that: -

i. The 2nd Petitioner did not give any notification, call for any meeting by the shareholders and voting members by the 2nd Petitioner's Governing Council over any dispute between KPL and FKF in so far as the subject matter of the Petition is concerned hence there being no dispute regarding the issue the 2nd Petitioner raises;

ii. There was no requisite resolution sanctioning the institution of this Petition. The Respondents submit that the Chief Executive Officer of the 2nd Petitioner could not institute the Petition in the absence of such instruction by the Governing Council of the 2nd Petitioner dint of Article 19(c) of the KPL Limited Constitution to file the Petition and swear the Affidavit in support thereof;

iii. The 2nd Petitioners gave no reason for by-passing a well laid out resolution forum stipulated and provided for in the governing statutes of the 3rd Respondent as well furnishing proof showing the steps it undertook to engage in negotiations with the 3rd Respondent or presenting the alleged dispute before the FKF Leagues and Competitions Committee;

iv. The Tribunal lacks jurisdiction because it is a subordinate court as stipulated under Article 169 (1) (d) of the Constitution of Kenya, 2010, clause 10.3 of the Agreement between FKF and KPL and falls short of an arbitral tribunal as stipulated by Articles 59 (2) and (3), 60, para 3 (c) of the FIFA Statutes i.e. that it lacks the principle of parity when constituting the panel, that it is not impartial, that it does not grant parties a fair hearing and does not accord them equal treatment;

v. The 2nd Petitioner was obliged to abide by all decisions and resolutions made by the 3rd Respondent dint of Rule 1.6 of the FKF Rules and Regulations Governing Kenya Football (2019); and

vi. There is a method used to declare a winner where there is failure to complete the league due to circumstances of force majeure dint of Rule 2.6 of the FKF Rules and Regulations Governing Kenya Football.

C. The Interested Parties' Case

52. The 7th – 23rd Interested Parties submit that the prayers and reliefs sought by the 2nd Petitioner are unavailable and unsustainable in law for reasons that:

a. This Petition is *res judicata* by dint of:

ii. prayer 5 of the Petition that prays for the Tribunal to issue an order of mandamus to compel the Respondents by themselves, agents, employees or whomsoever from frustrating the efforts and exclusive powers and rights of the 2nd Petitioner to run, organise and manage the KPL Season 2019-2020 which was suspended due to the Covid-19 pandemic, and that the Respondents be compelled to offer the 2nd Petitioner an opportunity to exclusively continue running and managing the Kenya Premier League without any form of interference from all Respondents as per the decision in Order V. of the SDT Petition No. 41 of 2016;

iii. Prayer 6 of the Petition that prays for the Tribunal to issue an order of certiorari against the Respondents by finding the 1st and 2nd Respondents in contempt of the Tribunal by intentionally refusing to obey and follow the Tribunal's binding decision in Order V. of the SDT Petition No. 41 od 2016; and

iv. Prayer 7 of the Tribunal that prays for the Tribunal to determine and give directions on whether the SDT Ruling in Petition No. 41 of 2016 is subsisting and the duration thereof.

b. The Respondents did not breach the Agreement by virtue of their decision on 30th April 2020 because the Agreement did not divest the 3rd Respondent of its overall responsibilities by dint of the FKF Constitution, FIFA Statutes and Rules 2.3.3 and 2.5.1 of the FKF Rules and Regulations Governing Kenya Football (2019);

c. The FKF-KPL Agreement is in respect to Kenya Premier League only whereas the 1st Respondent's decision of 30th April 2020 was made with respect to the Leagues of the 3rd Respondent;

d. Covid-19 is a case of force majeure which excuses the Respondents from their contractual obligations; and

e. The 2nd Petitioner is not entitled to any award of damages because of:

i. Not proving any actionable breach of contract or contempt of court on the part of the Respondents;

ii. Not having a competent prayer for damages as this issue is only raised in the application for conservatory orders and in the submissions; and

iii. Neither pleading particularised nor demonstrating any specific loss and damages suffered.

f. Further, the 1st – 5th Interested Parties submit that eight Director-Shareholders of the 2nd Petitioner admit that the Petition is an abuse of the court process and that they are willing to resort to an internal dispute resolution mechanism; and

g. In addition to the submissions of the Respondents, the 1st -5th Interested Parties submit on the Bundesliga, FIFA Directives on the resumption of sporting activities in relation to the Kenyan situation and in response to assertion by the 2nd Petitioner stating that resumption of the 11 league matches is not feasible because it would be irredeemably costly to implement.

Issues for Determination

53. Having considered all the parties' pleadings, affidavits. submissions and oral arguments, we identify the following issues as worthy of determination by this Tribunal:

A. Whether the Tribunal lacks the jurisdiction to determine this Petition; and whether the Tribunal is an arbitral tribunal as contemplated by the tenets of arbitration law and practice;

B. Whether the matter is *Res Judicata;*

C. Whether the Petition is defective for want of a resolution conferring authority on the 2nd Petitioner to commence and sustain these proceedings;

D. Whether the Petitioner exhausted internal dispute resolution mechanisms;

E. Whether there was the occurrence of a *Force Majeure;*

F. Whether there was any breach of Contract.

A. Whether the Tribunal lacks the jurisdiction to determine this Petition; and **whether the Tribunal is an arbitral tribunal as contemplated by the tenets of arbitration law and practice**;

54. The Respondents and Interested Parties remain adamant in challenging the jurisdiction of this Tribunal to hear and determine the Petition. It is noteworthy that this Tribunal comprehensively pronounced itself on the question of whether it was a court in its Ruling dated 28th July 2020 as well as several other decisions before it. We need not expend further time and energy in repeating this here.

55. The question of jurisdiction in the particular circumstances of this case is relatively easy to dispose of once it is understood that at the core of this dispute is the interpretation of the Agreement. Indeed, Article 10.2 of the Agreement expressly provides as follows:

"*any dispute or difference referred to in the preceding paragraph which is not resolved pursuant to that paragraph shall be referred*

by either party to the Sports Disputes Tribunal established under the Sports Act of 2013. The ruling of the Sports Disputes Tribunal may be appealed to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland."

56. Accordingly, the Panel need not look beyond the provisions of the Agreement entered into by the parties in order to determine whether or not it has jurisdiction and this ground of challenge is therefore without merit. In any event, the Tribunal having been invited and conferred with jurisdiction to determine SDT No. 41 of 2016 between essentially the same parties cannot now declare that it has no jurisdiction. Unlike parties who can blow hot and cold in the way in which they frame their cases before dispute resolution forums such as the Tribunal depending on the facts of their case and the legal advice received, the Tribunal has no such luxury. It is duty bound to make decisions that bring certainty on issues in respect of which it is called upon to express itself.

57. However, the Respondents also make the interesting argument that the Tribunal is not an independent arbitral tribunal because it proceeds in the absence of any due regard for the basic principles of arbitration. For this proposition, the Respondents point to Part VII of the Sports Act, 2013 which provides for the '*Arbitration of Sports Disputes'*. The Respondents go further to submit that the Tribunal cannot be an arbitral Tribunal within the meaning and intended framework of Article 159(2)(c) of the Constitution of Kenya and the Arbitration Act, 1995 and when measured against the tenets of arbitration law and practice.

58. This submission is obviously premised on a complete misapprehension of the intendment of Part VII of the Sports Act, 2013 and indeed the very architecture of the Sports Act in so far as the establishment of the Sports Tribunal is concerned.

59. There can be no doubt that the Tribunal is a statutory Tribunal established under the Sports Act and is therefore a subordinate Court as stipulated under Article 169(1)(d) of the Constitution of Kenya. It is therefore not an arbitral tribunal but rather a specialist tribunal established for the purpose of resolving sports disputes in Kenya. The intention of Part VII of the Sports Act is to require that the Tribunal utilize principles of arbitration and other aspects of alternative dispute resolution rather than litigation in the manner in which it approaches and seeks to resolve sports related disputes. The Tribunal in exercising its mandate resolves disputes in relation to every sport and not just football. Therefore the template into which the Respondents seek to fit the Tribunal in determining whether it is an independent arbitration Tribunal as determined by FIFA is not the template by which the Tribunal measures its structure as a dispute resolution forum.

60. In considering this issue the Panel can do no better than borrow from the description of an arbitral tribunal as set out in **England and Wales Cricket Board vs. Kaneria**, [2013] EWHC at page 27 where the Court, borrowed from **Walkinshaw vs. Diniz** [2000] 2 All E R (Comm) 237.

61. In **Walkinshaw vs. Diniz** Thomas J, as he then was, set out the facts which he considered relevant when considering whether or not the body with which he was concerned in that case was an arbitral body and whether the proceedings were therefore arbitration proceedings. He referred to a dictum of Hirst LJ in an earlier decision where the latter stated:

"*To my mind the hallmark of the arbitration process is that it is a procedure to determine the legal rights and obligations of the parties judicially, with binding effect, which is enforceable in law, thus reflecting in private proceedings the role of a civil court of law."*

62. In looking at the substance of the function of the body concerned he also looked at the question whether the duty of the body was to apply the law and also at the procedure adopted. He then ran through a series of factors which he set out as follows:

i. It is a characteristic of arbitration that the parties should have a proper opportunity of presenting their case;

ii. It is a fundamental requirement of an arbitration that the arbitrators do not receive unilateral communications from the parties and disclose all communications with one party to the other party;

iii. The hallmarks of an arbitral process are the provision of proper and proportionate procedures for the provision and for the receipt of evidence;

iv. The agreement pursuant to which the process is, or is to be, carried on ("the procedural agreement") must contemplate that the tribunal which carries on the process will make a decision which is binding on the parties to the procedural agreement;

v. The procedural agreement must contemplate that the process will be carried on between those persons whose substantive rights are determined by the tribunal;

vi. The jurisdiction of the tribunal to carry on the process and to decide the rights of the parties must derive either from the consent of the parties, or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration;

vii. The tribunal must be chosen, either by the parties, or by a method to which they have consented;

viii. The procedural agreement must contemplate that the tribunal will determine the rights of the parties in an impartial manner, with the tribunal owing an equal obligation of fairness towards both sides;

ix. The agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law;

x. The procedural agreement must contemplate a process whereby the tribunal will make a decision upon a dispute which has already been formulated at the time when the tribunal is appointed;

63. The Sports Tribunal in the manner in which it seeks to resolve disputes has modelled itself on these basic tenets whilst also recognizing that, to the extent that arbitration is a private law method of dispute resolution, there must of necessity be certain of the factors set out above which would not sit well with the Tribunal's workings. Sports Federations such as the 3rd Respondent are not private persons, are established and regulated to a significant extent by statute, to wit the Sports Act and are to a significant extent funded by the public purse and their conduct and operations must therefore necessarily be amenable to public scrutiny.

64. Indeed, when one considers other facets of arbitration it will become evident that if the Tribunal modelled itself along the lines suggested by the Respondent it would be inimical to the provisions of Article 50 of the Constitution of Kenya. For example, features of arbitration such as the cost of constituting a panel of three arbitrators would certainly mean that access to this forum would not be available to many of the persons who regularly appear before the Tribunal and would therefore fall afoul of Article 48 of the Constitution, 2010.

65. Confidentiality is another aspect that would certainly mean that decisions of the Tribunal could not be freely published and that persons wishing to participate in hearings of the Tribunal would be precluded except with the permission of the parties. This runs counter to Article 50 of the Constitution which requires that hearings be open to the public.

66. As we have already observed, it must be understood that in its strictest construction, arbitration is a private law methodology for dispute resolution and is therefore not necessarily suitable for the nature of disputes that regularly come before this Tribunal including the present dispute.

67. This does not mean, however, that the Tribunal cannot exercise and apply the principles such as those identified in **England and Wales Cricket Board**.

68. It will also be obvious that the Tribunal does not frame its decisions in the form of awards such as are contemplated under the Arbitration Act and therefore such decisions are not amenable to the provisions for recognition and enforcement or setting aside under sections 35 and 36 of the Arbitration Act.

69. The attempt to fit the Tribunal into the template suggested by the Respondents is therefore rejected having regard to the fact that, as we have already stated, the Tribunal covers many other sporting disciplines.

B. Whether the matter is *res judicata*

70. The 7th -23rd Interested Parties contend that the Petitioner's prayer leaves no doubt that it seeks to litigate over the same issues that were decided in SDT Petition No. 41 of 2016.

71. They argue that the question in the Petition in SDT Petition No. 41 of 2016 was on the validity, extent and parameters of the agreement between the 3rd Respondent and the Petitioner.

72. They further argue that the primary issue directly and substantially in issue in the present Petition is whether the 3rd Respondent had the mandate and power in the context to make the decision published on 30th April 2020.

73. Additionally, they argue that the Petitioner takes the position that the 3rd Respondent has acted in disobedience and contempt of the orders the Tribunal gave in SDT Petition No. 41 of 2016.

74. They relied on various authorities among them, **Haither Haji Abdi and another -vs.- Southdowns Developers and others [2012] eKLR** which expounded on the principle of *res judicata* stating that:

15. I find and hold that all matters concerning the parties in respect of the suit property are now res judicata. The substance of the case as between the petitioner and Southdown is whether the sale by the Kenyac was valid or not. The Court has already made determination as to propriety of the sale. The petitioners had a full opportunity to make all allegations regarding that sale including allegations regarding the position of one of the directors of Southdown and it would be improper to re-open a matter that has been determined by a Court of competent jurisdiction. This view is fortified by a similar finding by Justice Muchelule in the ruling dated 2nd December 2010 in Nairobi HCCC No. 1389 of 2004.

16. The fact that this matter comes before this Court as one to enforce fundamental rights and freedoms does not change the nature of the matter. In Samuel Njau Wainaina v Commissioner of Lands and Others Nairobi Petition No. 46 of 2012 (Unreported),

[22] In this respect, I would do no better than quote the case of Edwin Thuo v Attorney General & Another Nairobi Petition No. 212 of 2012 (Unreported) where the court stated, "The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata

17. The addition of the Attorney General, the Officer Commanding Lang'ata Police Division, Commissioner of Police and the Provincial Police Officer as parties to the petition are merely cosmetic changes. The common thread running through this and the previous suits is whether the suit property was properly sold to Southdown. These matters that have been settled by the judgment and cannot be re-opened merely by elevating the issue to one of public law and packaging it differently as an enforcement action under Article 22 of the Constitution in order to evade the general principle of res judicata."

75. The 2nd Petitioner did not canvass this issue in its submissions but briefly argued it orally before the Tribunal stating that in SDT Petition No. 41 of 2016, the Tribunal addressed itself to the fact that Kenya Premier League had exclusive rights to run the league free from the 3rd Respondent.

76. In addressing this issue, we are mindful that the plea of *res judicata* is provided for at section 7 of the **Civil Procedure Act** which provides that:

"No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or in which such issue has been subsequently raised, and has been heard and finally decided by such court."

77. The requisite ingredients for an efficacious plea of *res judicata* were demystified in **Nathaniel Ngure Kihiu -vs.- Housing Finance [2018] eKLR** where the court held that *res judicata* is applicable only where the former judgment was:

i. That of a court of competent jurisdiction.

ii. Directly speaking upon the matter in question in the subsequent suit; and

iii. Between the same parties or their privies.

78. The same court also set out clear conditions that must be satisfied before *res judicata* can successfully be pleaded:

i. The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit.

ii. The former suit must have been a suit between the same parties or between the same parties under whom they or any of them claim.

iii. Such parties must have been litigating under the same title in the former suit; and

iv. The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.

79. In view of the foregoing, the Tribunal notes that in SDT Petition No. 41 of 2016, it pronounced itself as having competent jurisdiction.

80. However, the Tribunal notes that it did not directly speak upon the matter in issue in the present Petition.

81. Firstly, the Tribunal identified the issue for determination in SDT Petition No. 41 of 2016 in the following terms:

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 24th September, 2015 ('**the Agreement**') entered into between the Petitioner and the 4th Respondent.*

82. As noted previously, the primary issue for consideration here is whether the Respondents had the right to cancel the 2019/2020 KPL season in relation to the FKF-KPL Agreement. There is evidently a common thread between the two (2) actions, that is, the Agreement. However, there is a difference in terms of the ability of the Respondents to cancel a season and pronounce a Club as a winner and the number of teams participating in the season. In this Petition, the Tribunal is not concerned with the number of teams participating in the season as it already addressed this issue.

83. On the other hand, prayers 5, 6 and 7 of the Petition are *res judicata* because this Tribunal already issued a permanent injunction restraining the Respondents from otherwise interfering with the Petitioner's right to manage the Kenya Premier League during the currency of the Agreement. Accordingly, an application for contempt should be addressed in that cause.

84. Nonetheless, the Petition cannot be deemed as invalid in its entirety from the foregoing conclusion. There are other issues that this Tribunal has not determined and other prayers that emanate from these novel issues.

C. Whether the Petition is invalid for want of authority

85. While raising the Preliminary Objection, the Respondents argued that the 2nd Petitioner lacked *locus standi* because there was no valid resolution approving the institution of this Petition and the absence of sanction from the Governing Council of the 2nd Petitioner to authorise the Chief Executive Officer of the 2nd Petitioner to swear an affidavit in support.

86. Mr. Amos Otieno Okoth in his Replying Affidavit dated 27th May 2020 at paragraph 54 stated that,

"THAT there is no such provision in the KPL Constitution that requires a meeting resolution or consent from the Governing Counsel to give authority to KPL to seek legal address when its rights have been infringed by a third party or any KPL shareholder

and in this case the Respondents."

87. However, in his oral arguments on the merits of the Petition, he only stated that the Tribunal had canvassed this issue in its Ruling of 28th July 2020.

88. Indeed, this Tribunal pronounced itself on this issue holding in part that:

54. The Tribunal is not aware of the contents of the 2nd Petitioner's constitution. The Respondents and the Interested Parties merely allege that the 2nd Petitioner requires a valid resolution approving the institution of the Petition but fails to prove this.

55. All the authorities cited to the Tribunal in relation to the question of the validity of the Petition as filed on behalf of the 2nd Respondent were decided before the repeal of the Companies Act, Chapter 486. Section 33 of the Companies Act, No. 17 of 2015 provides: "The validity of an act or omission of a company may not be called into question on the ground of lack of capacity because of a provision in the constitution of the company."

56. Prima facie therefore, the alleged provisions of the Constitution of the 2nd Respondent cannot, without more, be cited as precluding the 2nd Respondent from bringing instituting these proceedings.

57. The Respondents and the Interested Parties have failed to cite any specific limitation constraining the ability of the 2nd Petitioner to institute this Petition. The upshot of this is that the validity of the action of the 2nd Petitioner instituting this suit is of no consequence to its locus and the validity of the Petition itself.

89. However, since rendering a decision on this issue, circumstances have changed. Firstly, the 1st - 5th Interested Parties filed an application by way of Notice of Motion dated 14th August 2020 to which was annexed the affidavits of Ken Ochieng, the Chairman of Zoo Football Club, an equal shareholder with 17 other clubs in the 2nd Petitioner's company, and Robert Bitengo Maoga, the Chairman of Kariobangi Sharks Football Club, an equal shareholder with 17 other clubs in the 2nd Petitioner's company stating *inter alia* that there was no evidence showing that the 2nd Petitioner resolved to institute the suit and/or has an interest in the suit.

90. Further, the Respondents submit that Article 19 (c) (v) of the KPL Constitution provides that:

"Chief Executive Officer shall undertake such activities as directed by the Governing Council from time to time."

91. The Respondents argue further that pursuant to the provision cited above, any action undertaken by the CEO in the name of the company, ought to be sanctioned and directed by the Governing Council.

92. The Respondents relied on the authority of **Kenya Commercial Bank Limited v Stage-Coach Management Ltd [2014] eKLR** which held that:

"As regards the necessity for a company Resolution to back the institution of the suit, Odunga J. in his Judgement in the Leo Investments case (supra) referred to the holding of Hewett, J. in Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000 as follows: "It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect…….. As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."

And **East African Portland Cement Ltd v Capital Markets Authority & 4 others [2014] eKLR** where the court observed that:

"In Bugerere Coffee Growers Ltd vs Sebaduka & Another, it was held, in dismissing the suit, that when companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorising the proceedings in the case. The Court held

further that where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the defendants for the costs of the action... Consequently, I direct that the costs hereof be borne by: Mr. Mark Ole Karbolo and Mr. John Maonga, the two persons who made depositions for the filing of the petition without the authority of the company; Messrs. Aduda & Co Advocates, the firm of Advocates who filed this petition ostensibly on behalf of the company."

93. We consider it just to buttress that there is no requirement to file a Petition together with the resolution of the Board or shareholders at the same time. Order 4 Rule 1 (4) of the Civil Procedure Rules, 2010 provides that:

Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

94. In **Mavuno Industries Limited & 2 Others vs Keroche Industries Limited HCCC No. 122 of 2011** (cited with approval in **Britind Industries Limited vs. APA Insurance Limited [2017] eKLR**) held that;

"As properly submitted by the defendant, under Order 4 rule 1 (4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents, which common sense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint or with the Registrar of Companies, as the requirement is extended by the defendant, does not invalidate the suit".

95. Further in **Leo Investments Ltd vs Trident Insurance Co. Ltd (2014) eKLR** and **Republic vs Registrar General and 13 Others (2015) eKLR,** Odunga J and Kimaru J respectively expressed the view that the legal position is that a resolution of the Board of Directors of a company may be filed at any time before the suit is fixed for hearing.

96. Additionally, this was the same position taken by the Court of Appeal in **East Africa Safari Air Ltd -vs- Antony Ambaka Kegodre & Another (2011) eKLR** where it reversed the decision of the High Court denying the appellant the opportunity to demonstrate the appointment of the advocates before striking out the suit, even if irregular at the beginning, had been regularised.

97. The Court in expounded further on this issue held that:

"...a director who is authorised to act on behalf of the company may act in cases on behalf of the company without the board's resolution unless the contrary is proved."

98. Gikonyo J. in **Fubeco China Fushun v Naiposha Company Limited & 11 Others [2014]eKLR** also held that:

'In the case before me, Caroline Wairimu Kimemia is a director of the Defendant Company and she duly authorized the advocates on record to commence this Application. The plaintiff has also not presented any material or affidavit from the other directors denying the authority of Carolyne Wairimu Kimemia as a director in the defendant company. As such, I do not think the Court is in any position to dispute the authority of Caroline Wairimu Kimemia or the instructions to the advocate on record to defend the interest of the company. Therefore, in the absence of evidence to the contrary, I find the affidavits filed to be in order and the advocate herein to be properly on record for the defendant."

99. For these reasons, in addition to those given in the Ruling of 28th July 2020, the Petition was not deemed invalid.

100. However, following the evidence and claim by the Interested Parties in the Notice of Motion aforesaid, it was incumbent upon the 2nd Petitioner to furnish proof of a valid resolution.

101. The 2nd Petitioner annexed a letter dated 8th May 2020 signed by the Chief Executive Officer and copied to the Chairman of the 2nd Petitioner evidencing instructions given to the firm CMO Advocates to file a case on its behalf. Needless to say, letters of instructions do not constitute resolutions and fall short of the standard under Order 4 Rule 1 (4) of the Civil Procedure Rules.

102. The 2nd Petitioner had ample time to cure this defect the moment evidence to the contrary was adduced by filing the valid resolution. Furthermore, by parity of reasoning, if there was no valid resolution at the time of instituting the Petition, the 2nd Petitioner would have had the institution of this Petition ratified.

103. This Tribunal is bound by the decision of the Court of Appeal **East African Safari Air Limited vs. Anthony Ambaka Kegode & another** (above) that also partly held as follows: -

'I think that the true position is simply that a solicitor who starts proceedings in the name of a company without verifying he had proper authority to do so, or under an erroneous assumption as to the authority, does so as at his own peril, and, so long as the matter rests there the action is not properly constituted. In that sense it is a nullity and can be stayed at any time, provided the aggrieved party does not unduly delay his application, but it is open at any time to the purported plaintiff to ratify the act of the solicitor, who started the action, to adopt the proceedings, and say: 'I approve of all that has been done in the past and instruct you to continue the action.' When that has been done then in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification, the defect in the proceedings as originally constituted is cured, and it is no longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were in the first instance brought without proper authority. *" (emphasis added).*

104. In view of the foregoing, we therefore find that the Petition in so far as it was filed on behalf of the 2nd Petitioner, was filed without proper authority. And the 1st Petitioner's withdrawal obviously left the 2nd Petitioner hanging in the wind. It's sail has now collapsed and cannot carry if beyond this point.

105. This conclusion makes it unnecessary for us to consider the other arguments advanced. However, out of respect for the diligence and labour expended by Counsel in arguing their respective cases, we will proceed to consider the other arguments raised and express a view on them.

D. Whether the FKF-KPL Agreement terminated on account of *Force Majeure*

106. The Respondents while citing Clause 9 of the Agreement contend that the advent of the Covid -19 Pandemic globally and in Kenya constitutes an event of force majeure event and as such the 3rd Respondent is not liable to perform any obligations under the Agreement where such a circumstance arises. They highlighted the fact that football activities the world over were halted and the many deaths occasioned. The Respondents made reference to the FKF Rules and Regulations Governing Kenyan Football (2019) Rule 2.6 and Sub rule 2.6.1.2 which they hold governs such instances as well as the definition of Force Majeure under the heading ***'Definitions and Terms of and Phrases'*** which provides:

"Any circumstances beyond the reasonable control or management of any person that prevents or impedes the execution of certain actions subject of these rules including bad weather, earthquakes, ***tragedy****, accident*." (emphasis added by the Respondents)

107. The Respondents cited a passage from the decision of the Court of Appeal in **Kenya Bureau of Standards v Geo-Chem Middle East [2017] eKLR** and in their written submissions stated that:

'… it would be suicidal, unreasonable and callous to allow the league to continue till the end of the season considering the number of infections in Kenya, fatalities and lack of sufficient public health infrastructure to curb the spread of the virus if football activities were to be left to continue.'

108. Counsel for the 1st – 5th Interested Party expressed similar sentiments to the ones raised by the Respondents and stated in their Application dated 14th August 2020 that the decision was purely motivated by the doctrine of force majeure and that the circumstances were unforeseeable, insurmountable, and external with utmost impossibility of completing the matches and these frustrated the continuation of the 2019/2020 season.

109. Counsel for the 7th – 23rd Interested Party in support of the Respondents position cited **CASE 2018/A/5779, Zamalek Sporting Club -VS- Federation Internationale de Football Association (FIFA), award 31st October 2018** alongside FIFA Circular No. 1714 of 7th April 2020 on Covid 19 – Football Regulatory issues to evidence that by dint of the circular, FIFA had *per se* decided that Covid-19 brought about a force majeure situation and therefore FKF being a MA of FIFA and party to the then prevailing FKF-KPL Agreement, 2015 which provided for such an occurrence were released from the obligation under the Agreement and therefore

were not liable for breach as alleged by the Petitioner.

110. The Petitioners vehemently deny that the Agreement between the parties ever intended to provide for such an occurrence as the present Pandemic, a position firmly advanced by both the Interested Parties and the Respondents. They assert that the provisions of Rule 2.6. fails to provide expressly for the pandemic at hand. Counsel for the Petitioners during oral submissions stated:

"And your honor as I summarize, the last question, assume there was no covid-19 your honor, which is a factor on force majeure, we have no option, assume there was no Covid, could it be different" Would still the 1st Respondents have cancelled the League" Your honor, the answer is 'no'. The mandate would have been made with the 2nd Petitioner and with such we prove that it was not right that the 2nd Petitioner to do whatever he did and…"

111. The Tribunal has carefully perused the various parties' pleadings and evidence and case law as regards this matter in issue and has come to the conclusion that the plea of force majeure is a red herring.

112. As stated in the founding affidavit of Jack Oguda, the 2nd Petitioner had already recognised the advent and impact of covid 19 on sporting events including football and indeed had already suspended the league. The 2nd Petitioner therefore does not deny that covid-19 constituted an act of force majeure; what it contends is that the responsibility to decide the fate of the league was usurped by the Respondents in breach of the Agreement. It is as simple as that.

E. Lack of Exhaustion of Internal Dispute Mechanisms & Failure to Invoke & Exhaust them.

113. The Respondents and Interested Parties all argued that the Petition should fail as the Petitioner had failed to exhaust all remedies made available for disputes or disagreements under the Agreement and governing rules and regulations. The Respondents cited the case of **East Africa Pentacostal Churches Registered Trustees & 1754 others v Samwel Muguna Henry & 4 Others [2015] eKLR** and Articles 14(1)(a), 48(3) and 69(1) of the FKF Constitution and Rule 10.35. of the FKF Rules and Regulations Governing Football (2019) and advanced the proposition that the Petitioners flouted and failed to exhaust the internal mechanisms and structures of FKF to deal with disputes regarding FKF and Leagues.

114. The Petitioner in their written submissions relied on Articles 10.1 and 10.2 of the KPL-FKF 2015 Agreement and in response to the Respondents' point of issue during oral submissions stated that:

"Your honor, in a nutshell also I want to address the issue of whether there were internal mechanisms to try and settle the matter out of court. Your honor, indeed, there was. Your honor in the established agreement, there is a NEC, is a joint NEC that has been constituted and your honor, because the ruling in SDT 3 & 5, NEC's term has ended. It was impossible for KPL and FKF to constitute a joint executive counsel to be able to determine the internal disputes your honor and Your honor, through the letters that were written by the 2nd petitioner, the 1st, 2nd, and 3rd Respondent never bothered even to respond to them or even bring an environment for discussions your honor and that's why we came to court."

115. The Panel is called by the Petitioners to hold that the two letters issued to the 3rd Respondent herein regarding the various pronouncements made with regard to the League constitutes the requisite Notice alluded to in Clause 10.1 of the Agreement. That it should be held that it follows that the Respondents were not keen on an internal dispute resolution mechanism.

116. The Respondents and the Interested Parties on the other hand hold that the same cannot be deemed to be the requisite Notice intended by the clause as the letters merely state the Petitioners intention to not be part of the Respondents' decision and fail to either declare a dispute or call for negotiations to resolve the alleged dispute. They further submit that the FKF Constitution through Articles 48 and 67 create the ***League and Competitions Committee*** and the ***FKF Appeals Committee*** which are independent of FKF and thus impartial that the Petitioners should have engaged with before seeking redress from the Tribunal.

117. The Panel was cognizant of the argument as it relates to the 1st Petitioner who is in fact a member of the 3rd Respondent and as aforementioned, withdrew from the suit, and sought insight as to the Respondent's position with regards to the 2nd Petitioner who had averred the inability of the 3rd Respondent to constitute such a committee in view of the expiry of its tenure. Professor Ojienda in his oral submissions put it to the Panel that:

"Chair, there is often need for a demonstration, And an attempt at the process. This resolution that is set up under an

agreement…. You cannot bypass a contractual agreement to submit yourself say for instance to an arbitral process because of your view that the arbitrator would be partial or that, there is no possibility that parties would agree to arbitrators and an umpire."

118. The Agreement establishes a Joint Executive Committee. Whose membership shall consist of the FKF President and two (2) members of the FKF National Executive Committee and the KPL Chairman and two (2) members of the KPL Executive Committee. The Chief Executive Officettee.

119. It is clear that by dint of the decision in SDT No. 3 & 5 of 2010, the 3rd Respondent cannot muster the necessary numbers to enable a proper quorum for the Joint Executive Committee. The Tribunal has stated unequivocally that the term of the NEC has come to an end. The President therefore is a King without a crown. He is not synonymous with the Federation and cannot purport to substitute himself for the organs of the Federation.

120. The Tribunal has in numerous decisions upheld the principle that parties must exhaust their internal dispute resolution mechanisms before approaching the Tribunal. For instance, in **Peter Omwando -vs- Nick Mwendwa & Others (Sued as Officials of Football Kenya Federation),** the Tribunal stated as follows at para. 33:

'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 the same decision that *'... in this instance the pathway to having the dispute resolved within the local committee was not clearly defined.'*

121. And so it is in this matter. The pathway is blocked by reason of the 3rd Respondent's inability to participate meaningfully in any negotiations or discussions regarding the issue. The Tribunal need not resort to any other documents to establish this because the Agreement governs the entire relationship between the parties. Clause 12.1 of the Agreement states so expressly. It states that:

'This agreement constitutes the entire understanding of the parties with respect to the matters hereto and replaces and supersedes all prior negotiations and understanding between them, whether oral or written.

122. Therefore, there is no need to look at the Rules and Regulations to which the Respondents referred us.

123. Once this is understood, it will become evident that without the Joint Executive Committee established under the Agreement, there was no internal dispute resolution structure capable of being activated and the Tribunal cannot therefore fault the Petitioners for approaching the Tribunal before engaging in what would have been a purely academic and potentially frustrating exercise.

Breach of Contract

124. Flowing from the foregoing, the Respondents clearly flouted several provisions of the Agreement which governed the relationship between the 2nd Petitioner and the 3rd Respondent.

125. Clause 2.1(a), (d) and (g) provided expressly as follows:

The obligations of FKF include:

(a) to ensure KPL as the owner thereof has the exclusive, full and unhindered right to manage the Kenyan Premier league in accordance with the rules and regulations of KPL, FKF, CAF and FIFA;

(d) *to ensure there is no undue interference by FKF or other officials or third parties with KPL's management of the Kenyan premier league*

(g) *To refrain from making any media or public announcements and decisions on KPL's behalf which infringe on the exclusive, full and unhindered right of KPL to manage the Kenyan premier league.*

126. However, the pronouncements complained of were made by the 1st Respondent during a time when his term of office had ended. He remains in office by dint of Article 43 of the FKF Constitution 2017 but does not have the benefit of the structures of governance required to make decisions and conduct the ordinary business of the Federation. The Agreement on the other hand was entered into between the 2nd Petitioner and the 3rd Respondent. None of the parties addressed the question whether the 1st Respondent, in making the offending pronouncement was acting *qua* President of the FKF or as a renegade. Indeed, the 2nd Petitioner cannot at once argue that the pronouncement by the 1st Respondent was in breach of the Agreement and at the same time argue that the 1st Respondent had no authority to make these pronouncements because his term of office had expired. Either he speaks for the FKF or he does not. To make the 3rd Respondent liable for breach of contract, the 2nd Petitioner would have to go further and demonstrate that the 1st Respondent's actions were authorised by the 3rd Respondent. Perhaps the 1st Respondent was guilty of malfeasance but that cannot make the 3rd Respondent liable for breach of contract.

127. In the end we are unable to determine an issue which was not properly addressed. In any event, in view of our conclusion on the question of the propriety of this action, the matter is academic. Perhaps the parties will find another forum to address it better.

Summary

128. To summarize therefore, the Panel has come to the conclusion that the action was commenced without the authority or sanction of the 2nd Petitioner and neither Jack Oguda nor the firm of CMO & Company Advocates had the requisite authority and competence to commence and sustain this action. The Petition is accordingly dismissed.

129. However, in view of the Panel's other findings on the other aspects of the action, each party shall bear its own costs.

130. It is so ordered.

Dated at Nairobi this *15th* day of *September* , 2020.

Signed:

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John M Ohaga, SC; CArb; FCIArb

Chairperson

______________________________ __________________________

Gabriel Ouko, Member **E Gichuru Kiplagat, Member**

Covid-19 Protocol: This decision has been delivered by the Tribunal remotely by circulation to the parties' representatives by email and subsequent release to eKLR. A copy of the fully signed decision will be available for collection by the parties from the Tribunal registry in due course.

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