



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 279 OF 2016

DENNIS KADITO.....PETITIONER

VERSUS

OFFICE OF THE SPORTS DISPUTES TRIBUNAL....1ST RESPONDENT

SOFAPAKA FOOTBALL CLUB.....2ND RESPONDENT

JUDGMENT

1. The Petitioner, Dennis Kidito, is a registered Fifa Agent through the Dutch Football Association and an intermediary with authority to negotiate transfers of players with football clubs pursuant to Fifa Regulations. The respondent, the office of the Sports Tribunal, on the other hand is a *quasi-judicial* body established under the Sports Act 2013 with mandate to determine sports disputes, the 2nd respondent, Sofa Paka Football Club, is a company registered under the repealed Companies Act (Cap 4860 Laws of Kenya).

2. According to the Petition dated 1st July 2016 and filed in Court on 4th July 2016, the petitioner filed a claim before the 1st respondent seeking resolution a claim of USD, 17500/- Commission and despite serving the 2nd respondent; the 2nd respondent did not enter appearance or file a defence. The 1st respondent heard the dispute in the absence of the 2nd respondent but made a decision determining that it had no jurisdiction to hear that particular dispute by virtue of section 58(b) of the Sports Act, 2013 on account of the 2nd respondent's failure to enter appearance and file a defence or submitting to the tribunal's jurisdiction

3. The petitioner filed this petition contending that the tribunal was wrong in applying strict interpretation of the section and in particular the word "**agree**" and also that the tribunal acted in bad faith by failing to consider salient features with regard to jurisdiction, as well as failure to discharge its statutory obligations under the Act and Articles 48 and 159 of the Constitution thus violating the petitioner's rights and fundamental freedoms under Articles 10, 20, 23, 25, 27 and 48.

4. He therefore sought the following reliefs-

a. A declaration that section 58(b) violates the right to access justice.

b. Conservatory Orders against implementation of section 58(b) of the Sports Act.

c. A declaration that the petitioner's fundamental rights and freedoms to fear administration action, presumption of innocence, fear hearing and right to earn a living have been infringed by the actions of the 1st respondent as contained in court's decision of 31st May 2016.

d. A declaration that section 58(b) of the Sports Act, 2013 in particular the tribunal's interpretation of the word "AGREE" is invalid to the extent that it denies violates and infringes the petitioner's fundamental rights to the presumption of innocence and right to fair hearing based on the rules of natural justice.

e. A permanent injunction restraining the 1st and 2nd respondents from acting on the decisions made and delivered on 31st May 2016 with regard to the contractual dispute between the petitioner and 2nd respondent.

f. An order of mandamus directed to the 1st respondent to forthwith proceed with the hearing of the dispute with regard to the contractual dispute between the petitioner and 2nd respondent and allow the petitioner to lawfully continue to argue its case and determination be made on merit.

g. An order of prohibition directing the 1st respondent on the correct interpretation of key words of the sports Act 2013 to abide by provisions of the constitution.

h. Exemplary damages together with costs of the petition in the event the 1st respondent delays or refuse to abide by this Honourable Court decision.

Response

5. The 1st respondent filed Grounds of Opposition to the Petition dated 11th July 2016 and filed in Court on the same day. The 1st respondent took the view that the petition was misconceived and was without proper foundation, that the 1st respondent is a creature of statute, that the 1st respondent's decision of 31st May 2016 was self-explanatory and required no further education and that the petitioner was not left without recourse since he could still file a suit in Court for recovery of the liquidated claim of USD 17500/-. The 1st respondent further stated that the dispute before the tribunal did not involve enforcement of fundamental rights and freedoms and recourse to this Court was misconceived.

6. The 2nd respondent does not seem to have filed a response to the petition. However on 2nd September 2017 Jerry Santo filed an application dated the same day on behalf of Kenya footballers Association. Seeking to be enjoined as interested party to these proceedings. The application was allowed on 14th July 2017 but they do not seem to have filed responses to the petition either.

Submissions

7. During the hearing, Mr. Sichangi, Learned Counsel for the petitioner, submitted that although they filed a dispute before the sports disputes tribunal, the 2nd respondent did not enter appearance or file defence. The tribunal heard the dispute but dismissed it on a technicality. According to Counsel, the tribunal was wrong in relying on the word parties "agree" to hold that it did not have jurisdiction.

8. Counsel contended that section 58(b) of the sports Act is contrary to the provisions of Article 48 of the Constitution on access to justice as well as Article 159(2)(d) on substantial justice without undue regard to technicalities. He also contended that this was not in line with Order 51 rule 14 of the Civil Procedure Rules, in that where a party fails to enter appearance; the suit should be heard and determined.

9. Counsel faulted the tribunal stating that in a related matter ***Robert Williams v FKR Tribunal Case No 28 of 2016***, the tribunal assumed jurisdiction and made a determination and therefore accused the tribunal of applying double standards in this particular matter which is contrary to Article 27(1) of the Constitution.

10. Counsel urged the Court to declare that section 58(b) violates the petitioner's right to fair trial and access to justice. He relied on the case of ***Aids Law project v Attorney General & Others*** [2015]eKLR for this submission.

11. Mr. Kyallo, Learned Counsel for the interested party submitted relying on their replying affidavit in support of the petition. Counsel agreed with Mr. Sichangi, the petitioners counsel's submissions that section 58(b) of the Sports Act is unconstitutional. Counsel contended that Article 165(3) gives this Court jurisdiction to ensure that everything said to have been done is done in accordance with the constitution and the law. Counsel also relied on Article 23(1) of the Constitution asking the Court to uphold the Bill of rights.

12. There was no attendance on the part of the 1st and 2nd respondents and therefore no submissions were made on their behalf.

Determination

13. Considering the pleadings and submissions by Counsel, only one question arises for consideration that is, whether section 58(b) of the Sports Act is unconstitutional for violating Article 48 of the Constitution on access to justice.

14. The petitioner's grievance is that he filed a dispute with the 1st respondent against the 2nd respondent on a sports related dispute. The 2nd respondent did not enter appearance or file a defence and after hearing the dispute the 1st respondent dismissed it holding that it did not have jurisdiction basing its decision on section 58(b) which it interpreted to mean that the 2nd respondent did not "agree" to subject itself to the tribunal's jurisdiction.

15. Briefly principles underlying interpretation of the constitution are that it is important to consider constitutional and jurisprudential principles that govern statutory interpretation. The Constitution in Article 2(4) requires courts to declare any statute or statutory provision that is in consistent with it unconstitutional, to the extent of that inconsistency. However Article 259(1) of the Constitution provides that:-

"This Constitution shall be interpreted in a manner that-

- a) promotes its purposes, values and principles;***
- b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
- c) permits the development of the law; and***
- d) contributes to good governance."***

16. That would mean that the Court should as much as possible read the impugned statute or statutory provision in a way that gives its fundamental value. The Court should also examine the objects and propose of the Act and to read the statutory provisions so far as is possible in conformity with the Constitution (***Re Hyundai Motor distributors (PTY) and others v Social No and others*** [2000] ZACC 12 2001(1) SA 545).

17. In that regard, when the constitutionality of a statute or statutory provisions is in issue, the Court is obliged to determine whether through application of all legitimate interpretive aids the impugned statute or statutory provision is capable of being read in a manner that renders it constitutionally compliant.

18. In interpreting statutes it is also a requirement that the court looks at both the text and context in order to ascertain the true intent of the legislature in ***Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd.***, 1987 SCR (2) 1 the Supreme Court of India stated thus;

“Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.”

19. On the same principle ,***Nglobo J*** of the Constitutional Court of South Africa stated in ***Bato Staf Fishing (PTY) Ltd v Minister of Environmental Affairs and Tourism and others*** [2004] ZACC 15; 2004(4) SA 490(CC): 2004(7) BCLR 687(CC)

“The technique of paying attention to context in statutory construction is now required by the Constitution section 39(2). As pointed above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit purport and objects of the Bill of rights”

20. In the case of ***Commercial Tax Officer, Rajasthan v M/s Binan Cement Ltd*** [2014] SCR, the Supreme Court of India emphasized on the importance of context in the interpretation of statutes when it observed that the court should examine every word of a statute in its context and must use context in its widest sense.

21. The Court should as much as possible also bear in mind the golden rule principle when interpreting statutes. The purpose of a statute plays a pivotal role in determining the context, scope and the intended effect of the legislation. That is what ***Kasaliwal. J*** stated in the Indian case of ***St. Stephen's College v University of Delhi*** (1992) 1 SCC 552 that the golden rule of construction requires that words be read in their ordinary, natural and grammatical meaning.

22. And as ***Schreiner J A*** stated in ***Jaga v Donges No and Another*** [1950] (4) SA 653(a).

“Certainty no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that the context as here used is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is matter of the statute its apparent scope and purpose and within limits its back ground”

23. While applying contextual or purposive reading of a statute, it is important that it remains faithful to the actual wording of the statute and only when Courts are confronted with legislation that includes words that are incapable of sustaining on interpretation that would render it constitutionally compliant should they declare such legislation constitutionally invalid (***Bertie Vanzy L (PTY) Ltd & another V Minister for Safety and Security & others*** (2009) ZACC 11).

24. There is also the need to give the statute a holistic reading in order to ascertain the true legislative intent. This was stated by the Court of Appeal in the case of ***The Engineers Board of Kenya v Jesse Waweru Wahome & others*** Civil Appeal No 240 of 2013 thus;

“One of the canons of statutory interpretation is a holistic approach... no provision of any legislation should be treated as ‘stand -alone’ An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act.”

25. Turning back to the dispute before court, after reproducing provisions of section 58 of the Act on jurisdiction, the tribunal stated from page 11 paragraph 36 of its decision;

“[36] The nature of the current dispute relates to contractual duties in respect of an agency Agreement. It is that very mature a sport -related dispute” and the jurisdiction of the tribunal ought to be invoked through section 58(b),

[37]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) stages process must be satisfied and each stage depends on a positive answer to the prior stage..."

26. The tribunal concluded that in its opinion, it did not have jurisdiction to render itself on that dispute because parties had not submitted to its jurisdiction and therefore, it could not hear that dispute, something that did not go down well with the petitioner.

27. The tribunal is established under section 55 of the Act, which provides;

1) "There is established a tribunal to be known as the Sports Disputes Tribunal.

2) The Tribunal shall consist of the following members appointed by the Judicial Service Commission in consultation with the national sports organizations

a) a chairperson who shall be a person who is qualified to be appointed as a Judge of the High Court;

b) at least two members who shall-

i. be advocates of the High Court of Kenya with at least seven years experience; and

ii. have experience in legal matters relating to sports or have been involved in sport in any capacity; and

c) at least two and not more than six other persons who have experience in sport, in any capacity, of at least ten years.

3) The Judicial Service Commission shall, in consultation with the national sports organizations, appoint a deputy chairperson from the members of the Tribunal appointed under subsection 2(b)."

28. Section 58 which confers jurisdiction to the tribunal provides;

"[58] 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.(emphasis)

29. Section 59 further gives the tribunal power to determine disputes through alternative dispute resolution mechanisms.

30. Article 48 of the constitution which has been relied on by the petitioner, provides that the state shall ensure access to justice for all persons and, if fee is required, it should be reasonable and should not impede access to justice. Article 27(1) on the other hand provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

31. The petitioner's contention is that section 58(b) of the Sports Act violates Articles 27(1) 48 and 159(2)(d) of the Constitution. Article 27(1) prohibits discrimination in the application of the law and Article 48 requires the state to ensure access to justice. Article 159(2)(d) on the other hand provides that Courts and tribunals should resolve disputes by applying the principle of substantive justice as opposed to resolving such disputes through technicalities.

32. Section 58 of the Sports Act generally provides for the jurisdiction of the tribunal established under section 55 of the Act. The disputes that should be resolved by the tribunal are well stated in section 58(a). These are appeals against decisions made by national sports organizations or umbrella national sports bodies whose rule 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 to a Kenyan team or squad.

33. The other disputes which may be considered by the tribunal are **other sports related disputes that all parties agree to refer to the Tribunal and the tribunal agrees to hear** and (c) appeals from decisions of the Registrar of Sports made under the Act.

34. A reading of section 58 shows that in the case of disputes falling under section 58(a) the tribunal has jurisdiction to hear such disputes or decisions made by sports organizations so long as rules of these organizations allow appeals against their decisions to be lodged and heard by the tribunal. That means before the tribunal can hear such appeals, it must satisfy itself that those sports organizations' rules provides for appeal to it(tribunal) otherwise the tribunal would not have jurisdiction to hear such disputes.

35. On the other hand the tribunal appears to have unqualified jurisdiction to hear appeals from decisions of the Registrar of sports made pursuant to the provisions of the Act. However, in the case of the category of disputes falling under section 58(b), these are any other disputes that may be sports related but which parties agree to refer to the tribunal and even after agreeing to refer them, it is not automatic that the tribunal has to hear them. The tribunal has the option to decide whether to take over the dispute and hear it or decline jurisdiction. That is the tribunal will have to assess the nature of the dispute and decide whether or not it is an appropriate matter to be heard by it. This, in my view, is meant to ensure that parties do not raise unnecessary objections on the jurisdiction of the tribunal and also when the tribunal hands down its decision it binds parties for purposes of implementation and or execution.

36. In the present case, I have looked at the decision of the tribunal, the sports Act and more so section 58 as a whole and section 58(b) in particular. I have also looked at the nature of the dispute that was referred to the tribunal by the petitioner as well as the reasons advanced by the tribunal declining jurisdiction.

37. First I must state that I do not see any constitutional invalidity in section 58(b) of the Sports Act when juxtaposed against the Articles of the constitution alleged to be violated namely; Articles 27(1) and 48 of the constitution. Article 27(1) provides for equal protection and equal benefit of the law while Article 48 urges the state to ensure there is access to justice which is affordable.

38. In the case of the petitioner, there is no evidence that he was treated differently in the application of the law. The decision relied on to show that the tribunal had heard a similar case was explained and perhaps the circumstances under which the tribunal assumed jurisdiction were different from those of the petitioner's case. The petitioner's access to justice was also not denied. He had and still has a chance to have his dispute resolved in a civil court given that it is a claim for a liquidated sum.

39. A party who alleges violation of Article 27(i) of the Constitution has an obligation to prove that indeed there was such violation. it is not enough to merely allege breach. As the Court stated in the case of John Harun Mwau v Independent Electoral and Boundaries Commission & Another [2013] eKLR;

“ [i]t must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the constitution.”

40. The words of the statute in section 58(b) are clear and unambiguous that parties must agree to refer any other dispute of a sports nature to the tribunal and the tribunal after examining the sort of the dispute has to agree to hear it. That, in my respectful view, does not amount to denying anyone access to justice or amount to different treatment and therefore discrimination.

41. The petitioner's dispute amounted to a breach of contract arising from some form of sports related activity. The fact that the tribunal did not hear that dispute that in itself did not amount to an unreasonable decision capable of being annulled by the Court for being unconstitutional. He could have appealed if an appeal is allowed by the Act or take a different route but not to come to this court by way of a constitutional petition.

42. As pointed out above, the petitioner had and still has an opportunity to have his right addressed in a different forum other than the tribunal. Declining jurisdiction did not make that decision amount to the tribunal acting in a technical manner. As correctly pointed out by the tribunal, declining jurisdiction on account of clear provisions of the law cannot be said to be applying technicality. The issue could only be handled by the tribunal if both parties agreed, and even then, the tribunal had to agree to hear it.

43. As correctly observed by the tribunal such an agreement could be contained in the contract or a subsequent agreement after the dispute arose. On my part, I do not see any ambiguity or constitutional invalidity in the impugned section, neither can I fault the tribunal in the decision it made. It correctly interpreted and applied the provision of the statute.

44. Having carefully examined the petition and the impugned provision I do not find merit in the suggestion that section 58(b) of the Sports Act is constitutionally invalid. Consequently, the petition dated 1st July 2016 is declined and dismissed with no order as to costs.

Dated Signed and Delivered at Nairobi this 6th November, 2017.

E C MWITA

JUDGE