



Case Number:	Appeal Case 15 of 2018
Date Delivered:	09 Jul 2019
Case Class:	Civil
Court:	Sports Disputes Tribunal
Case Action:	Decision
Judge:	John M. Ohaga (Chairperson), Gilbert M T Ottieno & Peter Ochieng' (Members)
Citation:	Samson Josiah Jonyo & another v Kenya Body Builders Federation [2019] eKLR
Advocates:	Mr. Pius Owino as instructed by Okoth & Kiplagat Advocates for the Appellants No Appearance for the Respondent.
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

APPEAL CASE NO. 15 OF 2018

SAMSON JOSIAH JONJO1ST APPELLANT

ABSALOM MATENDE2ND APPELLANT

VERSUS

KENYA BODY BUILDERS FEDERATIONRESPONDENT

DECISION

Hearing: 26th March 2019

Panel: John M Ohaga – Chairperson
Gilbert M T Ottieno - Member
Peter Ochieng - Member

Appearances: Mr. Pius Owino as instructed by Okoth & Kiplagat Advocates, for the Appellants;

No Appearance for the Respondent.

The Parties

1. The Appellants are officials/former officials and/or members of the Respondent and have brought this appeal against the decision of the Respondent to hold elections which the Appellants deem to be against the Respondent's Constitution and the relevant statutory provisions, specifically the Sports Act, 2013.

2. The Respondent is a National Sports Organization established under the Sports Act, 2013, and is responsible for the promotion, development and control of the sport of bodybuilding and wellness in Kenya.

The Claim

3. Principally, the claim by the Appellants is anchored amongst others on the letter dated 10th July 2018 to the Registrar of Sports, supported by a Notice of Appeal dated on the same day. The Appellants have also annexed various supporting documents.

4. According to the documents filed by the Appellants, the elections conducted by the Respondent on the 11th August 2018 were in contravention of the Constitution and the Sports Act, 2013.

5. Among the complaints by the Appellants, is the fact that due process as laid out in the Respondent's Constitution was not followed in conducting the contested elections, and that consequently, the committees holding the various positions in the

Respondent are illegal.

6. It is instructive to note that despite attempts to serve the Respondent on various occasions, the Respondent has not filed its response, and therefore this Tribunal is left to determine the present appeal on the submissions of the Appellants before it.

Background

7. The circumstances of this case call upon this Tribunal to briefly re-hash the background leading to the current Appeal.

8. With the promulgation of the Sports Act, 2013, all the sports Federations in the country were de-registered and required to apply for registration anew in order to ensure compliance with the provisions of the Sports Act, 2013.

9. In order to comply with this directive, the Respondent, formerly under the Societies Act, applied for registration as required. However, according to the Appellants, in order to comply with the directive the Respondent elected a transitional committee to enable the registration of the Federation and to consequently carry out elections of the Respondent as required under the Constitution and the provisions of the Sports Act, 2013.

10. According to the Appellants they were duly elected as officials and/or members of the transitional committee to help the registration and transition of the Respondent.

11. The Respondent was duly registered on the 18th December 2017, and in accordance with its Constitution and the Sports Act, 2013, the Respondent was expected to hold proper elections within ninety (90) days of the issuance of the date of registration.

12. Elections were, however, not held within the prescribed period, and elections were purportedly held on the 11th August 2018, which elections the Appellants now contest.

13. This being an uncontested appeal to this Tribunal given the non-appearance of the Respondent, this Tribunal will be guided by the submissions of the Appellants as to the issues for determination by this Tribunal.

Preliminaries

14. This matter first came before the Tribunal on the 5th February 2019 when the Chairman directed that the Appellants serve the Petition upon the Respondent as soon as possible, and for the matter to be mentioned on the 12th February 2019 for further directions.

15. The matter then came up on the 12th February 2019, but there being no appearance by both the parties, the Tribunal adjourned the matter.

16. The matter subsequently came up before the Tribunal on the 26th February 2019 where Mr. Owino, Advocate appeared for the Appellants wherein they sought more time to file further pleadings, affidavits and evidence. The Tribunal accordingly granted leave to the Appellants to file further affidavits and statement of claim, together with the appropriate mention notice to be served on the Respondent within 14 days. The Appellants were given 14 days to comply, and the Tribunal directed that the matter be mentioned further on the 12th March 2019.

17. When the matter came up on the 12th March 2019, the Appellants informed the Tribunal that they were having challenges serving the Respondent and asked for 7 more days to effect service. The Tribunal directed the matter to be mentioned on the 19th March 2019.

18. On the 15th March 2019 according to the Affidavit of Service of one Kimberly Chelsea Kwesiga, the Appellants aver that they accordingly served the Respondent via its Treasure one Mr. Callistus Shikanga, with a mention notice.

19. On the 26th March 2019, the Appellants appeared before the Tribunal, but there was no appearance by the Respondent despite service having been effected on them. The Appellants informed the Tribunal that they were ready to proceed with the appeal. The Tribunal directed that the appeal be set down for hearing on the 26th March 2019.

20. The Appellants duly filed their written submissions on the 18th June 2019.

Appellant's Submissions

21. Via their written submissions dated 18th June 2019, it is the Appellant's submissions that there are two issues before the Tribunal for determination. Accordingly, the Appellants submit that the following issues call for the determination of this court:

a. Whether due process was followed in conducting the contested elections of the Respondent.

b. Whether the current committee as constituted are holding their positions legally"

22. Submitting on the first limb of the issues, the Appellants submit that due process in the conduct of elections is at the core of any democratic process. According to the Appellants, the Respondent's Constitution requires elections to take place at an annual general meeting held not later than April of each year, with the term of each elected committee being a period of 4 years. It was therefore the submission of the Appellants that the current transition committee having been elected in August 2014 to enable the registration and transition of the Respondent, its term ought to have come to an end at the corresponding annual general meeting to be held before April 2018, in which the committee ought to have called for a free and fair elections.

23. The Appellants relied on Section 20(2) of the Sports Act, 2013 to the effect that any sports organization seeking to conduct elections must do so in an open, free and fair environment.

24. It was further the submission of the Appellants that by denying the 2nd Appellant an opportunity to participate in the elections by not affording him an opportunity to pay and renew his membership in the Respondent to enable him participate, the Respondent's actions amounted to an unfair electoral process. The Appellants produced as evidence a deposit slip for payment of membership fees to Bank of Africa that was purportedly rejected as the Respondent's account in the bank was dormant.

25. It was further the submissions of the Appellants that the elections as conducted by the committee was in total disregard of the regulations as they were conducted more than 90 days after the issuance of registration date as required under the Sports Act, 2013.

26. As regards the question whether the committee presently in office was legally constituted, the Appellants noted the letter by the Sports Registrar addressed to the Respondent rejecting the purported elections held in August 2018. According to the Appellants, the Sports Registrar in the letter dated 11th October 2018, stated that the elections as conducted by the Respondent and its purported outcome were faced with various irregularities, hence the committee was not legally in office.

27. The Appellants relied on the decision of the Supreme Court in the case of *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others [2015] eKLR* to the effect that the validity and integrity of any election is gauged upon the conduct of that election being in substantial compliance with the electoral law. It was therefore the submission of the Appellants that the elections having controverted due process as under the Sports Act, 2013, the elections were a nullity and the present committee which came in as a result of the elections are in office illegally.

Preliminary

28. This Tribunal takes cognizance of the fact that the Appeal before the Tribunal is one that requires this Tribunal to consider the issues raised in the absence of a response by the Respondent.

29. The Tribunal notes that in making the decision on the matter before it, it will place reliance on the materials and pleadings placed before it, and will take the evidence produced by the Appellants as uncontroverted by virtue of the fact that the Respondent failed to file any answer.

30. It is incumbent upon this Tribunal do justice to parties that appear before, and such justice ought to be meted without any unreasonable delay. It cannot be disputed that indeed the Appellants appeared before this Tribunal, which directed that the Respondent be served with the pleadings. However, despite several attempts at serving them, the Respondent has failed, ignored and neglected to answer and has left the cause undefended. The Tribunal therefore notes that the Appellants cannot continue to be held in suspense any longer, hence the direction that the matter be set down for hearing despite the non-appearance by the Respondent.

31. There is properly before this Tribunal an Affidavit of Service sworn by one Kimberly Chelsea Kwesiga dated the 18th March 2019 and filed on the 19th March 2019, sworn to the effect that a Mention Notice dated 15th March 2019 (also attached on the affidavit of service) was duly served upon the Respondent, through their Treasurer Mr. Callistus Shikanga.

32. The deponent further categorically states that Mr. Shikanga was personally known to her. According to the Affidavit sworn by Kimberly Chelsea Kwesiga, Mr. Shikanga refused service after perusal of the documents.

33. There being no evidence placed before the Tribunal by the Respondent controverting the claims by the Appellants as to service or the main claims in the appeal, the Tribunal proceeds on the basis that proper service was effected on the Respondent.

Discussion

34. The Sports Act, 2013 was explicitly enacted to govern the affairs of national sports organizations. Regarding the conduct of elections by national sports organizations of which the Respondent is one, the Act provides under the Second Schedule as follows-

The constitution of a body seeking registration as a sports organization shall provide that-

(a) elections of officials and athletes representatives at the national, branch and sub-branch levels shall be done directly by club members;

(b) only citizens of Kenya shall be eligible for election as the chairperson, secretary or treasurer of a body at the national level;

(c) the elections contemplated in paragraph (a) above shall be held at regular intervals after a period of between two years and four years, and persons elected as officials thereof shall consequently hold office as follows—

(i) the chairperson shall hold office for a term not exceeding four years, but is eligible for re-election for one more term;

(ii) any other official shall hold office for a term not exceeding four years but is eligible for re-election for one more term.;

(d) elections shall be held in accordance with the general principles for the electoral system as stipulated in Article 81 of the Constitution;

35. The above provisions of the Act seem to have been subsumed and adopted in the Respondent's Constitution dated 23rd September 2014. *Article 7.2* of the said Constitution, expressly provided that-

a. Elections at all levels including at branches and associations shall be conducted by an independent body and shall be free and fair and in accordance with the general principles for the electoral system as stipulated in Article 81 of the Constitution of Kenya 2010.

b. Gender and regional balance shall apply as far as is practicable in each circumstance.

36. It is notable that both the Sports Act, 2013 and the Respondent's Constitution insist on the inclusion of the general principles for an electoral system as enunciated under Article 81 of the Constitution, which provides-

81. The electoral system shall comply with the following principles—

- (a) freedom of citizens to exercise their political rights under Article 38;**
- (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;**
- (c) fair representation of persons with disabilities;**
- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and**
- (e) free and fair elections, which are—**
 - (i) by secret ballot;**
 - (ii) free from violence, intimidation, improper influence or corruption;**
 - (iii) conducted by an independent body;**
 - (iv) transparent; and**
 - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.**

37. We note further that the right of every citizen of Kenya to participate in a free and democratic elections is further anchored under Article 38 of the Constitution of Kenya, 2010 which provides-

...

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

- (a) any elective public body or office established under this Constitution; or**
- (b) any office of any political party of which the citizen is a member.**

(3) Every adult citizen has the right, without unreasonable restrictions—

- (a) to be registered as a voter;**
- (b) to vote by secret ballot in any election or referendum; and**
- (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.**

38. Indeed, this Tribunal cannot insist enough on the vital importance of fair electoral processes, especially in a body that seeks to promote the activities of bodybuilding and wellness in the country, and to foster good relationships with its stakeholders.

39. The adherence to the principles of the electoral system as set out above is so vital that this Tribunal would not hesitate to declare an election invalid by virtue of any such violations of the principles. As was stated in the English case of *Morgan & another – vs – Simpson & another* [1974] 3 ALL E.R 722 quoted with approval in the case of *Hamzah Musuri Kevogo v Independent Electoral*

and Boundaries Commission & 3 Others [2017] eKLR where the court observed thus-

An election court was required to find an election invalid:-

(a) if irregularities in the conduct of elections had been such that it could not be said that the elections had been conducted as to be substantially in accordance with the law as to the election; or

(b) if the irregularities had affected the results.

Accordingly, where breaches of the election rules, though trivial, had affected the results, that, by itself, was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected.

40. The principles as enunciated under the Constitution of Kenya, 2010, are the sanctity of any elections conducted in the Country. We further note that elections are not just isolated events and matters of mathematical calculations and adding up of numbers to determine winners. The processes and the principles governing the elections are equally as important if not more important than the outcome, for we hold that any legitimate election must boast of its adherence to the Constitutional principles enunciated above. This view finds its sanctity in the decision of the Supreme Court of Kenya in the case of *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR* where the court expressed itself as follows-

On our part, having considered the opposing positions, we are of the view that, the contentions by the 1st and 2nd Respondents ignore two important factors. One that elections are not only about numbers as many, surprisingly even prominent lawyers, would like the country to believe. Even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the stated solution. Elections are not events but processes. As Likoti J.F. opines “[e] elections are not isolated events, but are part of a holistic process of democratic transition and good governance..... Incidentally IEBC’s own Election Manual (Source Book) recognizes that an election is indeed a process.

41. It was the Appellants’ submission that the elections as conducted by the Respondent did not follow the due process of law as enunciated under the Constitution of Kenya, 2010, the Sports Act, 2013 and the Respondent’s Constitution.

42. According to the Appellants, as provided under the Sports Act and under the Respondent’s Constitution, officials of the Respondents are supposed to serve for a period of not more than 4 years. The Appellant submits that the current officials before the purported elections of 11th August 2018, had been elected into office on a transitional basis in August 2014 and hence their term was to end at the corresponding general meeting held before April 2018, yet they only conducted elections on 11th August 2018, more than four years later.

43. Furthermore, it was the Appellants’ submissions that by locking out the 2nd Appellant from participating in the elections, due process was clearly flouted. The Appellants have annexed a bank slip from the Bank of Africa showing their failed attempts to pay their membership fees to enable them comply with the Respondent’s Constitution.

44. Under *Appendix 1.2* of the Respondent’s Constitution, it is provided that-

1. One must have been an active valid member of the Federation for at least 2 (Two) years before declaring interest in any National office post.

...

45. The question then becomes, how does one become a member of the Respondent? The Respondent’s Constitution provides the answer. Under Article 4 of the Respondent’s Constitution providing on membership, it states-

...

(h) Every member shall pay a yearly subscription of Kshs. 500 or such fee as to be decided from time to time by the Committee/Executive Council, but in consultation with the branches.

46. From the evidence adduced before this Tribunal by the Appellants which stands uncontroverted, the 2nd Appellant tried to pay the membership fee into the Respondent's bank account at Bank of Africa on 8th June 2018, almost a month before the elections, but the bank informed him that the money could not be received since the bank account was currently dormant. It was therefore the Appellants' submissions that this disqualified him from participating in the elections as he could not pay his membership fees.

47. It is not lost on this Tribunal that *Article 3.3.* of the Respondent's Constitution expressly provides that among the powers of the Respondent is to-

(h) Open and operate banking accounts for the purpose of conducting its business and to overdraw such accounts where necessary.

48. It is therefore not in doubt that the Respondent had the responsibility of ensuring that eligible members had access to the Respondent's bank accounts and can pay the membership fees to enable their participation. By failing to keep active bank accounts, the Respondent officials essentially ensured difficulty in the electoral process, and this amounted to an unfair electoral process.

49. Under Article 38 of the Constitution, it is expressly provided that-

Every adult citizen has the right, without unreasonable restrictions [Emphasis Ours]—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

50. It is our view that by refusing to provide and maintain an active bank account to facilitate the payment of membership fees, the Respondent's actions amounted to an unreasonable restriction of the right of the Appellants to be registered as voters and to participate in the elections of the Respondent either as voting members, or as candidates for the elections.

51. The Appellants have further submitted that the illegality of the elections as conducted by the officials of the Respondent can be gleaned from the letter dated 11th October 2018 by the Sports Registrar, declining to accept and recognize the election returns of the Respondent as filed on grounds that the elections were conducted using the Respondent's old constitution which was not aligned with the Constitution of Kenya, 2010 and the Sports Act, 2013 and the Sports Registrars Rules and Regulations; there was no observer from the office of the Registrar to oversee the elections; the election panel had less than five(5) people; voting by non-registered organizations took place; and the principles of Article 81 of the Constitution of Kenya, 2010 were flouted.

52. It is instructive to note that under the Certificate of Registration No. 8 issued to the Respondent dated 18th December 2017, some of the conditions for continued registration issued by the Sports Registrar to the Respondent was that-

(1) The organization complies with the Sports Act and any other relevant law

(2) The organization reviews its constitution in line with the Kenya Constitution, 2010, the Sports Act, No. 25 of 2013 and its international statute

(3) The organization holds elections within ninety days from the date of the registration.

...

53. Under the Sports Act, 2013 and specifically *Regulation 4* of the Sports Registrar Regulations, 2016, the requirements to be satisfied before registration is granted are clearly enunciated.

54. Further, under Regulation 5, the power of the Registrar is clearly set out as-

(1) Upon considering an application for registration of a body as a sports organization, the Registrar may-

(a) issue a certificate of registration subject to conditions; or

...

55. It is this power that the Registrar decided to invoke when she decided to issue the registration of the Respondent subject to the conditions laid out in the Certificate of Registration No. 8 dated 18th December 2017. It was therefore incumbent upon the Respondent's officials to ensure compliance with the conditions set out therein, which the Appellants submit they failed to do, and which submission is supported by the letter from the Registrar dated 11th October 2018, declining the returns of the elections of the Respondent, deeming them non-compliant with the conditions given in the Certificate of Registration.

56. We further note that Regulation 20 provides mandatory requirements that must be satisfied for any elections by a Sports organization to be deemed valid and legal. Under the regulation, it is provided that-

...

(2) Notwithstanding paragraph (1), a sports organization seeking to hold an election shall- (a) appoint an independent panel consisting of at least five members to conduct the election;

(c) include observers from at least one umbrella sport organization, the Ministry responsible for matters related to sports and the Registrar's office;

(d) ...

(e) conduct the election in an open, free and fair environment;

57. In the letter dated 11th October 2018, the Registrar was very categorical that the Respondent had failed to comply with the above provisions of the Regulations and of the conditions set out in the Certificate of Registration No. 8 issued to the Respondent.

58. The regulations further provide that consequent to elections, where the Registrar is satisfied with the elections, then she will register the newly elected members/officials. This is clearly provided for under Regulation 20 (5) in the following terms-

...

The Registrar may register a newly elected office bearer, *if satisfied with the election and the election process* (Emphasis Ours).

59. From a reading of the above provisions of the Regulations, it is our view that the Registrar has the power and the mandate to determine the validity of the elections, and where satisfied that the elections were properly conducted, she would register the elected officials. The opposite would also be true, that where the Registrar was not satisfied with the election process, then she is imbued with the power to refuse registration of the elected officials, and that instance and until the decision is overturned through proper legal procedures, the elections would be rendered invalid and consequently nullified.

60. The upshot of the foregoing is that the letter by the Registrar dated 11th October 2018 was very clear in its purport. In terms of the wording of the letter, the Registrar stated categorically as follows:

We hereby reject the election returns due to the following reasons:-

- 1) You used the old constitution that is not aligned with the Constitution of Kenya, 2010 and the Sports Act, 2013 and the Sports Registrars Rules and Regulations.**
- 2) There was no observer from the office who was to oversee the elections**
- 3) The election panel had less than five (5) people**
- 4) Article 81 of the Kenya Constitution 2010 was faulted**
- 5) Non-registered organizations voted.**

61. The letter by the Registrar was clearly a renunciation of the elections conducted by the Respondent on 11th August 2018 and therefore the officials cannot purport to be in office legally. The upshot is that any purported actions and conduct of the officials against the express orders of the Registrar would be invalid and illegal.

62. The Sports Act is very clear on the procedure to be followed to contest the decision of the Registrar. Where the officials are aggrieved by the decision of the Registrar to declare their elections invalid, then they ought to have appealed such decision to the Tribunal for determination. Barring any such appeal, then the decision of the Registrar to declare the elections invalid stands.

63. Under Section 58 of the Sports Act, 2013 it is provided-

The Tribunal shall determine—

(a) appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including —

(i) appeals against disciplinary decisions;

(ii) appeals against not being selected for a Kenyan team or squad;

(b) other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear; and

(c) appeals from decisions of the Registrar under this Act

64. Therefore, the proper channel for the officials of the Respondent to contest the decision by the Registrar would have been before this Tribunal, and not to ignore the decision by the Registrar and continue holding office. The upshot is that the decision of the Registrar stands unless otherwise legally set aside as provided for by law.

Decision & Conclusion

65. The Constitution of Kenya, 2010 and the Sports Act, 2013 places upon this Tribunal the responsibility to dispense justice between the parties before it, and the Tribunal would not hesitate to do so.

66. Where uncontroverted evidence is placed before the Tribunal showing that a party was properly served yet they failed to appear

and file response, then the Tribunal's hands are tied.

67. Furthermore, every sports organization is under obligation to adhere to the provisions of the Constitution of Kenya, 2010 as the Supreme law of the land, and to the Sports Act, 2013 and the organization's constitutive document.

68. The upshot of the circumstances surrounding this case, and the failure of the Respondent to enter appearance and file their response despite numerous attempts to serve them, is that the Tribunal finds the evidence as tendered before it by the Appellants is uncontroverted and therefore stands.

69. This Tribunal therefore **ORDERS**: -

- i. The election conducted by the Respondent on 11th August 2018 is hereby declared invalid;**
- ii. The Officials and the Committees of the Respondent purported to have been elected on 11th August 2018 are hereby declared illegally elected, and their positions duly dissolved;**
- iii. Fresh elections shall be conducted in accordance with the Respondent Constitution, the Sports Act, 2013 and the Constitution of Kenya, 2010 within ninety (90) days of the issuance of this decision;**
- iv. The Sports Registrar to oversee the conduct of the new elections and to file a report with this Tribunal on the same.**

Dated at Nairobi this 9th day of July, 2019

John M. Ohaga, Chairperson

Gilbert M T Ottieno, Member

Peter Ochieng', Member



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