



REPUBLIC OF KENYA

THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

SDTSC NO. E001 OF 2021

FRANCIS NGIRA OKELLO.....PETITIONER

-versus-

FOOTBALL KENYA FEDERATION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

CABINET SECRETARY IN CHARGE OF SPORTS, CULTURE & HERITAGE.....3RD RESPONDENT

CABINET SECRETARY IN CHARGE OF HEALTH.....4TH RESPONDENT

AND

ENTERTAINMENT NETWORK GROUP KENYA LIMITED.....1ST INTERESTED PARTY

SHOP AND DELIVER LIMITED.....2ND INTERESTED PARTY

BLUEJAY LIMITED.....3RD INTERESTED PARTY

KISUMU HOTSTARS FC

(Suing through ANDREW OTIENO AKONGO).....4TH INTERESTED PARTY

DECISION

Panel:

I. John M Ohaga, SC; Carb - Chairperson

II. Gabriel Ouko - Member

III. Mary N Kimani - Member

Appearances:

I. Mr. Francis Okello appearing for himself

II. Mr Omwebu for the 1st Respondents

III. Mr. Martin Munene, State Counsel for the 2nd, 3rd and 4th Respondents;

IV. Mr Akongo appearing for himself.

V. Kogweno & Bubi Advocates LLP appearing for the 1st Interested Party

PARTIES

1. The Petitioner is an adult of sound mind, and describes himself as an experienced sports journalist having covered the Kenyan Football Leagues for over 10 years in various capacities and extensively as an OB cameraman and a producer with Super Sport and MediaPro. He also runs an online Kenyan football blog known as “*The World of Tow Tow.*”

2. The 1st Respondent is a National Sports Organisation duly registered as such within the Republic of Kenya. It is the body mandated by its Constitution and the Sports Act No. 25 of 2013 and through its affiliation to FIFA, CAF and CECAFA to manage the sport of football in Kenya.

3. The 2nd Respondent is the Attorney General of the Republic of Kenya. He is being sued as the Principal Legal Adviser of the Republic of Kenya and its legal representative in all proceedings that the Government of Kenya is party to.

4. The 3rd Respondent is a Cabinet Secretary within the meaning provided by the Constitution of Kenya. She is hereby sued in her capacity as the Cabinet Secretary in charge of Sports, Culture and Heritage.

5. The 4th Respondent is a Cabinet Secretary within the meaning provided by the Constitution of Kenya. He is hereby sued in his capacity as the Cabinet Secretary in charge of Health.

6. The 1st Interested Party is a limited liability company incorporated within the Republic of Kenya. It is licensed and regulated by the Betting Control and Licensing Board of Kenya with “BETKING” brand being its licensed trademark.

7. The 2nd Interested Party is a limited liability company incorporated within the Republic of Kenya. It is licensed and regulated by the Betting Control and Licensing Board of Kenya with “BETIKA” being its licensed trademark.

8. The 3rd Interested Party is a limited liability company incorporated within the Republic of Kenya. It is licensed and regulated by the Betting Control and Licensing Board of Kenya with “BETWAY” brand being its licensed trademark.

9. The 4th Interested Party is an adult of sound mind and disposition and the Team Manager of Kisumu Hotstars FC.

PLEADINGS AND PRELIMINARIES

10. The matter was commenced vide Petition dated 10th June

2021. Simultaneously with the Petition was filed an application by way of Notice of Motion of the same date which was accompanied by a Certificate of Urgency and Supporting Affidavit (‘the Application’).

11. The application sought various orders of injunction the main purpose of which was to stop the 1st Respondent from proceeding with all its Lower Tier Leagues and Cup Competitions and conservatory orders restraining the 3rd and 4th Respondents from authorising the commencement of and or proceeding with all 1st Respondent's Lower Tier Leagues and Cup Competitions.

12. Upon Considering the application, the Tribunal duly certified it as urgent and issued the following directions vide Directions dated 18th June 2021.

i. That the Petitioner shall serve the Petition, the Notice of Motion and the Supporting Affidavit together with these directions on the Respondent and Interested Parties by Friday 25th June 2021.

ii. The Petition and Notice of Motion shall be heard together in the interest of expeditious disposal of the matters in contention.

iii. The Respondents and Interested Parties shall have fourteen (14) days after service of the Petition to frame and file appropriate responses.

iv. The Petitioner shall thereafter have seven (7) days within which to file a supplementary affidavit, if any.

v. The matter shall be listed for hearing on Tuesday 20th

July, 2021 at 2.30 p.m. for hearing.

13. The 4th Interested Party herein filed its Notice of Motion on 7th July 2021 alongside a certificate of urgency and supporting affidavit to be joined as the 4th Interested Party herein on grounds that Kisumu Hotstars FC participates in one of the 1st Respondent's Lower Tier Leagues and is subject to the Petition herein.

14. The 2nd, 3rd and 4th Respondents filed Grounds of Opposition dated 16th July 2021 to the application and the Petition on grounds that;

i. Both the application and the suit offends the provisions of section 16(2) of the Government Proceedings Act, in that an injunction cannot issue against the Government.

ii. The prayers being sought by the Applicant in the application are conclusive in nature since the Petition also seeks similar orders and that the same can only be granted after hearing all the parties.

iii. Prayer No. 5 of the Petition is not tenable since it is not the mandate of the 2nd, 3rd and 4th Respondents to direct arrests since the same would be contrary to Article 245 (2) (b) of the Constitution.

15. The 1st Respondent filed its Grounds of Opposition to the

Application dated 20th July 2021 on grounds that;

i. The Application just like the Petition is scandalous, frivolous, vexatious and is an abuse of the court's process.

ii. The Sports Disputes Tribunal is an Appellate Tribunal is an Appellate Tribunal mandated to hear appeals of a specific nature as prescribed in Section 58 of the Sports Act, 2013 and the petitioner's application does not satisfy any of the criteria set therein.

iii. The Application just like the petition, comprises of numerous bald assertions that are not predicated upon any evidentiary material to support the claims made.

iv. The Application, just like the Petition, is meant to embarrass the Respondents especially, the Government of the Republic of Kenya.

v. By dint of Section 16(2) of the Government Proceedings Act, an injunction cannot issue against the Government of Kenya hence the application is fatally defective.

vi. Without prejudice to the foregoing, the prayer for issuance of a temporary injunction against the 1st Respondent must be predicated upon the satisfaction of the tripartite test laid down in the case of **Giella versus Cassman Brown (1973) EA 358** which the Applicant has not even attempted to satisfy.

vii. The Tribunal needs not be troubled by a matter that can be exhausted through enforcement action mechanisms available to the 3rd and 4th Respondents under the relevant law in the appropriate cases.

16. The 1st Respondent filed its written submissions together with its list of authorities dated 2nd August 2021.

17. The 2nd, 3rd and 4th Respondents filed their written submissions dated 28th July 2021.

18. The Tribunal has read and considered all the pleadings, submissions, and authorities by all the parties.

THE PETITIONER'S CASE

19. The Petitioner's case is set out in the Petition, Notice of Motion and Supporting Affidavit of Francis Ngira Okello dated 10th June, 2021.

20. The Petition is concerned with the legality of the actions of:

i. The 1st Respondent in, unlawfully or illegally and or negligently, running all its Lower Tier Leagues and Cup Competitions in contravention of the various existing executive orders, directives, guidelines, policies and or legislation that touch on public health and social behavioural status relating to COVID-19 pandemic and or any other law as set out by the Respondents and FIFA (hereinafter simply known as "**COVID-19 Measures**") without regard to the health of all those involved and the general public.

ii. The 1st Respondent who without the 3rd and 4th Respondent's knowledge, approval and or consent required under the "**COVID-19 Measures**" is running all its Lower Tier Leagues and or Cup Competitions.

iii. The 1st Respondent in holding out to its membership and or the general public that it has the 3rd and 4th Respondent's knowledge, approval and or consent required under the **COVID-19 Measures** in so running all its Lower Tier Leagues and or Cup Competitions.

iv. The 1st Respondent in directing or coercing its membership to participate in all its Lower Tier Leagues and or Cup Competitions without the 3rd and 4th Respondent's knowledge, approval and or consent required under the **COVID-19 Measures**.

v. The 1st Respondent in unreasonably and without any justifiable cause declining, ignoring and or refusing to observe any **COVID-19 Measures** particularly not conducting any PCR Testing upon its match officials and its member clubs 'players and staff participating in its Lower Leagues and or Cup Competitions.

vi. The 1st Respondent in failing to provide reasonable working conditions for all its match officials and its member clubs' players and staff participating in all its Lower Tier Leagues and or Cup Competitions.

vii. The 2nd, 3rd and or 4th Respondents in failing to provide to all the 1st Respondent's match officials and member clubs' players and staff and the general public the protection and equal benefit of the **COVID-19**

Measures.

viii. The 2nd, 3rd and 4th Respondents in failing to promote, protect and uphold the rule of law and defend public interest.

21. The Petitioner accordingly seeks an award against the

Respondents in the following terms:

i. A declaration be and is hereby issued that the resumption of the 1st Respondent's Lower Tier Leagues purportedly authorised or directed by the 1st Respondent was illegal, unlawful and in gross violation of the

"COVID-19 Measures."

ii. A declaration be issued and hereby issued that all results in all the 1st Respondent's Lower Tier Matches hitherto so illegally and unlawfully played in gross violation of the **"COVID-19 Measures"** are null and void.

iii. An order of Permanent Injunction be and is hereby issued restraining or in any other way forbidding the 1st Respondent or its servants and or agents from proceeding with all its Lower Tier Leagues and Cup Competitions and or any other League other than its Tier one League as was authorised under the **"COVID-19**

Measures" until such a time as the same shall be specifically be so authorised.

iv. An order of permanent injunction be and is hereby issued restraining or in any other way forbidding the 3rd and 4th Respondents from authorising the commencement of and or proceeding with all the 1st Respondent's Lower Tier Leagues and Cup Competitions and or any other League other than the 1st Respondent's Tier (1) one League until such a time as it shall be deemed that all 1st Respondent's Lower Tier Leagues and Cup Competitions can safely commence and or proceed.

v. An order requiring the 2nd, 3rd and or 4th Respondents to immediately direct the arrest and prosecution of the 1st Respondent's President and Chief Executive Officer for their previous and or continued contravention of the various **"COVID-19 Measures"**.

vi. Costs of the petition to be awarded to the Petitioner.

THE RESPONDENTS' CASE

1ST RESPONDENT

22. The 1st Respondent, Football Kenya Federation filed Grounds of Opposition dated 20th July 2021 and written submissions dated 2nd August 2021 in which they intend to rely on to oppose the Petition.

23. The 1st Respondent in its written submissions argues that the Sports Tribunal is an Appellate Tribunal mandated to hear appeals of a specific nature as prescribed in Section 58 of the Sports Act, 2013 and the Petitioner's application does not satisfy any of the criteria set therein, more so, section 58 (b) upon which it has been brought as cited in the Notice of Motion.

24. Further, the Respondent argues that the Petition and application comprise of numerous bald assertions that are not predicated upon evidentiary material to support the premises upon which it is built as envisaged under Section 107 of the Evidence Act hence it is fundamentally and fatally defective. It is for striking out *in limine*.

25. By dint of Section 16(2) of the Government Proceedings Act, an injunction cannot issue against the Government of Kenya hence the application is fatally defective.

26. That the Application just like the Petition is scandalous, frivolous, vexatious and is an abuse of court process when measured against all the parameters defined in the case of **County Council of Nandi vs Ezekiel Kibet Rutto & 6 Others (2013) eKLR**

27. Without prejudice to the foregoing, the prayer for issuance of a temporary injunction against the 1st Respondent must be predicated upon the satisfaction of the tripartite test laid down in the case of **Giella versus Cassman Brown (1973) EA 358** which the Applicant has not even attempted to satisfy and which if applied, the balance of convenience test commends a refusal to grant any injunction as sought.

2ND, 3RD AND 4TH RESPONDENT

28. The 2nd, 3rd and 4th Respondents filed its Grounds of Opposition dated 16th July 2021.

29. The Respondents herein wish to abandon ground 2 of the Grounds of Opposition since the Honourable Tribunal directed that the Substantive Petition be heard together with the preliminary points of law raised.

30. The issues for determination before the Honourable Tribunal according to the 2nd, 3rd, and 4th Respondent are therefore.

- i. Whether the orders sought contravene section 16(2) of the Government Proceeding Act.
- ii. Whether Prayer No. (v) of the petition is tenable in light of Article 245 of the Constitution of Kenya.

Whether the orders sought contravene section 16(2) of the Government Proceedings Act

31. The Petitioner seeks a mandatory injunction against the 2nd, 3rd and 4th Respondents restraining them from authorising commencement of the 1st Respondent's Lower Tier Leagues and Cup Competitions until such a time it is safe to do so.

32. Section 16 (2) of the Government Proceedings Act Chapter 40 provides that

“The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.”

33. It is the 2nd, 3rd and 4th Respondent’s submissions that both the Application and Petition should be dismissed for contravening the provisions of section 16 (2) of the Government proceedings Act.

Whether Prayer No. (v) of the petition is tenable in light of Article 245 of the Constitution of Kenya.

34. The Petitioner in prayer (v) of the Petition seeks the following order

“An order requiring the 2nd , 3rd and or 4th Respondents to immediately direct the arrest and prosecution of the 1st Respondent’s President and Chief Executive Officer for their previous and or continued contravention of the various “COVID-19 Measures”.

35. The Petitioner seeks an order compelling the 2nd, 3rd and 4th Respondent to give directions to the Inspector General of Police to arrest and prosecute the President and Chief Executive Officer of the 1st Respondent which order if granted would be inconsistent with Article 245 (4) (b) of the Constitution.

INTERESTED PARTIES’ CLAIM

THE 4TH INTERESTED PARTY

36. The 4th Interested Party, Kisumu Hotstars (suing through Andrew Otieno Akongo) vide a Notice of Motion, certificate of urgency and Supporting Affidavit dated 7th July 2021 made an application to be joined as the 4th Interested Party herein.

37. The 4th Interested Party argues that any orders or directions issued in the Petition herein will directly affect the Applicant’s interests hence the Applicant’s desire to be heard in response to the said petition.

ISSUES FOR DETERMINATION

38. The Tribunal now directs its mind to the issues to be determined in this suit. The issues framed as follows:

i. Whether the resumption of the 1st Respondent’s Lower Tier Leagues purportedly authorised or directed by the 1st Respondent was illegal, unlawful and in gross violation of the “COVID-19 Measures.”

ii. Whether all results in all the 1st Respondent’s Lower Tier Matches hitherto so illegally and unlawfully played in gross violation of the “COVID-19 Measures” are null and void.

iii. Whether an order for a temporary injunction against the

1st Respondent is valid

iv. Whether the orders sought contravene section 16(2) of the Government Proceeding Act.

v. Whether Prayer No. (v) of the petition is tenable in light of Article 245 of the Constitution of Kenya.

ANALYSIS

Whether the resumption of the 1st Respondent's Lower Tier Leagues purportedly authorised or directed by the 1st Respondent was illegal, unlawful and in gross violation of the "COVID-19 Measures."

39. It is trite law as canvassed in **Robert Ouma Njoga v Benjamin Osano Ondoro (2016) Eklr** that; **"He who asserts must prove"**

40. Section 107 of the Evidence Act provides that;

(1) Whoever desires any court to give judgement as at any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

41. Upon reading the Petitioner's Petition, Application and Supporting Affidavit, the Tribunal is hesitant to agree with the Petitioner's assertions because the evidence brought forthwith do not prove that the 1st Respondent illegally and unlawfully authorised the resumption of the Lower Tier Leagues.

42. The Tribunal is inclined to agree with the 1st Respondent's submissions which highlights that:

i. Ground (ii) and (iii) of the Application is without basis since the Petitioner has failed to produce any such communication or confirmation by the 3rd and 4th Respondents of the allegations he makes in those paragraphs

Whether all results in all the 1st Respondent's Lower Tier Matches hitherto so illegally and unlawfully played in gross violation of the "COVID-19 Measures" are null and void.

43. On this question, the Tribunal is tasked with determining whether it should on a balance, suspend all the results of the 1st Respondent's Lower Tier Matches.

44. The Petitioner vide its Application, Petition, and Supporting Affidavit has not proven that the matches played as of the date of filing this suit are illegal and unlawfully played.

45. The Tribunal is alive and cognisant of the COVID-19 Pandemic and the resultant measures deployed to combat it. Particularly the **"Final Revised Resumption of Sports Guidelines of**

12/5/2021" issued by the 3rd Respondent and **"COVID-19**

Protocols (revised) for FKFPL 2020/21 Season" issued by the 1st Respondent.

46. The Tribunal is hesitant to suspend the results of the matches played because it is aware that rescheduling the matches and starting from the beginning is not practicable. Further, the

Tribunal notes that at the time of filing this suit the Lower League Teams were on match 23 of their fixtures out of 38. It is therefore unreasonable and expensive both in resources and time to allow this prayer.

Whether an order for a temporary injunction against the 1st Respondent is valid

47. The prayer for issuance of a temporary injunction against the 1st Respondent must be predicated upon the satisfaction of the tripartite test laid down in the case of **Giella versus Cassman Brown (1973) EA 358** which the Applicant has not even attempted to satisfy and which if applied, the balance of convenience test commends a refusal to grant any injunction as sought.

The tripartite test is as follows:

i. Whether The Petitioner has shown a prima facie case

48. The question of what constitutes a prima facie case was decided in the Court of Appeal in the case of **Mrao Limited V First American Bank of Kenya and 2 others** as follows:

“A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

49. The Petitioner in this case vide the Petition, supporting affidavit and application has not demonstrated that he has a prima facie case with a probability of success.

ii. Whether the Petitioner will suffer irreparable loss

50. The Plaintiff is a journalist by profession and is suing in his personal capacity. He has not shown any evidence in his pleadings that he will suffer irreparable loss if this injunction is not allowed. Neither has he demonstrated the requisite locus to maintain this petition which relates to a league in which he has no direct interest.

iii. Whether the balance of convenience tilts in favour of allowing the application

51. The Tribunal is not persuaded that on a balance, the interests of the sport of football lie in favour of allowing the Petition. Allowing an injunction has far reaching economic consequences on the football ecosystem, particularly in the lower leagues in which the majority of footballers in Kenya participate .

Whether the orders sought contravene section 16(2) of the Government Proceeding Act.

52. The Petitioner seeks a mandatory injunction against the 2nd, 3rd and 4th Respondents restraining them from authorising commencement of the 1st Respondent’s Lower Tier Leagues and Cup Competitions until such a time as it is safe to do so.

53. The Tribunal agrees with the 1st, 2nd, 3rd, and 4th Respondent’s submissions that the orders sought against the Government contravene Section 16 (2) of the Government Proceeding Act.

Whether Prayer No. (v) of the petition is tenable in light of Article 245 of the Constitution of Kenya.

54. The Petitioner in prayer (v) of the Petition seeks the following relief:

“An order requiring the 2nd, 3rd and or 4th Respondents to immediately direct the arrest and prosecution of the 1st Respondent’s President and Chief Executive Officer for their previous and or continued contravention of the various “COVID-19 Measures”.

55. It is the Tribunal’s considered view that this prayer contravenes Article 245 (4) (b) of the Constitution which provides as follows:

“The Cabinet Secretary responsible for police services may lawfully

give a direction to the Inspector General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector- General with respect to-

- a) The investigations of any particular offence or offences
- b) The enforcement of the law against any particular person or persons;

or

- c) The employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.”

56. Notably, the 2nd, 3rd and 4th Respondents are the Attorney General, Cabinet Secretaries for Sports and Health respectively. Article 245 (4) provides that the Cabinet Secretary responsible for Police Services, who is not among the Cabinet Secretaries sued, is the only one who may give policy directions on matters National Police Service to the Inspector General of Police.

57. An order directing the 2nd, 3rd and 4th Respondent to arrest the

1st Respondent’s President and Chief Executive Officer would be void and hence unenforceable.

CONCLUSION

58. In summation of the foregoing the Tribunal dismisses this Petition;

59. With respect to costs, having regard to the public interest exhibited by the Petitioner in filing this Petition, we are of the view that each party should bear its own cost.

60. The Tribunal wishes to commend the Petitioner and Counsel defending for their very helpful submissions and the cordial manner in which they conducted themselves.

DATED AT NAIROBI THIS 31ST DAY OF AUGUST 2021. SIGNED:

JOHN M OHAGA, SC; CARB; FCIARB

CHAIRPERSON

Gabriel Ouko, Member Mary N Kimani, 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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