



Case Number:	Petition 28 of 2016
Date Delivered:	05 Jul 2016
Case Class:	Civil
Court:	Sports Disputes Tribunal
Case Action:	Decision
Judge:	John M Ohaga FCIArb Chairman, Sports Disputes Tribunal
Citation:	Robert Williamson v Football Kenya Federation [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Tribunal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Preliminary objection dated 24th May, 2016 succeeded
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**

**PETITION NO. 28 OF 2016**

**ROBERT WILLIAMSON.....PETITIONER**

**-versus-**

**FOOTBALL KENYA FEDERATION.....RESPONDENT**

**DECISION ON OBJECTION TO JURISDICTION**

**Hearing:** 21<sup>st</sup> June, 2016

**Panel:** John M Ohaga Chairperson

Mary Kimani Member

Peter Ochieng' Member

**Appearances:** Gradus Oluoch instructed by Gradus Oluoch & Co. Advocates for the Petitioner

Patricia May Mitei instructed by Sila Munyao & Co. Advocates for the Respondent

**The Parties**

1. The Petitioner is a Scottish citizen and a resident of Kileleshwa, Nairobi and is represented in these proceedings by the firm of Gradus Oluoch & Company Advocates of P.O Box 12908-004000.
2. The Respondent ('**FKF**') is the national sports organization responsible for the administration of football in Kenya. It is represented by the firm of Sila Munyao & Company Advocates of P.O. Box 1835 Kericho.

**Background**

3. The proceedings were commenced by way of a Statement of Claim which was filed on 29<sup>th</sup> April, 2016. The Petitioner on even date, swore a Supporting Affidavit. The cause of action identified was unlawful termination of service.
4. The matter was mentioned for directions on 10<sup>th</sup> May, 2016. On the same date the Respondent entered appearance through the firm of Sila Munyao & Co. Advocates. The Respondent was directed to file a Response within 14 days thereof but failed to do so. The hearing of the matter was scheduled for 31<sup>st</sup> May, 2016.
5. When parties appeared before the Tribunal on 31<sup>st</sup> May, 2016, it came to our attention that the Respondent had just filed a Notice of Preliminary Objection. Mr Oboso who was acting for the Respondent on that day, requested for leave to file and serve the Replying Affidavit sworn by Robert Muthomi. The Tribunal granted the leave sought and granted Mr Oluoch seven (7) days to file a reply to the Preliminary Objection. The matter was scheduled for directions on 7<sup>th</sup> June, 2016.

6. On 7<sup>th</sup> June, 2016 Mr. Oluoch filed and served on Ms Mitei an Amended Petition and as such upon request by Ms Mitei an adjournment was granted to her so that she could familiarize herself with the said document.

7. The hearing of the Preliminary Objection was conducted on 21<sup>st</sup> June, 2016.

### **The Dispute**

8. The Petitioner was contracted by FKF on 25<sup>th</sup> August, 2014 to be the head coach of the national football team popularly known as 'Harambee Stars'. The period of the agreement is disputed; the Petitioner has produced an Agreement that shows that he was contracted for a 5-year period while FKF has produced an Agreement that shows that he was contracted for a period of two years.

9. The Petitioner claims that sometime in February 2016 he learnt from the Media that his services as the Head Coach had been terminated and a new Head Coach appointed.

10. The Petitioner further claims that he had salary arrears and terminal dues are still owing and he has attempted to informally negotiate with the officials of FKF to no avail. To this effect, a demand letter and subsequent communication has been annexed to his Supporting Affidavit.

11. He has asked the Tribunal to make the following orders:

- a. A declaration that his termination was wrongful;
- b. Salary arrears for 12 months amounting to Kshs. 30,000,000;
- c. House rent arrears for 6 months amounting to Kshs. 900,000;
- d. Terminal dues amounting to Kshs. 10,000,000;
- e. Compensation for 3.5 years amounting to Kshs. 105,000,000;
- f. Costs and interest in all of the above save (a);
- g. Any other relief the Tribunal deems fit to grant.

12. The Respondent filed a Replying Affidavit sworn by Robert Muthomi, its General Secretary/CEO on 24<sup>th</sup> May, 2016. Mr Muthomi stated that the Petition is premature since the cause of action has not arisen as the Petitioner is still in the employ of the Respondent and that his contract has not been terminated as claimed though it was the Petitioner who had absconded duty as the Head Coach.

### **The Preliminary Objection**

13. The Respondent has invited us to strike out the Petition in the grounds that:

- a. *The Respondent, a society, has no capacity to be sued in its own name;*
- b. *The Tribunal does not have jurisdiction to hear and determine the Petition; and*
- c. *The entire Petition is incompetent and ought to be struck out with costs.*

14. The first ground is now spent as the Petitioner filed an Amended Petition on 7<sup>th</sup> June, 2016.

15. In support of its Preliminary Objection, the Respondent filed Submissions and List of Authorities.

16. Reliance was placed upon *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd*[1] on the essence of a preliminary objection and *Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd*[2] on the issue of jurisdiction.

17. Article 11 of the said FKF National Team Head Coach Agreement provides that:

#### ***Resolution of Disputes***

*Football Kenya Federation and The Head Coach shall make effort to resolve amicably by direct informal negotiating any disagreement or dispute arising between them under or in connection with this agreement.*

*If, after thirty (30) days from the commencement of such informal negotiation Football Kenya Federation and The Head coach have been unable to resolve amicably a contract dispute, either party may require that the dispute be referred for resolution and arbitration at the Centre for Arbitration and Dispute Resolution in accordance with the Arbitration Act of the laws of Kenya and if no settlement is reached to FIFA.* (emphasis ours) [j1]

18. The Respondent submitted that from the wording of Article 11, there was no intention by the parties therein that any dispute was to be subjected to the jurisdiction of this Tribunal.

19. Ms Mitei added that the wording of Section 58(b) was very clear and the words therein must be given their plain meaning, that is, that both parties must submit to the jurisdiction of the Tribunal before the Tribunal can consider proceeding to hear and determine the matter on its merits. Reference was made to our decision in *Dennis Kadito vs Sofa Paka FC*[3] wherein we stated as follows:

*'...in respect of sports related disputes such as this one, the provisions of section 58(b) can be satisfied only where there is prior agreement to submit to the jurisdiction of this tribunal for example as a term of the contract or subsequent to the dispute, the parties enter into a consent to submit themselves to the jurisdiction of the Tribunal. In the absence of either of these circumstances, the Tribunal cannot act without the protection of the law.'*

20. Further reliance was placed in the *Dennis Kadito* case wherein we referred to the finding of the Court in *Ex Parte Mayfair Bakeries Ltd vs Rent Restriction Tribunal and Kirit R (Kirti) Raval*[4] and the Respondent submitted as follows:

*It is our submission therefore that lawful intentions of parties must be given due consideration in construction of the subject agreement. Despite the parties herein having agreed that the subject agreement be governed by and interpreted in accordance with the Laws of Kenya, Football Kenya Federation and applicable FIFA as is evidenced by Article 12 of the Football Kenya Federation National Team Head Coach Agreement, the parties did not wish to submit to a jurisdiction other than that which is established as per the subject agreement.'*

#### **The Response**

21. The Petitioner submitted that the jurisdiction of this Tribunal in the dispute herein is by virtue of Section 58(b). It was submitted that it was a common agreement that if a dispute was to arise under the Agreement, parties would subject it to arbitration and that in the absence of an arbitration center in Kenya recognized by law, the fall back is the Tribunal as it is the only body in Kenya charged with the responsibility of handling sports disputes.

22. Reliance was placed on our decision in *Peter Omwando vs FKF*[5] wherein we stated as follows:

*However, while the Tribunal acknowledges that it must respect the rules of procedure set out in the instruments promulgated by*

*FKF, it also has to balance those rules vis-à-vis the rights of persons aggrieved by the decisions of any organs of FKF. In seeking protection of constitutional freedoms and rights, the Tribunal must ensure that the rules are in consonance with the rights guaranteed under the Constitution. Where this is lacking, the Tribunal has to step in and seek protection of those rights, more so because it is that avenue where legal redress can be sought. Indeed, this is the spirit behind section 59(b) of the Sports Act.*

23. While placing further reliance on *Peter Omwando vs FKF*, Mr. Oluoch invited us to interpret Article 11 of the Agreement as against FKF following the *contra preferentum* rule.

### **Jurisdiction**

24. Jurisdiction is without doubt the bedrock of any decision making body. In *Kakuta Maimai Hamisi -vs- Peris Pesi Tubiko & 2 others*<sup>[6]</sup> 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. Courts, like nature, must not sit in vain.”*

25. In *The Matter of the Interim Independent Electoral Commission*<sup>[7]</sup> the Supreme Court discussed the issue of jurisdiction in the following terms:

*“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.”*

26. And in *Samuel Kamau Macharia -vs- Kenya Commercial Bank and 2 Other* <sup>[8]</sup> the Supreme Court stated that:

*“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”*

27. The Act provides for the jurisdiction of the Tribunal at Section 58 as follows:

#### **The Tribunal shall determine—**

**a. Appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including-**

**i. appeals against disciplinary decisions;**

**ii. appeals against not being selected for a Kenyan team or squad;**

**b. Other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear; and**

**c. Appeals from decisions of the Registrar under this Act.**

28. Both parties are agreed that this matter sounds under Section 58(b) of the Act.

29. In *Dennis Kadito -vs- Sofapaka FC* [9], this Tribunal stated as follows with respect to Section 58(b) of the Act:

*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.*

*In this case, the Tribunal acknowledges that the dispute is sports related; the next question is therefore whether the parties have agreed to refer the matter to the Tribunal. Only if the answer to this is in the affirmative will the Tribunal consider the question whether it agrees to hear the dispute.*

30. The crucial question for our determination is whether Article 11 of the Agreement confers jurisdiction on this Tribunal to adjudicate over the dispute herein.

31. The Tribunal has been invited to look at two of its prior decisions namely *Peter Omwando vs FKF* and *Dennis Kadito vs Sofa Paka FC*. Whereas the *Dennis Kadito* decision is gaining popularity as the point of reference in respect of jurisdiction in respect of Section 58(b), the *Peter Omwando* decision has been cited because this Tribunal assumed jurisdiction because of the absence or inadequacy of a dispute resolution mechanism within FKF that could be regarded as one that would ensure a *right to a fair hearing, the right to contentious proceedings and the principle of equal treatment*. These are the minimum standards for dispute resolution mechanisms in terms of the FIFA Circular No. 1010 dated 20<sup>th</sup> December, 2005.

32. Mr. Oluoch has asked us to find that we have jurisdiction because there was an intent between the contracting parties that disputes be referred to arbitration and that due to the non-existence of the 'Centre for Arbitration & Dispute Resolution', the only body that has the power of the law to arbitrate over sports disputes is this Tribunal.

33. We refer to the case of ***Attorney General of Belize Telecom Limited [2009] 2 All ER 1127*** where the Privy Council was confronted with a similar scenario which required interpretation of certain clauses in the Memorandum and Articles of Association of the Respondent and Lord Hoffman expressed his position as follows:

*'The Court has no power to improve the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, the meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed...It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament or the intention of whatever person or body was or is deemed to have been the author of the instrument.'*

34. So what was the intention of the parties to the Agreement in respect of Article 11" We are guided by **Halsbury's Laws of England, 4<sup>th</sup> Edition Reissue** at paragraph 772 where interpretation of express contractual terms was discussed as follows:

*The object of all interpretation of a written contract is to discover the real intention of the parties. Where a general principle for the construction of a contract has once been laid down, and that construction comes to be accepted and people afterwards make contracts on that understanding, the court will usually adhere to that recognized construction and make the most accurate application of it in the circumstances of the particular case...However, if it is clear from the background that the parties have used the wrong words or syntax, or that something must have gone wrong with the language used, the court is not obliged to attribute to the parties an intention which they plainly could not have had. [Emphasis ours]*

35. We find that it was the intention of the parties herein to subject any dispute that arose in the Agreement to arbitration. Unfortunately, a reading of the Agreement shows that there is a possibility that an error was committed and the body charged with handling the arbitration was a non-existent body in Kenya. *Then does this mean that the Tribunal can assume jurisdiction"*

36. The Tribunal finds that the answer to the question posed above is in the negative. This is because section 58(b) stipulates that an agreement to subject a dispute to the Tribunal must have been entered into by the parties to the dispute prior to this Tribunal

exercising jurisdiction. It is clear that there is no such agreement and that is why Mr Oluoch invited us to find that we have jurisdiction because we are the body mandated by law in Kenya to arbitrate over sports and sports related disputes. Nonetheless, we hold that jurisdiction is so essential an element to a dispute resolution body, that it cannot be left to the craft of interpretation. It has to be a straight forward issue that is discerned from a reading of the Sports Act and where applicable the Agreement between the disputing parties as well. Unfortunately, with much anxiety we find that we are not properly clothed with the jurisdiction so required under the Sports Act in respect of this dispute.

37. Further, having been invited by the Petitioner to look at our earlier decision in *Peter Omwando vs FKF*, we find that the distinguishing factor is that Article 11 of the Agreement creates a mechanism for dispute resolution and the mechanism therein can still be relied upon because reference was made to the Arbitration Act, 1995. Thus, the Petitioner was not left without a recourse in law to agitate for the protection of his fundamental rights and freedoms.

38. The upshot of the foregoing is that the Preliminary Objection dated 24<sup>th</sup> May, 2016 succeeds save to add that each party shall bear its own costs.

39. The Tribunal commends Counsels for their very helpful submissions and the cordial manner in which they conducted themselves.

**DATED AT NAIROBI THIS 5TH DAY OF JULY 2016**

**Signed:** \_\_\_\_\_

**John M Ohaga FCI Arb**

**Chairman, Sports Disputes Tribunal**

**Delivered in the presence of:**

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[\[1\]](#) Nairobi Civil Appeal No. 9 of 1969

[\[2\]](#) (1989) 1 KLR

[\[3\]](#) Sports Disputes Tribunal Appeal No. 23 of 2016

[\[4\]](#) Nairobi HCMCC No. 246 of 1981

[5] Sports Disputes Tribunal Petition No. 25 of 2016

[6] [2013] eKLR

[7] Constitutional Application 2 of 2011 (Unreported)

[8] Application No. 2 of 2011

[9] Sports Tribunal Appeal No. 23 of 2016

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[j1] There is no party autonomy in this arbitration clause. In other words, the parties have no right on their own initiative to appoint an arbitrator. They are obliged to go to the Centre for Arbitration and Dispute Resolution. Accordingly, section 12(6) of the Arbitration Act is not available to them. For that reason, the arbitration provision in the contract is inoperative.



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