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Case Class:	Civil
Court:	Sports Disputes Tribunal
Case Action:	Decision
Judge:	John M. Ohaga FCIArb Chairman, Sports Disputes Tribunal
Citation:	Richard Omwela, Chairman & 2 others (suing on behalf of the Kenya Rugby Union) v Sports Registrar [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Tribunal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
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 NO. 23 OF 2017**

**RICHARD OMWELA, CHAIRMAN.....1<sup>ST</sup> PETITIONER**

**GEOGREY GANGLA, SECRETARY.....2<sup>ND</sup> PETITIONER**

**JOSHUA ARONI, TREASURER.....3<sup>RD</sup> PETITIONER**

**{suing on behalf of the KENYA RUGBY UNION}**

**-versus-**

**THE SPORTS REGISTRAR.....RESPONDENT**

**DECISION**

**Hearing:** 22<sup>nd</sup> November, 2017

**Panel:** John M Ohaga – Chairperson

Mary Kimani – Member

Njeri Onyango – Member

**Appearances:** Ms. Irene Kiwool instructed by the firm of Muchemi & Co Advocates for the Petitioner

Ms. Zipporah Komu-Gicheru, State Counsel instructed by the Office of the Attorney General for the Respondent

**The Parties**

1. The Petitioner is the Kenya Rugby Union (hereinafter ‘**the Union**’) and bring this action through persons stated to be its elected officials. The Union’s objective is to promote, foster, encourage control and develop the game of Rugby throughout the Republic of Kenya.

2. The Respondent is the Sports Registrar (‘**the Registrar**’) an Office established under Section 45 of the Sports Act, 2013 and is responsible for the registration of Sports Organizations and multi Sports bodies representing sports organizations at the National level in accordance with the Sports Act.

**The Appellant’s case**

3. The Union states that on the 22<sup>nd</sup> March, 2017, it successfully held its Annual General Meeting. Prior to this, the Union states that it had issued a Notice to all its affiliates and members as required under its Constitution.

4. The Union states that in accordance with the requirements of the Sports Act[1] (**'the Act'**) and the Sports Registrar's Regulations[2] (hereinafter **'the Regulations'**) it had notified the Registrar of its intention to hold its elective Annual General Meeting (**'AGM'**) and thereat to conduct elections to fill positions that would fall vacant in the Board. The letter is dated 16<sup>th</sup> March, 2017. In the said letter the Union requested that the Registrar do assign an officer from the office to "*preside and act*" as the Returning Officer during the elections of the officials of the Union.

5. The Union states that with the aforesaid letter, it forwarded to the Registrar copies of its Constitution, Notice and Agenda of the AGM, Minutes of the previous year's AGM, Annual Accounts, list of current office bearers and list of nominees.

6. It is further stated that the AGM held at the RFUEA Grounds from 3.00 p.m. on 22<sup>nd</sup> March, 2017 was attended by the Union's delegates, a representative of the Registrar, one Mr. Richard Ombeba and representatives from the Kenya National Sports Council (hereinafter **'KNSC'**) who presided over the elections.

7. The AGM proceeded as planned and the elections conducted in accordance with the Agenda. The Union thereafter by its letter of 23<sup>rd</sup> March, 2017, forwarded to the Registrar a list of the elected officials and requested the Registrar to update the records held by the Registrar regarding the Union.

8. The Union states that it remitted the following to the Registrar to enable registration:

i) A list of the new Board of Directors;

ii) Minutes of the AGM;

iii) An amended Constitution and By-Laws of the Union;

9. The Registrar, however, declined to register the officials as presented. In a letter dated 17<sup>th</sup> July, 2017, the Registrar notified the Union of her refusal to act and register the officials. The reasons stated for such decline was that the Union's elections of 22<sup>nd</sup> March, 2017 were not presided over by an **'independent body'** as required under paragraph (d) of the Second Schedule to the Act[3].

10. The documents filed show that the Registrar also responded to the Union's application for Registration made vide a letter dated 12<sup>th</sup> February, 2015 in a letter of 17<sup>th</sup> August, 2017, which letter contained recommendations for amendments to the Union's Constitution to align it with the Kenya Constitution, 2010 and the Act.

11. The Union stated that it undertook and acted on those recommendations and by a letter of 24<sup>th</sup> August, 2017 and remitted to the Registrar the required documents still seeking the Registration of the Union as required under Section 47 (3) of the Act.

12. The Union asserts that it conducted the elections in accordance with the requirements of both the Sports Act and the Rules and is unable to understand why the Registrar has refused to accept the returns from the election.

### **The Response**

13. The Registrar has filed an elaborate Replying Affidavit sworn by the Sports Registrar Rose Wasike.

14. It is conceded in the Reply that the Union successfully transited as required under Section 50 of the Act, and it is therefore a legally recognized Sports Organization but it awaits the formal issuance of a Certificate of Registration.

15. It is also conceded that a Notice of the electoral AGM of the Union of 22<sup>nd</sup> March 2017 was given.

16. The Registrar states that the Act requires all Sports Organizations to adhere to the general principles set out at Article 81 of the Kenyan Constitution 2010, but that the Union failed on one fundamental requirement, that is, to have the elections "*conducted by an*

*independent body*”.

17. The Registrar also states that the requirements of Article 81 aforementioned are substantially incorporated in the Regulations and that the principles to be observed as set out at paragraph 9 of her response require that a Sports organization seeking to hold an election shall[4]:

- a) **Appoint an independent panel consisting of at least five members to conduct the elections;**
- b) **Include observers from at least one umbrella Sports organization, the Ministry responsible for matters related to sports and Registrar’s Office;**
- c) **Observe the principle of non-discrimination as provided in the constitution;**
- d) **Inform the Registrar at least four weeks prior to the expected date of elections;**
- e) **Conduct the election in an open, free and fair environment;**
- f) **Ensure that the nominated candidates obtain clearance from the Directorate of Criminal Investigation, the Kenya Revenue Authority, the Ethics and Anti-Corruption Commission, the Credit Reference Bureau and the Higher Education Loans Board; and**
- g) **Ensure that the Office of the Chairman or President, secretary and treasurer are reserved for Kenyan citizens only”**

18. The Registrar states that the Union breached the Regulations and specifically Regulation 20(2(a) when it appointed the KNSC to preside over its elections, the assertion being that the KNSC like the Union is a Sports organization, registered by the Sports Registrar.

19. The Registrar also says that when submitting its application for registration of the officials, the Union failed to attach Clearance Certificates of the officials from the various organizations like the KRA.

### **The Hearing**

20. The parties elected to proceed for hearing by way of oral submissions.

21. Counsel for the Union in her submissions gave a narrative of the sequence of events as set out above and emphasized that the Registrar was notified of the elections by a letter of 16<sup>th</sup> March, 2017, the elections were held on 22<sup>nd</sup> March, 2017 and that there were no complaints by any delegates. The Registrar was represented by an officer from her office, one Mr. Richard Ombeba who observed the elections. The Registrar was subsequently notified of the outcome and requested to register the officials.

22. Counsel for the Union also questioned the fact that the Registrar has selectively elected not to present a report by her officer who represented her at the AGM which would have been relevant for the Tribunal’s consideration. She posed the question as to the relevance or purpose of sending an observer to such meetings if no report, adverse or positive, from them is produced.

23. Counsel for the Union found mischief in the fact that the Registrar’s letter rejecting registration of the Union’s officials came on 17<sup>th</sup> July 2017, four (4) months after the request for registration which had been made on 23<sup>rd</sup> March 2017, and noted that this failure to register is detrimental to the proper management of the Union’s affairs.

24. Counsel for the Union further argued that the KNSC is a neutral party. She referred to the decision of this Tribunal in **Shadrack Maluki & Others –vs- Registrar of Sports & Others**[5] decided on 28<sup>th</sup> April 2017 wherein she argues that the Tribunal held that KNSC is a neutral party as regards its presiding over the elections of the Kenya Judo Association.

25. Counsel for the Union further stated that the Union vide its letter of 24<sup>th</sup> August 2017 which is at annexure RB7 did remit to the Registrar the relevant Clearance Certificates of its elected officials. She therefore asked the Tribunal to issue orders directed at the Registrar to register the officials of the Union to facilitate their full participation in the management of the Union.

26. State Counsel appearing for the Registrar opposed the application. She relied on the Registrar's Replying Affidavit, and particularly on the reasons set out in the Registrar's letter of 17<sup>th</sup> July, 2017. She stated that the elections of the Union held on 22<sup>nd</sup> March 2017 were not valid for failure to comply with statute law, the Kenya Constitution 2010 and the Regulations.

27. Regarding the presence of the Registrar's representative during the AGM, she stated that such presence does not and cannot validate an otherwise invalid action, and only compliance with rules would validate the elections.

28. While admitting that 'independent body' is not defined in the Regulations, she maintained that independence was necessary to avoid bias, real or perceived, or any interference. That whereas there was no complaint from the Union's delegates and members, that does not remove the requirement for independence of the body presiding over the elections.

29. Ms. Gicheru maintained that the KNSC was not independent for the reason that it is a sports body just like the Union. She distinguished the decision in **Shadrack Maluki & Others** relied upon by the Union on the grounds that in that case, the Tribunal was addressing issues of wrangles and irregularities in the management of the Judo Federation but not a defect of the body conducting the elections; thus that the decision was not relevant to the present case.

30. In a brief response, Counsel for the Union expressed the view that the cardinal rule is that an independent election is the expression of the will of the electorate and the role of the electoral body is to ensure that the internal rules are respected. That the Registrar's representative knew in advance who was to conduct the election and neither the Registrar nor the said representative objected at the time to KNSC's participation in the elections.

31. Regarding the KNSC, Counsel for the Union observed that in **Shadrack Maluki & Others** referred to, and others that have been before the Tribunal, the Registrar did not object to the participation of KNSC in the elections of the federations. She said that the KNSC's mandate included to "*encourage Sports growth...*" This she said makes the KNSC even more interested in seeing how elections of its affiliates (including the Union) are conducted. That the only requirement in the Regulations is for an independent body, but there is no guide as to who can or cannot preside over elections, thus it is left to the Sports organizations to make the judgment.

### **Discussion**

32. The competing positions taken by the Union and the Registrar in this matter in our view revolve solely around on the propriety or otherwise of the conduct of the Union's elections by the KNSC.

33. However, first principles require that we start with the foundation for the holding of elections by sports bodies.

34. As already stated, the Second Schedule to the Act require that *elections shall be held in accordance with the general principles for the electoral system as stipulated in Article 81 of the Constitution;*

35. Article 81(e) of the Constitution of Kenya sets out the general principles for the electoral system to the effect *inter alia* that free and fair elections are to be:

**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.**

36. The question then is what constitutes an “*independent body*” and whether KNSC fits that bill. The importance of the independence of the body conducting the election cannot be overemphasized.

37. The KNSC was formed in 1966 with a mandate to advise the government on matters relating to sports and to encourage sports and recreation at all levels, to formulate policy plans, to coordinate sports and foster collaborations between sports bodies as well as co-operations with similar interest bodies, to assist with personnel, facilities, equipment and publicity.

38. It is noted that the KNSC is constituted by various Sports Federations but the KNSC is not an affiliate of any of them.

39. The term “Independent” has been defined to mean:

**Not influenced or controlled by others in matters of opinion, conduct etc.; thinking or acting for oneself; Not subject to another’s authority or jurisdiction, autonomous, free; Not dependent, not depending or contingent upon something else for existence, operation etc.**

40. It would then be relevant to ask whether based on this dictionary definition of the word ‘*independent*’, and noting the mandate of the KNSC and its relationship with the Union, the KNSC can be considered to be an independent body or returning officer in the elections of the Union or any other affiliate Sports Organization.

41. The essence of the requirement for supervision of elections is to safeguard against the potential for federations being ‘hijacked’ by cliques and to ensure or allow federation’s affiliates and members who constitute its electoral congress to exercise their will freely and fairly.

42. The various provisions both in the Schedule to the Act and the Regulations with respect to elections are well intended to safeguard and infuse good governance in Sports Federations. It is, however, noteworthy that whereas it is required that the elections be overseen by an “*independent body*”, this term has not been defined and neither has the Registrar sought to identify or designate such a body in order to guide federations and sports organizations as to who can or cannot oversee their elections.

43. Ms. Gicheru for the Registrar stated that the KNSC is not an independent body because it is a Sports organization registered by the Registrar same as the Union; no attack was directed at its mandate and how this affects its independence or neutrality or that of its council members who would ordinarily attended the electoral AGM of the Union or other Sports Body.

44. The Registrar’s Rules and Regulations require that “*an organization seeking to hold an election shall appoint an independent panel consisting of at least five members to conduct elections*”.

45. It is our understanding from the foregoing that in fact the election supervisor need not be a body or organization such as the KNSC, but can be composed of selected individuals independent of the Union or any other sports organization which is holding the elections. Based on this understanding, it would be necessary in the present instance, to show that the persons from the KNSC who conducted the election of the Union on 22<sup>nd</sup> March, 2017 failed to meet the criteria of “*independence*” as defined above.

46. The Registrar’s refusal to accept the election is based solely on the perceived lack of independence of the KNSC. While we accept that independence can be both real and perceived, it is necessary that some basis be established to create such real or perceived lack of independence. Merely stating that the KNSC is a sporting organization and therefore not independent fails to take into account the specific mandate of the KNSC as above shown or to also consider the fact that independent individuals can be appointed to constitute an electoral panel.

47. Nothing has been put before the Tribunal to point to the possibility that apart from being members of the KNSC, the individuals who attended and presided over the Union’s elections of 22<sup>nd</sup> March, 2017 failed the independence test or failed to meet the specific

requirements of the Regulations. None of those individuals have been identified and shown or alleged to have had any interest in the outcome of the Union's elections or other adverse interests as would interfere with their free thinking or create any biases real or perceived.

48. The primary consideration in an election is whether the will of the electorate has been affected by any irregularity. This principle was distilled in the famous case of **Morgan and Others v Simpson and another**<sup>[6]</sup> where Lord Denning stated as follows:

*“(1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not.... (2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election.*

49. It is interesting that no delegate or losing candidate in the Union's elections has placed before the Registrar or the Tribunal a complaint or petition of any nature arising from the conduct of the elections. And whilst we accept that this is not a necessary ingredient of the Registrar's decision-making process, we would have thought that the Registrar would have taken this into account.

50. From the foregoing, the Tribunal is not inclined to agree with the Registrar's position in regard to the participation of the KNSC and/or those individuals from the KNSC who acted as returning officers in the election of 22<sup>nd</sup> March, 2017 and the Tribunal therefore finds and holds that the elections of the Union held on the 22<sup>nd</sup> March, 2017, were proper and were conducted within the law and the persons elected as office bearers on that day were properly elected.

51. Other matters relating to the registration of the Union in compliance with the Sports Act shall be pursued by the Union with the Registrar upon compliance with the requirements set out in the letter of 17<sup>th</sup> August, 2017 (Annexure RB4). The Union shall also supply to the Registrar such documents of its elected officials as shall be necessary to facilitate their registration as officials.

### **Conclusion.**

52. The Tribunal therefore comes to the conclusion that the elections of the Kenya Rugby Union held on 22<sup>nd</sup> March, 2017 presided over by the representatives of the KNSC were proper and lawful and the Respondent is hereby directed to register the list of elected officials of Kenya Rugby Union as indicated in the Union's letter of 23<sup>rd</sup> March, 2017, subject to the requirements set out under Part VI of the Act.

53. If it is the Registrar's intention that no sports organization should be involved in the conduct of elections for another sports organization, then this must be stated explicitly in the Regulations.

54. This matter shall be mentioned on **31<sup>st</sup> January, 2018** to confirm compliance with this order and for such further directions as may be necessary.

55. Each party shall bear its costs of this Appeal.

**Dated at Nairobi this 11<sup>th</sup> day of December, 2017**

**Signed:**

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**John M. Ohaga FCI Arb**

**Chairman, Sports Disputes Tribunal**

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**Mary Kimani**

**Member**

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**Njeri Onyango**

**Member**

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[1] No. 25 of 2013

[2] Promulgated vide Legal Notice No. 158 of 2016

[3] This provides that elections shall be held in accordance with the general principles for the electoral system as stipulated in Article 81 of the Constitution;

[4] See Rule 20(2) of the Sports Registrar Regulations, 2016

[5] Appeal No. 38 of 2016

[6] [1974] 3 All ER. 722



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