



Case Number:	Cause 24 of 2017
Date Delivered:	29 Mar 2018
Case Class:	Civil
Court:	Sports Disputes Tribunal
Case Action:	Decision
Judge:	John M Ohaga
Citation:	Jacob Keli Mutungi & 3 others v Ambrose Rachier & 3 others [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Tribunal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Claimant is accordingly disallowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

CAUSE NO. 24 OF 2017

JACOB KELI MUTUNGI1ST CLAIMANT
CHRISPINE ODULA WADENYA.....2ND CLAIMANT
JACKSON SALEH LUSULI.....3RD CLAIMANT
SAMMY OKINDA.....4TH CLAIMANT

VERSUS

AMBROSE RACHIER

LORDVICK ADUDA

CALVINCE BUNGU

SAMMY BOLO (sued as officials of)

GOR MAHIA FOOTBALL CLUB.....RESPONDENT

DECISION

(Preliminary Objection on jurisdiction)

Hearing: 27th February, 2018

Panel: John M Ohaga - Chairperson;

Elynah S Shiveka – Vice-Chairperson

E Gichuru Kiplagat - Member

Appearances: Ms. Doreen Kikanu as instructed by Simba & Simba, Advocates for the Claimants (doreen@simba-advocates.com)

Mr. Ezekiel Munyua as instructed by Rachier & Amollo LLP, Advocates for the Respondent (ezekiel@rachieradvs.co.ke)

The Parties

1. The Claimants are all football players who allege that they entered into contracts of employment with the Respondent for different periods and which stipulated different considerations. We will deal with each claimant separately in the body of this decision.

2. The Respondent is Gor Mahia Football Club (hereinafter '**the Club**') which has been sued through its officials.

The Claim

3. The claim is as set out in the Statement dated 23rd October 2017 and lodged at the Tribunal on 30th October 2017. The Statement is accompanied by a Verifying Affidavit sworn by the 1st Claimant, Jacob K. Mutunge, who is also duly authorized to appear, plead and act on behalf of the other Claimants. To the claim is attached different contracts of employment entered into by the Club evidencing the employment of the Claimants.

4. For the present purposes, the Tribunal will only be interested in the clauses setting out the dispute resolution provisions.

Preliminaries

5. When the matter first came up on 9th November 2017, the Chairman of the Tribunal issued directions requiring the Claimants to serve the Respondent with the Statement of Claim and accompanying documents by close of business on 16th November 2017. The Respondents were thereafter required to file an appropriate response by 30th November 2017 and the matter was to be mentioned on 5th December 2017 to confirm compliance and for further directions.

6. On 5th December 2017, there was no appearance for any of the parties.

7. The matter came up again on 11th December 2017 where there was no appearance once again for any of the parties, and the Tribunal duly directed that the matter be mentioned on 16th January 2018.

8. On 16th January 2018, Ms. Matasi held brief for Ms. Kikanu for the Claimants, but she was clearly not aware that the matter was to be mentioned and sought a further mention date to enable Ms. Kikanu to be present and to deal with the matter. The Tribunal therefore directed that the Statement of Claim be served on the Respondents within seven (7) days and the matter be mentioned on 30th January 2018.

9. On 1st February 2018, the firm of Rachier & Amollo LLP filed a Notice of Appointment on behalf of the Respondent. Simultaneously with the Notice of Appointment was filed a Notice of Preliminary Objection.

10. There is no record of what transpired on 30th January 2018 but on 6th February 2018, the matter came before the Tribunal again when Ms. Kikanu attended on behalf of the Claimants and Mr. Munyua attended on behalf of the Respondents. Ms. Kikanu explained that she had only seen the matter on the cause list and required fourteen (14) the days to enable her consider the Preliminary Objection. The Preliminary Objection was therefore set for hearing on 20th February 2018.

11. However, on 20th February 2018, the Tribunal was not sitting as the members were away attending a strategy retreat.

12. On 27th February 2018, the Tribunal heard oral arguments by the parties. The Respondent's oral arguments merely highlighted written submissions which it had filed on the same day, 27th February 2018. At the close of the oral arguments, Counsel for the Claimants sought and was granted leave to file written submissions, and these were filed on 12th March 2018. There was also liberty granted to the parties to file affidavits setting out the contentious positions with respect to the question of how the dispute resolution provisions in the various contracts had been activated and with what result.

13. The Claimants filed an affidavit sworn by Kikanu Doreen on 12th March 2018, while the Respondent swore a further affidavit sworn by the Club's Secretary General, Lordvick Aduda on 23rd March 2018.

The Preliminary Objection

14. The Preliminary Objection is as to the jurisdiction of the Tribunal to hear and determine the dispute set out in the claim. The objection is in the following terms: **That there exist arbitration clauses which are operative and capable of being enforced:**

i.) **That pursuant to Clause 22 of the KPL Contract of Employment entered into on 7th January 216 with the 1st Claimant,**

all disputes arising out of or relating to the contract including the termination or consequences of termination thereof shall be referred to Dispute Resolution in accordance with the KPL rules from time to time;

ii.) That pursuant to Clause 15 of the Contract of Employment entered into with the 2nd Claimant on 1st July 2016, all disputes arising out of or relating to the contract shall be referred to Arbitration in accordance with the Arbitration Act of 1995 or any statutory modification or reenactment therefore for the time being in force or in accordance with FIFA Regulations for the Status and Transfer of players;

iii.) That pursuant to Clause 22 of the KPL Contract entered into on 26th January 2016 with the 3rd Claimant, all disputes arising out of or relating to the contract including the termination or consequences of termination thereof shall be referred to Dispute Resolution in accordance with the KPL rules from time to time;

The Respondent's Arguments

15. As can be discerned from the Notice of Preliminary Objection, the Respondent does not accept that the Tribunal has the requisite jurisdiction to hear and determine the dispute brought on behalf of the Claimants as set out in the Statement of Claim.

16. The first limb of the Claimant's submissions is that Article 162 (2) (a) of the Constitution provides for the establishment of the Employment and Labour Relations Court which is further mandated under Section 12 (1) (a) of the Employment and Labour Relations Court Act to hear and determine disputes arising out of the employer and employee.

17. The second limb of the objection is that in any event, the various contracts of employment relied on by the 1st and 3rd Claimants as evidencing their employment by the Club contains a provision for dispute resolution which requires that all disputes arising out of or relating to the contracts including the termination of employment are to be referred to arbitration or resolution in accordance with the Kenya Premier League rules; with respect to the 2nd Claimant, the contract entered into with the Respondent provides for arbitration in accordance with the Arbitration Act, 1995 or in accordance with the FIFA Regulations for the Status and Transfer of Players.

18. It is therefore the Respondent's assertion that whichever way you look at it, the Tribunal has no jurisdiction and the Claimants would be obliged to pursue the avenues for dispute resolution made available under their respective contracts. The Respondent also relied on several authorities to which we shall give consideration to in the course of our discussion on the competing positions.

The Claimants' Submissions

19. The Claimants commenced by stating that the claim is brought under the provisions of Section 58 (b) of the Sports Act. They also anchor their submissions on Article 159 (2) of the Constitution which provides that alternative forms of dispute resolution are to be promoted.

20. With respect to reliance by the Respondent on Article 152 (2) of the Constitution, the Claimant points out that Section 15 (1) of the Employment and Labour Relations Court Act provides for resort to other appropriate means of dispute resolution in line with Article 159 (2) of the Constitution.

21. The Claimant further relies on the principle under the FIFA Statute which bars resort to ordinary courts of law and the FIFA Regulations which gives jurisdiction to Sports Disputes Resolution Committees and Tribunals which are recognized by National Federations to hear and determine contractual and employment matters.

22. With respect to the Tribunal established by the Kenya Premier League, it is the Claimants' contention that the jurisdiction of this is limited to hearing and determining matters relating to discipline and code of conduct.

23. With respect to judicial bodies established by the Football Kenya Federation, the Claimants draw the Tribunals attention to the fact that the most appropriate forum would be the Arbitration Committee. However, it is the Claimants' contention and supported by the averments in the affidavit of Kikanu Doreen that the Claimants have attempted to activate the Arbitration Committee but that despite filing and serving the Respondent with the Statement of Claim, the Committee has not invited the parties for the first preliminary meeting since 21st August 2017, which is a period of more than six (6) months.

24. The Claimant further asserts that the Respondent's Preliminary Objection is brought in bad faith and merely for the purpose of evading the claim because the Respondent has neither filed any pleadings before the Arbitration Committee in response to the claim nor has it sought to explain why it did not file any responses if it indeed wish to pursue arbitration as set out in the contract. The Claimants say that the Respondent is merely using the Preliminary Objection as an avenue to frustrate the resolution of the dispute and the Claimants continue to suffer prejudice as their salaries have been in arrears since February 2017.²⁵ The Claimants therefore express the fear that they are in danger of being left without a forum to ventilate their grievances as the only body available to them being the FKF Committee is not properly constituted and therefore their right of access to justice as envisaged under Article 48 of the Constitution.²⁶ The Claimants also refer to various decisions of the Court and the Tribunal in support of their contention that the Tribunal should take jurisdiction hear and determine the dispute.

Jurisdiction

27. The starting point must be to acknowledge that the Tribunal is a creature of statute and we must therefore look to its founding statute to establish the length and breadth of its jurisdiction. Without a doubt, the present matter falls under Section 58 (b) of the Sports Act which provides as follows:

The Tribunal shall determine-

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

28. Section 59 of the Act then provides that:

The Tribunal may, in determining disputes apply alternative dispute resolution methods for sports disputes and provide expertise and assistance regarding alternative dispute resolution to the parties to a dispute.

29. In construing this provision, the Tribunal stated as follows in the case of Denis Kadito versus Sofapaka Football Club:

However, a reading of Section 58(b) demonstrates that it is not sufficient that the matter before the Tribunal should be a 'sports-related dispute'; the parties to the dispute must also agree to refer the matter to the Tribunal and the Tribunal must agree to hear the matter. It is clear that there is therefore a three (3) stage process for establishing the jurisdiction of the Tribunal under Section 58(b). Each limb of the three (3) stage process must be satisfied and each stage depends on a positive answer to the prior stage.

30. The question therefore is how to discern the agreement entered into by the parties in the context of Sections 58 and 59 of the Sports Act. In order to do this, the Tribunal must consider each contract entered into by the respective Claimants separately and construe this as against the provisions of Section 58(b) and 59 of the Act to determine whether or not the Tribunal is in fact the appropriate forum to hear and determine the dispute.

31. Challenges to its jurisdiction have been entertained by the Tribunal since its inception and the Tribunal acknowledges that jurisdiction is a threshold issue which must be dealt with and determined at the outset.

32. Indeed, the principles are clear. In **Kakuta Maimai -vs- Peris Pesi Tobiko & 2 Others**^[1], the Court of Appeal stated as follows:

'So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue is a desideration imposed on courts out of decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul-de-sac.'

33. In the **Matter of the Interim Independent Electoral Commission**,^[2] the Supreme Court pronounced as follows:

'Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out

in judicial precedent...Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.'

Discussion

34. It is clear from each of the dispute resolution provisions set out in the contracts entered into by the parties that they wished to avoid litigation and to embrace an alternative form of dispute resolution. The question therefore is whether the Tribunal provides the appropriate forum and whether the Tribunal is willing to hear and determine the disputes.

35. The challenge to the Tribunal premised on the existence of the Employment and Labour Relations Court as established under Article 162 (2) of the Constitution can be disposed off fairly quickly once the provisions of Section 15 (1) of the Employment and Labour Relations Court Act are appreciated and we understood Counsel for the Respondent to readily concede this point. We will therefore not dwell on this limb of the challenge.

36. The more compelling challenge is the reliance on the dispute resolution forums established under the Arbitration Act, the KPL (Kenya Premier League) rules and/or under the FIFA Regulations.

37. In Williamson versus Football Kenya Federation, the Tribunal stated as follows:

'The obligation upon the Tribunal is to ensure that where there is absence of a mechanism for legal redress, the Tribunal acts as the avenue subject to the provisions of the Sports Act, where legal redress can be sought.'

Bearing in mind the provisions of Article 159(2), Article 48 of the Constitution as well as section 59 of the Sports Act, and in light of the absence of a valid arbitration clause, we find that this Tribunal has jurisdiction over the dispute herein.'

38. In Peter Omwando versus Football Kenya Federation, the Tribunal in dismissing a Preliminary Objection on jurisdiction stated as follows at paragraph 38

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

39. Jonathan Mwaniki -versus- Chemelil Sugar, also concerned a dispute relating to the termination of employment contract for a football player. The Tribunal stated as follows in dismissing the Preliminary Objection:

*'Admittedly, Section 58(b) is more problematic because it effectively requires the parties to confer jurisdiction upon the Tribunal. The Tribunal discussed Section 58(b) at some length in the case of **Dennis Kadito vs Sofa Paka Sports club** and again in the case of **Bernard Ogutu vs Gor Mahia FC...***

In this case, the FIFA Regulations on the Status and Transfer of players becomes material. Those regulations are required to be incorporated into the constitutions of football governing bodies worldwide and apply to players participating in organized football either as amateurs or professionals...

Once resort to the ordinary courts of law is excluded then the remedy suggested by counsel for the Respondent which is resort to the Employment and Labour Relations Court ceases to be available and therefore is not an efficacious alternative...

The Tribunal does not consider that it is in the interest of justice to leave such a party without a remedy and for this reason the preliminary objection is declined. The Tribunal will proceed to hear the merits of the claim.

40. It is therefore clear from the foregoing that the Tribunal will examine not only the dispute resolution provisions but also the forum created under the particular dispute resolution provisions to ascertain whether that forum is efficacious and available to aggrieved parties such as the Claimant. However, as observed in Timonah Wanyonyi versus AFC Leopards:

'The Tribunal cannot clothe itself with jurisdiction where a party feels frustrated that the appropriate dispute resolution forum has taken too long to determine a dispute. Further, failing agreement under section 58 (b) of the Act, the party must satisfy the Tribunal that there is considerable threat to the protections secured by Article 48.

41. We will therefore now proceed to examine and determine the position with respect to each Claimant based on a construction of the dispute resolution provision and the availability of the forums created by the respective provisions.

1st and 3rd Claimants

42. Clause 22 of the contract dated 1st January 2016 entered into between the 1st Claimant and the Club and the contract dated 26th January 2016 between the 3rd Claimant and the Club provides as follows:

All disputes arising out of or relating to this contract, including disputes as to the meaning or interpretation of any provision of this contract or as to the carrying into effect of any such provision or as to the termination or consequences of termination shall be referred to Dispute Resolution in accordance with the KPL rules from time to time.

The parties warrant that in accordance with the football rules any and all disputes of whatsoever nature shall be determined in accordance with the KPL rules and in the Dispute Resolution Tribunals of the KPL rather than before any court or other tribunal in so far as it is a requirement of FIFA and other footballing rules that the internal dispute resolution mechanisms available in football should be utilized by participants in the game save where the football rules do not provide an appropriate tribunal to determine the dispute.

43. In order to probe the mechanism established under this provision, it becomes necessary to look at and construe the forums established under the KPL (Kenya Premier League) rules.

44. Part 8 of the rules state as follows:

8. APPEALS

8.1 Competent Authorities

Protests or appeals by members registered in a national league or competition must be dealt with by the National Leagues and Competitions Committee. Protests or appeals by members registered in a Branch League or competition must be dealt with by the Branch Leagues and Competitions Committee.

8.2 Basis for Appeals

An appeal must state the full reasons for the appeal and specify the grounds and rules on which it is based. An appeal will be adjudicated only on the grounds or rules specified. An appeal must be based on one or more of the following grounds: (i) one or more rules other than the Laws of the Game were seriously violated during or immediately before or after a match; (ii) a committee or other relevant authority made a decision which was not justified by the facts of the case; (iii) a committee or other relevant authority decided on an inappropriate penalty or compensation or (iv) a committee or other relevant authority acted contrary to the rules or constitution.

8.3 Documentary evidence

Members must provide on request any documents and other evidence related to an appeal being considered by a competent authority.

8.4 Post-Match Appeals

(a) Procedure: An appeal by a member must be made in writing. The appeal and fee must be received by the KFF within 48 hours after the match. The appeal must be considered at the next meeting of the competent national or Branch committee. If

further investigations are needed they must be completed and a decision made within 30 days after the date of the appeal was received by the KFF.

(b) Committee decisions: Members have the right to appeal the decision of the committee on their case. Members in a national league or competition can appeal to the National Independent Disciplinary and Appeals Committee (IDAC). Members in a Branch league or competition can appeal to the Branch Independent Disciplinary and Appeals Committee (IDAC). Decisions of a Branch IDAC can be appealed to the National IDAC. All appeals must be made in writing. The appeal and fee must be received from KFF within 48 hours from the date the member received the official letter informing them of the decision of the committee. The appeal must be considered at the next National or Branch IDAC.

(c) Subsequent decisions: A member can appeal the decision of the National IDAC on their case to the Kenya National Sports Council. A member can then appeal the decision by the Kenya National Sports Council on their case to the Ministry of Culture and Social Services, if still not satisfied with the decision, the member can appeal to the KFF to create an independent Arbitration Panel. All appeals must be made in writing and copied to the KFF Secretary General. The appeal and fee must be received by the competent authority within 48 hours from the date the member received the official letter informing them of the decision.

8.5 Decisions on appeals

The competent committee or authority can make one of the following decisions: (i) to allow or dismiss the appeal; (ii) to change the decision appealed against; (iii) to order the subordinate committee or authority to reconsider their decision in which case their reconsidered decision is final and cannot be appealed again.

8.6 Appeal Fees

If an appeal is successful, the appeal fees will be repaid to the member.

45. From the foregoing provisions, it is clear that the rules established under the Kenya Premier League Rules are in respect of disciplinary matters, matters arising from various competitions and matters related to compliance with the rules of the game of football.

2nd Claimant

46. Clause 15 of the Contract dated 1st July 2016 between the 2nd Claimant and the Club states as follows:

Any dispute on this contract is to be settled by Arbitration in accordance with the Arbitration Act 1995 or any statutory modification or re-enactment therefore for the time being in force or in accordance with FIFA regulations for the Status and Transfer of Players.

47. It is clear that the first option offered under clause 15 is arbitration in accordance with the Arbitration Act, 1995.

48. What is also clear, however, is that no mechanism is provided for the appointment of an arbitrator and a party seeking to exercise this option would have to resort to the High Court in the first instance under Section 12 of the Arbitration Act, 1995.

49. The next option is the FIFA Regulations for the Status and Transfer of Players. These provide for a Dispute Resolution Chamber at Article 24 which states as follows:

1. The DRC shall adjudicate on any of the cases described under article 22 a), b), d) and e) with the exception of disputes concerning the issue of an ITC.

2. The DRC shall adjudicate in the presence of at least three members, including the chairman or the deputy chairman, unless the case is of a nature that may be settled by a DRC judge. The members of the DRC shall designate a DRC judge for the clubs and one for the players from among its members.

The DRC judge may adjudicate in the following cases:

- i) all disputes up to a litigious value of CHF 100,000;
- ii) disputes relating to the calculation of training compensation;
- iii) disputes relating to the calculation of solidarity contributions.

50. Article 24 makes reference to Article 22 which provides as follows:

Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:

- a) disputes between clubs and players in relation to the maintenance of contractual stability (articles 13-18) where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract;
- b) employment-related disputes between a club and a player of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement;
- c) employment-related disputes between a club or an association and a coach of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings exists at national level;
- d) disputes relating to training compensation (article 20) and the solidarity mechanism (article 21) between clubs belonging to different associations;
- e) disputes relating to the solidarity mechanism (article 21) between clubs belonging to the same association provided that the transfer of a player at the basis of the dispute occurs between clubs belonging to different associations;
- f) disputes between clubs belonging to different associations that do not fall within the cases provided for in a), d) and e).

51. From the provisions of the FIFA Regulations for the Status and Transfer of Players, it is clear that FIFA is only competent to hear disputes between a club and player of an international dimension. As the dispute between the parties are of a local dimension, FIFA will not have the jurisdiction to hear and determine the dispute.

4th Claimant

52. As the Tribunal has not been provided with the employment contract in respect of this claimant, it makes no comment in relation to this claimant.

Decision

53. With respect to the 1st and 3rd Claimants, it is clear that the KPL rules do not in fact provide for the nature of dispute set out in the Statement of Claim which is between employer and employee. In consonance with its previous decisions as set out in Williamson versus Football Kenya Federation et al, the Tribunal takes the view that in the absence of an appropriate forum within the contract between the parties, it must step in and fill the lacuna in order to provide the Claimant with an avenue for redress.54. Indeed, it is instructive that clause 22 of the agreement between the 1st and 3rd claimants and the Respondent contains a proviso to the effect that it applies '...save where the football rules do not provide an appropriate tribunal to determine the dispute'.

55. The Tribunal also takes cognizance of the complaints made by the Claimants with respect to the Respondent's refusal or reluctance to engage with them for the purpose of resolving the dispute.

56. Accordingly, the preliminary objection in so far as it relates to the 1st and 3rd Claimants is dismissed.

57. With respect to the 2nd Claimant, the first option of arbitration initially appears attractive until closer scrutiny is given to the efficacy of the forum.

58. As the Tribunal has already noted, no mechanism is provided for the appointment of an arbitrator and accordingly, the claimant seeking to activate this forum would have to apply to the High Court under Section 12 of the Arbitration Act. There are further provisions of the Arbitration Act which provide for the intervention of the High Court including Sections 14, 15, 16A, 17, 18 and 35.

59. The Tribunal is cognizant of the principle set out in the FIFA Statutes to the following effect:

Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.

60. For this reason, the option of arbitration under the Arbitration Act ceases to be efficacious.

61. With respect to the FIFA Regulations for the Status and Transfer of Players, we have already observed that these provide only for disputes between a club and player of an international dimension. There has been no suggestion that the Claimant is such a player and accordingly, this provision is also unsuitable.

62. The preliminary objection as relates to the 2nd Claimant is accordingly also disallowed.

Conclusion

63. The Tribunal shall therefore proceed to entertain the claim as against the 1st, 2nd and 3rd Claimants.

Dated and delivered at Nairobi this 29th day of *March* 2018.

Signed:

John M Ohaga

Chairperson, Sports Disputes Tribunal

In the presence of:

1. Elynah Shiveka, _____

Vice Chairperson

2. Gabriel Ouko, _____

Member

[\[1\]](#) [2013] eKLR

[\[2\]](#) Supra, note 8



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