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Case Class:	Civil
Court:	Sports Disputes Tribunal
Case Action:	Decision
Judge:	John M. Ohaga, Chairperson Gilbert M T Ottieno, Member Peter Ochieng, Member
Citation:	Elijah M. Aliero & another v Agnes Flora Oluoch & another; Patrick Muthiani(Interested Party) & 10 others [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Tribunal
History Magistrates:	-
County:	Nairobi
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Case Outcome:	-
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Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

APPEAL SDT NO. 7 OF 2019

ELIJAH M. ALIERO.....1ST PETITIONER

DOUGLAS ISAAC SIDIALO.....2ND PETITIONER

VERSUS

AGNES FLORA OLUOCH.....1ST RESPONDENT

KENYA NATIONAL PARALYMPIC COMMITTEE.....2ND RESPONDENT

and

PATRICK MUTHIANI..... 1ST INTERESTED PARTY

JOHN TITA.....2ND INTERESTED PARTY

DENIS OMONDI.....3RD INTERESTED PARTY

SOSPETER MAINA.....4TH INTERESTED PARTY

LENAH NYABOKE..... 5TH INTERESTED PARTY

PAULINE AWANGE.....6TH INTERESTED PARTY

RUTH MUENI.....7TH INTERESTED PARTY

STANLEY MUTUMA.....8TH INTERESTED PARTY

KENNEDY NDUNGI.....9TH INTERESTED PARTY

BERNARD ONGODO..... 10TH INTERESTED PARTY

ROSE CHESANG.....11TH INTERESTED PARTY

DECISION

Hearing: 30th July, 2019

Panel: John M Ohaga – Chairperson;

Gilbert M T Ottieno - Member;

Peter Ochieng - Member;

Appearances: S B Otieno Esq instructed by S B Otieno & Company, Advocates for the Applicants; Ms. I W Cheronu instructed by V A Nyamodi & Company, Advocates for the Respondents

The Parties

1. The 1st Petitioner is a male adult and the Secretary General of the 2nd Respondent.
2. The 2nd Petitioner is a male adult and a member of the 2nd Respondent.
3. The 1st Respondent is a female adult and currently acting as the Chairperson of the 2nd Respondent.
4. The 2nd Respondent is a non-profit making national sports organization registered under the Sports Act, 2013 with the objectives, among others, to ensure representation of athletes with disabilities in National and International sports.
5. The Interested Parties herein have not been described in any of the pleadings of the parties.

Background

6. We set out below a summary of the relevant facts on the basis of the pleadings and oral submissions of the parties herein and the evidence produced thereof.
7. On 24th October 2014, an election was conducted to usher in the officials of the Kenya National Paralympic Committee (hereinafter referred to as the “KNPC”) including the Executive Committee together with its Chairperson.
8. These officials are to hold office for a term not exceeding four years but are eligible for re-election for one more term.
9. For a period of time now, the KNPC has been faced with wrangles over its leadership. There has also been disharmony among the members.
10. Strictly speaking, the next election for the officials of the KNPC was to be conducted on or before 23rd October 2018.
11. Several attempts have been made to ensure the election takes place on the 23rd October 2018, but these efforts have not borne any fruit.
12. Following this internal turmoil in the leadership of the KNPC, several cases have been filed in this Tribunal including sport disputes Nos. 13, 18, 19 and 25 of 2018 all relating to the leadership of various affiliates of KNPC and the KNPC pending elections.
13. This Tribunal by an order made on 18th December 2018 directed that all these disputes be amalgamated and undergo an alternative dispute resolution mechanism to be able to navigate the intertwined issues.
14. This Tribunal appointed a Mediation Committee chaired by Mrs. Njeri Onyango with membership drawn from all KNPC affiliates to try and resolve the rifts amicably. The Committee in total has 17 members.
15. Despite all these efforts, the disputes continued to be unresolved.

Proceedings before the Tribunal

16. On 11th April 2019, the Petitioners through their advocates S.M. Otieno lodged a Notice of Motion dated 10th April 2016 (hereinafter referred to as the “**Application**”) seeking numerous orders. We are not going to quote *verbatim* the orders as sought in the Application but by way of paraphrasing, the Petitioners prayed for orders that:

a. *The application be certified urgent.*

b. *A fresh date for para athletics trials be set urgently by the mediation committee secretariat to facilitate selection of para athletes scheduled to represent Kenya at the 4th international athletics meeting- Marrakech, Morocco between 21st April 2019 and 28th April 2019 (hereinafter referred to as the “4th International Athletics Meeting”)*

c. *The funds held by KNPC in the Kenya Commercial Bank A/c No. 1103207792 be withdrawn and utilized towards the facilitating trials, selection and preparation of para athletes to participate in the 4th International Athletics Meeting.*

d. *The 2nd Respondent be ordered to supply the 1st Petitioner with the password to the KNPC email address: paralympickenya@gmail.com to enable him take charge of correspondence therein.*

17. On 18th June 2019, the matter came for a Mention but the Petitioners argued that some of the prayers have been overtaken by events and as such they sought to amend their pleadings appropriately and file a Further Affidavit. The event they referred to is the 4th International Athletics Meeting which took place in April of 2019. Thus, prayers a), b) and c) were rendered obsolete. There was no appearance from the Respondents.

18. The Petitioners were given 7 days to file Amended Petition and Further Affidavit. Such Amended Petition was to be served on the respondents together with a Mention Notice on 2nd July 2019. The Matter was listed for a Mention on 2nd July 2019 at 2:30pm.

19. On 2nd July 2019, when the matter came up for a mention, the Petitioners said that they have not served the respondents because they have not found all the documents they required to file together with the Amended Petition. They requested for 7 days to file and serve the Amended Petition. The Matter was set for a Mention on 9th July 2019 for further directions. There was still no appearance from the respondents.

20. On 9th July 2019, the Petitioners were ordered to serve the respondents within 7 days. The matter was listed for directions on 16th July 2019.

21. On 16th July 2019, the Respondents appointed the firm of V.A. Nyamondi & Company Advocates to act on their behalf. During the mention of the matter, Ms. Cheronon for the respondents requested for a week to respond to the Amended Petition. The Tribunal ordered that the matter be mentioned on 23rd July 2019 and that the parties should pick a hearing date without further delay.

22. The matter proceeded for hearing on 30th July 2019.

Petitioners' Case

23. The Petitioners' case is set out in the Amended Petition and the Further Affidavit of Mr. Elijah M. Aliero both dated 8th July 2019 and lodged in this Tribunal on 9th July 2019 together with the annexures produced thereof.

24. In both their pleadings and submissions, the Petitioners have contended that the 1st Respondent is unfit to continue serving as the Chairperson of the KNPC and they gave several reasons to this effect which we are going to set out below.

Alleged lack of commitment

25. The Petitioners have contended that 1st Respondent has allegedly failed to show commitment to the process being conducted by the Mediation Committee and has acted in utter indiscipline. To this end, the Petitioners produced several documents including an email from Mrs. Njeri Onyango, the Chair of the Mediation Committee, the contents of which we are going to examine in our analysis.

26. As alleged by the Petitioners, this email comes after the 1st Respondent acted in total defiance of the direction of the Mediation Committee directing that a joint trial be held for para athletes to afford all athletes from Nairobi and upcountry an equal and fair opportunity for selection to compete at the 4th International Athletics Meeting. Additionally, the Petitioners have alleged that the trials held by the respondents have been declared null and void.

27. The Petitioners have also alleged that the 1st Respondent has disregarded direct conditions set by the International Paralympic Committee (hereinafter referred to as the “IPC”) for Kenya’s Participation at the 4th International Athletics Meeting. To demonstrate this point, the Petitioners produced a letter for the IPC dated 18th April 2019 addressed *inter alia* to the 1st Petitioner, the 1st Respondent and the 2nd Respondent.

28. The Petitioners argued that the IPC set out the conditions for Kenya’s participation including the condition that in addition to the athletes already entered in the competition by the 1st Respondent, two additional athletes should be nominated by the Mediation Committee to compete at the event. Further, in the event that the 1st Respondent would attend the event, the Petitioners alleged that Mediation Committee was entitled to send one representative to the competition to ensure that both parties are represented.

29. The Petitioners have contended that 1st Respondent did nothing whatsoever to ensure the conditions set by the IPC for Kenya’s participation are met with the result that the 2nd Respondent failing to comply with the conditions aforesaid.

30. In addition, the Petitioners have produced a report prepared by the Secretariat of the Mediation Committee setting out allegedly all that have transpired from preparation and participation in the 4th International Athletics Meeting.

31. Relying on the contents of the said report, the Petitioners have submitted that the 1st Respondent submitted a list of attendees at the 4th International Athletics Meeting to the Ministry of Sports, Culture and Heritage in which at least 12 people in the said lists were joyriders since some of the people entered in the competition as athletes did not participate in the competition.

32. The Petitioners have also alleged that the 1st Respondent organised an illegal demonstration on Thika Superhighway after the athletes returned from Morocco. The Petitioners argued that the alleged demonstration is in the public domain.

33. Following this turn of events, the Ministry of Sports, Culture and Heritage wrote a letter alleging that “they” have been taken for “ride” to do illegality by officials who are part of the disputed leadership in the KNPC.

34. The Petitioners have argued that 1st Respondent’s alleged act of defiance of Mediation Committee’s directions and the directions of the IPC is a breach of Article 73 (2)(e) of the Constitution of Kenya that provides the guiding principles of leadership and integrity including the principle of discipline and commitment in service to the people.

Alleged conflict of Interest

35. The other reason the Petitioners gave for 1st Respondent’s unfitness for the office of the Chairperson is that the 1st Respondent has been allegedly demanding to be paid 20% commission for every sponsorship grant to the 2nd Respondent meant to promote para-sports activities in Kenya.

36. Thus, the Petitioners argued, the 1st Respondent has allowed her personal interest to conflict with her duty of selflessness towards the 2nd Respondent contrary to Article 73(2)(c)(ii) of the Constitution of Kenya. To this end, the Petitioners produced Minutes of the Meeting of KNPC allegedly held at Nyayo National on 18th August 2017 and a Memorandum to this Tribunal dated 26th March 2019 calling for disciplinary action against the 1st Respondent and the 9th Interested Party.

37. The Petitioners have alleged that the 1st Respondent vide a letter of even date on the 2nd Respondent’s letterhead wrote to request for financial assistance from a Dr. Liana to enable the 2nd Respondent’s delegates attend the IPC general assembly. In the said letter, the 1st Respondent allegedly supplied details of her person account, intending that the monies to be given as financial assistance be paid directly into her personal account.

Alleged change of KNPC’s E-mail Password

38. The Petitioners have further alleged that the 1st Respondent has changed the password of the 2nd Respondent’s email in a bid to lock out the 1st Petitioner and prevent him from discharging his mandate to take charge of correspondence on behalf of the 2nd Respondent.

Alleged dysfunction in the Executive Committee

39. The Petitioners have also raised several allegations against the Executive Committee of the 2nd Respondent. They alleged that the members of the Executive Committee of the 2nd Respondent have failed to meet for the last 4 months despite 10 duly issued notices to them by the 1st Petitioner. This, the Petitioners have argued, amounts to violation of section 4.3.1.8 of the KNPC Constitution.

40. To prove this point, the Petitioners have produced in this Tribunal a letter dated 7th February 2019 from the 1st Petitioner to this Tribunal notifying this Tribunal that no board meeting has been held in the last 4 months for lack of quorum despite the 1st Petitioners effort to call for the meetings.

41. The Petitioners have also averred that the Second Schedule to the Sports Act and section 4.3.1.10 of the KNPC Constitution limits the term of office of members of the executive committee to 4 years and since it is now 2019 and the last election was held on 24th October 2014, their term has lapsed by operation of law and it thus proper that the said members of the executive committee be removed.

Petitioners' prayers

42. From the foregoing, the Petitioners have prayed for the following orders:

a. *Removal of the 1st Respondent as the Chairperson of the 2nd Respondent.*

b. *An order disbanding the national executive committee of the 2nd Respondent.*

c. *An order directing that an interim committee to be constituted to take over and manage affairs of the 2nd Respondent or in the alternative, the mediation committee previously constituted by this Tribunal serve as caretaker committee of the 2nd Respondent until next election is conducted.*

d. *An order that the 1st Respondent to supply the 1st Petitioner with the password to the KNPC email address: paralympickenya@gmail.com or to any other email address held by KNPC to enable him take charge of correspondence as per his mandate under Section 4.3.3.3 of the KNPC Constitution.*

e. *Costs and interest.*

1st Respondents' Case

43. The 1st Respondent's Case is set out in a Replying Affidavit of Agnes Flora Aluoch dated 23rd July 2019 and lodged in this Tribunal on the same date together with the annexures produced thereof.

Alleged lack of capacity

44. The 1st Respondent alleged that the Executive Committee of the 2nd Respondent passed a resolution on 2nd April 2019 suspending the 1st Petitioner from the position of Secretary General. As such, the 1st Petitioner has no capacity to institute present Petition as the Secretary General of the 2nd Respondent.

45. To this effect, the 1st Respondent has produced Minutes of the Meetings of the KNPC dated 2nd April 2019 together with copies of the letters addressed to the 1st Petitioner, the Commissioner of Sports, Membership Engagement Coordinator of International Paralympic Committee and Cabinet Secretary, Ministry of Sports, Culture and Heritage.

46. The 1st Respondent has also alleged that the 2nd Respondent does not have the capacity to institute and defend suits and therefore the Petition is fatally defective as against the 2nd Respondent.

Response to the alleged lack of commitment

47. In reply to the letter allegedly sent by the 1st Petitioner requesting for a meeting on 2nd April 2019 with the 1st Respondent, the 1st Respondent has alleged that it has not received any such letter.

48. The 1st Respondent in further response, alleged that on 2nd April 2019 there was a meeting scheduled for the 2nd Respondent's Executive Committee at Moi Sports Centre, Kasarani which allegedly the 1st Petitioner was aware of. The 1st Respondent does not, however, state whether the said meeting took place.

49. The 1st Respondent also alleged that the trials held by the 2nd Respondent's Executive Committee on 26th March 2019 for the 4th International Athletics Meeting was not declared null and void. A fact, the 1st Respondent said, was evidenced by a letter of 18th April 2019 from IPC, the content of which we are going to examine in our analysis.

50. In response to the allegation that the 1st Respondent did nothing to comply with the conditions given by IPC for Kenya's Participation in the 4th International Athletics Meeting, the 1st Respondent alleged that on 22nd April 2019 when the National Paralympic Committee of Morocco issued an invitation of three individuals, she said that she was not in a position to facilitate the attendance of those listed in the invitation having travelled out of the country on 19th April 2019.

51. The 1st Respondent further argued that the 1st Petitioner had no capacity to write the letter dated 20th April 2019 addressed to the IPC using the 2nd Respondent's letterhead as the 1st Petitioner was suspended on 2nd April 2019.

52. The 1st Respondent has also alleged that the Mediation Committee usurped the powers of the Executive Committee of the 2nd Respondent by preparing a report on the 4th International Athletics Meeting and presenting the same to the Ministry of Sports, Culture and Heritage.

53. Further, the 1st Respondent argued that the 1st Petitioner had no capacity to sign the report on 12th June 2019 in the capacity of Secretary General of the 2nd Respondent as he was suspended from that position on 2nd April 2019.

54. On the issue of the 12 joyriders at the competition, the 1st Respondent has argued that the report does not specially list the names of the 12 people who allegedly attended the 4th International Athletics Meeting as Joyriders.

55. The 1st Respondent denied violating any law or regulation including Article 73 (2)(e) and Article 73(2)(c)(ii) of the Constitution of Kenya and the Official KNPC Constitution.

Response to alleged conflicts of interest

56. In response to the alleged conflict of interest, the 1st Respondent contended that the respondents have not made any resolution to the effect that the 1st Respondent or any other member of the Executive Committee be paid 20% commission for every sponsorship grant to the 2nd Respondent.

57. The 1st Respondent argued that the minutes produced by the Petitioners have not been confirmed and signed by either the Chairperson of the KNPC or the Secretary General of the KNPC and as such are not official minutes of any meeting held by the KNPC's Executive Committee.

58. Further, the 1st Respondent contended that she never issued out any her personal account for purpose of receiving money meant to sponsor the 2nd Respondent's activities. 1st Respondent contended that all money meant for the 2nd Respondent's activities are deposited in the 2nd Respondent's Bank Account and all the withdrawals thereafter are supported by minutes.

59. The 1st Respondent argued that the letter dated 4th November 2015 requesting for financial assistance for KNPC activities is neither signed by her nor does it contain her Bank Account Number.

Response to alleged changing of KNPC Email Password

60. The 1st Respondent contended that the 1st Petitioner was suspended from the position of Secretary General of the 2nd Respondent on 2nd April 2019. Thus, the 1st Petitioner had no capacity to have the password of the 2nd Respondent's e-mail.

61. The 1st Respondent further argued that the 1st Petitioner is not under any mandate to take charge of the 2nd Respondent's correspondence as the same is undertaken by the 9th Interested Party who allegedly serves as the acting Secretary General of the 2nd Respondent pursuant to the provisions of Article 4.3.3.4 of the KNPC Constitution.

Response to alleged dysfunction of the KNPC Executive Committee

62. The 1st Respondent alleged that the 2nd Respondent's Executive Committee has been holding its meeting in full compliance with the KNPC Constitution.

63. Further, 1st Respondent argued that no evidence has been adduced by the Petitioners to show that the 2nd Respondent's Executive Committee has failed to meet the requirements of the KNPC Constitution.

64. It is the 1st Respondent's argument that according to Article 4.3.1.2 of the Official KNPC Constitution, the term of office for the Executive Committee shall be four years. However, the 1st Respondent further argued that the Executive Committee shall remain in office provisionally until a new Executive Committee is elected.

65. The 1st Respondent argued that although the term of office of the current Executive Committee has lapsed in 2018, no elections have been held since the last election in 2014. Therefore, pursuant to the provisions of Article 4.3.1.2 of the Official KNPC Constitution, 2014 the 2nd Respondent's Executive Committee is duly constituted.

66. The 1st Respondent further argued that the delay in conducting KNPC elections was because 3 of the 4 KNPC affiliates have ongoing matters before this Tribunal which include the SDT Appeal Nos. 13, 18, 19 and of 2018. The import being that the General Assembly allegedly does not have a quorum of 50%+1 which is mandatory for the transaction of business at the General Assembly as per the provisions of Article 5.1.7.3 of the KNPC Constitution.

67. It is the 1st Respondent's argument that according to Article 4.3.1.1 of the KNPC Constitution, the Executive Committee is the representation of the 2nd Respondent's Membership elected by the General Assembly.

68. Thus, the 1st Respondent argued, the jurisdiction to change the membership of the 2nd Respondent's Executive Committee rests solely on the 2nd Respondent's General Assembly through an election.

69. The 1st Respondent further argued that according to the KNPC Constitution, the Executive Committee is the only organ mandated to manage the affairs of the KNPC.

70. Lastly, the 1st Respondent argued that the Petition lacks merits and prayed that the same be dismissed with costs.

Legal Issues

71. From the pleadings, evidence and submissions of the adverse parties herein, the following issues fall for determination before this Tribunal:

- i) *Whether the 1st Petitioner has the right to institute this petition.*
- ii) *Whether the 2nd Respondent has the capacity to defend this suit.*
- iii) *Whether the 1st Respondent should be removed from the position of the Chairperson of the 2nd Respondent.*
- iv) *Whether the Executive Committee of the 2nd Respondent should be removed from their position.*
- v) *Whether the 1st Respondent should supply the 1st Petitioner with the password to the KNPC email address: paraylympickenya@gmail.com*

vi) *Whether an interim committee should be constituted to take over and manage the affairs of the 2nd Respondent until next election is conducted.*

Analysis

Whether the 1st Petitioner has the right to institute this petition

72. There is no dispute that the 1st Petitioner was the Secretary General of the 2nd Respondent until a resolution was allegedly passed on 2nd April 2019 at Moi Sports Centre Kasarani to oust the 1st Petitioner.

73. The respondents have vehemently argued that the 1st Petitioner lacks the capacity to either act as the Secretary General of the 2nd Respondent or to bring this present suit in the same capacity because a resolution was passed on 2nd April 2019 to remove him as the Secretary General.

74. The said resolution allegedly passed on 2nd April 2019 at Moi Sports Centre Kasarani reads, in part, as follows:

“...Considering Kenya has not qualified any athletes in the Tokyo 2020 Paralympics games, board members expressed their frustrations with the Secretary General and agreed on the following:

· Patrick Mudhiani, second Vice Chair proposed and was seconded by Lena Nyaboke, deputy Treasurer, on the suspension of the Secretary General barring him from conducting any of the KNPC's and its affiliate's business.

· The final decision would be left pending, awaiting an annual general meeting (AGM)...” (Emphasis ours)

75. It is quite clear from the reading of this part of the resolution that a proposal was made to suspend the 1st Petitioner as the Secretary General of the 2nd Respondent but the final decision was to be left pending, awaiting an Annual General Meeting. The 1st Respondent have not produced any document to show that an Annual General Meeting was conducted to finalise the decision of the suspending the 1st Petitioner as the Secretary General of the 2nd Respondent. Thus, we cannot accept the argument from the respondents that the proposal made on 2nd April 2019 was the final decision to suspend the 1st Petitioner.

76. From the foregoing, we are of the view that the 1st Petitioner is still the Secretary General of the 2nd Respondent pending the final decision of the Annual General Meeting and as such he has the right to act in such a capacity and institute this suit on his own behalf or on behalf of the KNPC.

77. We are guided by the provision of Article 22 of the Constitution of Kenya 2010 which provides that every person, including the person acting as a member of a group or class of persons, has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill has been denied, violated or infringed, or is threatened.

78. Important note from the 1st Respondent pleadings and oral arguments is that the 2nd Respondent have not raised any issue against the 2nd Petitioner in bringing this suit to this Tribunal. We presume that the 2nd Petitioner is the right party in this case.

79. We have held hereinabove above that the 1st Petitioner has the right to institute this proceeding against the 2nd Respondent and to act in the capacity of the Secretary General of the 2nd Respondent. However, for argument sake, if we held to the contrary that the 1st Petitioner has no right to institute this matter, the 2nd Respondent has not objected to the 2nd Petitioner's right to bring this case. The import of which is that all the allegations by the 2nd Petitioner still stands against the respondents.

Whether the 2nd Respondent has the capacity to defend this suit.

80. The 1st Respondent has contended that the 2nd Respondent does not have the capacity to institute and defend suits, therefore the Petition herein is fatally defective as against the 2nd Respondent. The 1st Respondent has not given any reason beyond this contention.

81. The 2nd Respondent is a National Sports Organisation within the meaning of section 2 of the Sports Act, 2013. Section 50 of the

Sports Act, 2013 provides for effect of registration of sports organisation. Section 50(1)(b) of the Sports Act, 2013 provides for effect of registration of sports organisation in the following terms:

“(1) Upon the registration of an existing sports organization under this Act-

(a)...

(b) all rights, powers, liabilities and duties, whether arising under any written law or otherwise, which immediately before the commencement of this Act were vested in, imposed on or enforceable by or against an existing sports organization shall, be vested in, imposed on or be enforceable by or against the sports organization registered under this Act.”

82. From the reading of this provision, it’s clear that rights, powers, liabilities and duties can be enforced by or against a sports organization and particularly in this case the KNPC. KNPC has the capacity to defend this suit.

83. Besides, we are also guided by the view of the Court of Arbitration for Sport in the Arbitration CAS 2017/A/5227 Sporting Clube de Braga v. Club Dynamo Kyiv & Gerson Alencar de Lima Junior, award of 8 March 2018, which held as follows:

“As a general rule of procedural law, the doctrine of locus standi requires that a party named as a Respondent stands to be sufficiently affected by the matter at hand in order to qualify as a proper Respondent within the meaning of the law.”

84. In this case, the 2nd Respondent stands to be affected sufficiently by the outcome of this case and as such a proper respondent.

Whether the 1st Respondent should be removed from the position of the Chairperson of the 2nd Respondent

85. The Petitioners have extensively argued that the 1st Respondent should be removed from the position of the Chairperson of the 2nd Respondent and they have given their reasons as we have set them hereinabove. The 1st Respondent has also replied to those allegations as we have set them hereinabove. We are going to analyse each of the reasons hereinbelow.

Lack of commitment

86. The Petitioners have contended that 1st Respondent has allegedly failed to show commitment to the process being conducted by the Mediation Committee and has acted in utter indiscipline. As stated earlier, the Petitioners have produced to this Tribunal an email from Mrs. Njeri Onyango which reads in part as follows:

“...The Trials were held despite my clear direction that a date has to be set agreed between the Chairperson and the SG. The list remitted by the chairperson has already been declared null and void. Her presentation of the same is in direct defiance of the current mediation process and is in contempt of the decisions reached in the process. It is clear action of impunity....”

87. The content of the said email has not been denied by the 1st Respondent. Specifically, the 1st Respondent has not denied that she held trials despite Mrs. Njeri Onyango’s direction that a date must be agreed between the 1st Petitioner and 1st Respondent. She has not denied that she was in direct defiance of the mediation process and in contempt of the decisions reached in the process.

88. **Order 2 rule 11 of the Civil Produce Rules** provides as follows on admissions and denials:

“(1) Subject to sub rule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it.”

89. Therefore, to the extent that the 1st Respondent failed to respond to these allegations, we are convinced by the Petitioners’ argument that the 1st Respondent action of failing to hold joint trial as directed by the Mediation Committee shows the 1st Respondent’s lack of commitment to the process being conducted by the Mediation Committee.

90. Admittedly, the 1st Respondent serves in the Mediation Committee and it is misguided for her to fail to abide by the said directions.

91. However, the 1st Respondent has contended in her Replying Affidavit that the list remitted has not been declared null and void. The 1st Respondent produced a letter dated 18th April 2019 from IPC which states in part as follows:

“...The 29 athletes already entered into the competition by Agnes Oluoch will be allowed to participate”

92. The Petitioners have also contended that 1st Respondent did nothing whatsoever to ensure the conditions set by the IPC for Kenya’s participation are met with the result that the 2nd Respondent failing to comply with the conditions aforesaid.

93. In response, the 1st Respondent argued that at the material time, she had travelled out of the country and she could not facilitate. To this effect, the 1st Respondent produced her visa showing that she was out of the country.

94. We are convinced that the 1st Respondent was not in a position to facilitate for the IPC conditions to be met as she was not in the country save to say that she could have delegated the duty to someone else, say her deputy.

95. The Petitioners have also alleged that there were 12 joyriders entered by the 1st Respondent on the list of attendees at the 4th International Athletics Meeting who did not participate in the competition. The Petitioners have invited us to look at the report that was prepared by the Secretariat of the Mediation Committee setting out allegedly all that have transpired from preparation and participation in the 4th International Athletics Meeting. At paragraph 8, the report states:

“...12 people were joyriders who had to be fixed into the team as athletes to circumvent the conditions set upon Kenya by the International Paralympic Committee...”

96. To which the 1st Respondent responded that no specific names of the 12 people who allegedly attended the 4th International Athletics Meeting as Joyriders had been provided by the Petitioners.

97. It is correct, that the Petitioners have not adduced any further evidence to prove the specific names of 12 joyriders. Therefore, we cannot make determination of the specific people who attended the competition as joyriders.

98. It is well-known aphorism that he who alleges must prove. **Section 107 of the Evidence Act** provides as follows:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent 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.”

99. In this case, the burden to prove that the 1st Respondent entered 12 joyriders in the competition lies with the Petitioners. We are of the view that this burden has not been discharged completely by the Petitioners. Thus, the Petitioners’ allegation that the 1st Respondent entered 12 joyriders in the competition must fail.

100. The Petitioners have also contended that the 1st Respondent has organized demonstration on Thika Superhighway which they argued was in the public domain. The Petitioners have relied on a letter from the Ministry of Sports dated 19th June 2019 which reads in part:

“...In the past “we” including the Ministry have been taken for a ride to do illegality by officials who are part of the disputed leadership and the results were illegal demonstrations leading to an embarrassment to the ministry.”

101. This letter does not state specifically state that the 1st Respondent was the one behind the demonstration along Thika Superhighway.

102. In absence of any other evidence, the argument by the Petitioners that the 1st Respondent organized demonstration on Thika Superhighway must also fail.

Conflict of interest

103. The Petitioners contended that 1st Respondent has allowed her personal interest to conflict with her duty of selflessness towards the 2nd Respondent contrary to Article 73(2)(c)(ii) of the Constitution of Kenya. They argued that the 1st Respondent has been allegedly demanding to be paid 20% commission for every sponsorship grant to the 2nd Respondent meant to promote para-sports activities in Kenya.

104. To this end, the Petitioners produced Minutes of the Meeting of KNPC allegedly held at Nyayo National on 18th August 2017 and a Memorandum to this Tribunal dated 26th March 2019 calling for disciplinary action against the 1st Respondent and the 9th Interested Party.

105. At this point, it is important to note that the Minutes of the Meeting of KNPC allegedly held at Nyayo National Stadium on 18th August 2017 have not been signed by anyone and as such this Tribunal cannot rely on its content.

106. The Petitioners have alleged the 1st Respondent vide a letter of even date on the 2nd Respondent's letterhead wrote to request for financial assistance from a Dr. Liana to enable the 2nd Respondent's delegates attend the IPC general assembly. In the said letter, the 1st Respondent allegedly supplied details of her person account, intending that the monies to be given as financial assistance be paid directly into her personal account.

107. Again, the said letter has not been signed and this tribunal cannot rely on its content.

108. This leaves us with the Memorandum dated 26th March 2019. Having read the content of the Memorandum, we are of the view that the same are just allegations against the 1st Respondent and does not prove the conflicts of interest alleged.

109. The Memorandum reads, in part, as follows:

“there is substantial evidence that Agnes Flora Oluoch has been involved in fraud and embezzlement of Kenya National Paralympic Committee finance whereby she has been using her position to influence the National Executive Committee to make illegal payments from Kenya National Paralympic Committee bank account to her.

She has been fraudulently claiming 20% commission from every sponsorship grants meant to promote Para-sports activities in Kenya....”

110. From the reading of this, it is evident that other substantive evidence needed to be adduced by the Petitioners to prove that the 1st Respondent demanded to be paid 20% commission for every sponsorship grant to the 2nd Respondent. Viewed in isolation, the Memorandum dated 26th March 2019 does not suffice to prove that the 1st Respondent made such demands.

111. The upshot of this is that allegation that 1st Respondent has allowed her personal interest to conflict with her duty of selflessness towards the 2nd Respondent contrary to Article 73(2)(c)(ii) of the Constitution of Kenya must also fail.

112. Since we have held that the 1st Respondent disobeyed the directions of the Mediation Committee, does this justify her removal" We are of the view that it does not.

113. Viewed in isolation, without the conclusive evidence that she allowed her personal interest conflict with her duty of selflessness towards the 2nd Respondent or without the conclusive evidence that she disobeyed the directions of IPC or without the conclusive evidence that she was behind the demonstration on Thika Superhighways, it is quite difficult for this Tribunal to make a determination to remove her from her position of Chairperson.

114. Important to note is that the Mediation Committee is not a supervisory body of the affairs of the 2nd Respondent. The Mediation Committee was tasked with guiding the KNPC and its affiliates build consensus and hold elections to user in bona fide

officials.

115. Although it is rude and disrespectful for the 1st Respondent not to abide by directions of the Mediation Committee, failure to follow such directions of the Committee does not in itself grant us the power to remove the 1st Respondent from her position of the Chairperson.

Whether the Executive Committee of the 2nd Respondent should be removed

116. The Petitioners have contended that the members of the Executive Committee of the 2nd Respondent have failed to meet for the last 4 months despite 10 duly issued notices to them by the 1st Petitioner. To support their argument, the Petitioners produced a letter from KNPC, signed by the 1st Petitioner, to this Tribunal dated 7th February 2019 which reads in part:

"...Please note that for the last 4 months I have issued over 10 notices for board meetings but none has materialized because of lack of quorum..."

117. In response, Ms. Cherono for the respondents argued in her submission that the Petitioners have not produced the alleged notices because no such notice were issued by the 1st Petitioner.

118. The respondents contended that 2nd Respondent's Executive Committee has been holding its meetings in full compliance with the provisions of KNPC Constitution. Equally, the respondents have not produced any minutes of such alleged meeting before this Tribunal.

119. Now, we are faced with a situation of two equally unconvincing arguments from the adverse parties herein. The Petitioners have argued the meetings have not taken place even after the 1st Petitioner issued 10 notices in 4 months. No such notices have been produced before this Tribunal. We are of the view that the letter that was sent to this Tribunal does not conclusively prove that the notices have been issued without the notices being annexed thereto. The respondents argued that the meetings have been taking place and they have not adduced any evidence to prove that such meetings took place. Who should we believe"

120. This Tribunal seeks recourse in the **section 107, 108 and 109 of the Evidence Act**. The sections provide as follows:

"107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent 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 then burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

121. In this case, the Respondent alleges the existence of the fact that meetings took place and as such, the burden to proof rested with them to prove the same.

122. Lord Denning J. in **Miller vs Minister of Pensions (1947) 2 ALL ER 372**, in discussing the burden of proof had this to say-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the

evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."(Emphasis ours)

123. We have held hereinabove that the burden to prove that the 2nd Respondent's Executive Committee has held meetings rested on the Respondents. We have also held that there are two equally unconvincing argument from the adverse parties on this issue. Therefore, we hold that the Respondents' have not discharged their burden and therefore, their argument that the meeting took place must fail. We accept the Petitioners' argument that the meetings have not taken place.

124. Now, does the fact that Executive Committee has failed to hold meetings warrant their removal" The Petitioners have not referred us to any particular law, including the KNPC Constitution, that can grant us the power to remove the Executive Committee on the ground of failure to hold meetings. They, however, referred us to section 4.3.1.8 of the Constitution of KNPC that provides as follows:

"All members of the Executive Committee are expected to attend meetings, except in the event of circumstance beyond their control, which should be duly justified. Any member who does not attend three consecutive meetings without reasonable excuse as determined by the Executive Committee shall be deemed to have resigned his position, as a result received no further notice to attend."

125. This section does not provide that an Executive Committee should be removed in the event that they fail to hold a meeting as argued by the Petitioners. It only provides that in the event that a meeting is held, and a member of the Executive Committee fails to attend three consecutive meeting, he/she is deemed to have resigned their position. We have held that no meeting was conducted and as such an Executive Committee member cannot be removed on the basis that they have not attended a meeting that has not taken place.

126. As such, in the absence of the provision to remove the Executive Committee under the KNPC we are unable to make the decision to remove the Executive Committee.

127. The Petitioners have also contended that the Second Schedule to the Sports Act and section 4.3.1.10 of the KNPC Constitution limits the term of office of members of the executive committee to 4 years and since it is now 2019 and the last election was held on 24th October 2014, their term has lapsed by operation of law and it thus proper that the said members of the executive committee be removed.

128. In response, 1st Respondent's argued that according to Article 4.3.1.2 of the Official KNPC Constitution, the term of office for the Executive Committee shall be four years. However, the 1st Respondent further argued that the Executive Committee shall remain in office provisionally until a new Executive Committee is elected.

129. The 1st Respondent also further contended that although the term of office of the current Executive Committee has lapsed in 2018, no elections have been held since the last election in 2014. Therefore, as per the provisions of Article 4.3.1.2 of the Official KNPC Constitution, 2014 the 2nd Respondent's Executive Committee is duly constituted.

130. Section 4.3.1.2 of the KNPC Constitutions provides as follows

"The term of office shall be four (4) years. The Executive Committee shall, however, remain in office provisionally until a new Committee is elected"

131. From the arguments of the adverse parties herein, it is not in dispute that the term of office of the Executive Committee is 4 years. What is in dispute is whether they should remain in office until another election is conducted.

132. It is clear from the reading of section 4.3.1.2 of the KNPC Constitution that the Executive Committee that is currently in place

shall remain in office provisionally until a new Committee is elected. We hold that this is the correct position.

133. The Petitioners have invited us to make an order that an interim be constituted to take over and manage the affairs of the 2nd Respondent or in the alternative, the Mediation Committee previously constituted by this Tribunal serve as caretaker committee of the 2nd Respondent until next election is conducted. We cannot accept this line of argument from the Petitioners.

134. The Constitution is quite clear that the Executive Committee should remain in office provisionally until a new Committee is elected. There is no provision to introduce an interim Committee or a Mediation Committee taking over the affairs of the 2nd Respondent and we cannot create such a provision. It would be beyond the powers of this Court to re-write the KNPC Constitution.

135. The upshot of this is that the Executive Committee of the 2nd Respondent should remain in office until a new Executive Committee is elected.

Whether the 1st Respondent should supply the 1st Petitioner with the password to the KNPC

136. The Petitioners have also alleged that the 1st Respondent has changed the password of the 2nd Respondent's email address: paralympickenya@gmail.com in a bid to lock out the 1st Petitioner and prevent him from discharging his mandate to take charge of correspondence on behalf of the 2nd Respondent.

137. In response, the 1st Respondent contended that the 1st Petitioner was suspended from the position of Secretary General of the 2nd Respondent on 2nd April 2019. Thus, the 1st Petitioner had no capacity to have the password of the 2nd Respondent's e-mail.

138. From the foregoing arguments, it is not in dispute that the 1st Respondent changed the password of the 2nd Respondent's email address: paralympickenya@gmail.com or at least the 1st Respondent has not denied these allegations. We have also held hereinabove that the 1st Respondent has the capacity to act as the Secretary General of the 2nd Respondent as his suspension was not finalised.

139. According to section 4.3.3.3 of the KNPC Constitution, the Secretary General has the power to take charge of the correspondence of the Executive Committee and the General Assembly.

140. We are of the view that the 1st Respondent's act of changing the password of the KNPC was a bid to lock out the 1st Petitioner and prevent him from discharging his mandate under the KNPC Constitution.

Orders

141. In view of the foregoing, we allow the Amended Petition in part as follows:

a. The 1st Respondent do hereby supply the 1st Petitioner with the password to the 2nd Respondent's email address: paralympickenya@gmail.com within seven (7) days from the date hereof to enable the 1st Petitioner to take over the correspondence of the 2nd Respondent;

b. The parties shall bear their own costs.

DATED and **DELIVERED** at **NAIROBI** this 3rd day of *September*, 2019.

John M. Ohaga, Chairperson

Gilbert M T Ottieno, Member Peter Ochieng, Member



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