



**Oliele & 2 others v Parliament of Kenya & 3 others; Football Kenya Federation (Interested Party)
(Constitutional Petition E001 of 2024) [2024] KEHC 12242 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12242 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CONSTITUTIONAL PETITION E001 OF 2024**

GL NZIOKA, J

OCTOBER 11, 2024

IN THE MATTER OF ARTICLE 22 (1) AND 23

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 2, 27, 32, 36, 38, 40, 47, 81, 94**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF THE SPORTS ACT

BETWEEN

FRANCIS OLIELE 1ST PETITIONER

JOHN ONONO 2ND PETITIONER

ERICK KURGAT 3RD PETITIONER

AND

THE PARLIAMENT OF KENYA 1ST RESPONDENT

**THE CABINET SECRETARY, MINISTRY OF YOUTH AFFAIRS CREATIVE
ECONOMY AND SPORTS 2ND RESPONDENT**

THE SPORTS REGISTRAR 3RD RESPONDENT

THE HONOURABLE THE ATTORNEY GENERAL 4TH RESPONDENT

AND

FOOTBALL KENYA FEDERATION INTERESTED PARTY



JUDGMENT

Introduction

A. Description of the parties

1. The 1st Petitioner is the Chairperson of Football Kenya Federation (herein “FKF”) Nakuru County, residing in Naivasha.
2. The 2nd Petitioner is the Chairperson of FKF, Naivasha Sub-County, Nakuru County.
3. The 3rd Petitioner is the Secretary FKF, Kuresoi South Sub-County, Nakuru County.
4. The 1st Respondent is established under Article 93 of the Constitution of Kenya (herein “the Constitution”) constituted by two Houses; the National Assembly and the Senate with legislative authority and power to enact laws.
5. The 2nd Respondent is the Cabinet Secretary, Ministry of Youth Affairs, Creative Economy and Sports, empowered under Sections 52 to 54 of the Sports Act, (herein “the Act”) with power to intervene in the affairs of sports organizations in the county.
6. The 3rd Respondent established under Section 45 of the Act and whose functions include registration and regulation of sports organizations.
7. The 4th is appointed pursuant to Article 156 of the Constitution whose constitutional mandate is inter alia, being the principal legal adviser to the Government and represents the Government in all legal proceedings.
8. The Interested Party is a national Sports Organization duly registered under the Act and represents Kenya as an affiliate member of Federation Internationale de Football Association (FIFA).

B. The petitioners’ case

9. By a petition dated 5th April, 2024, amended on 29th April 2024 (herein “the petition”), the petitioners are seeking for the following prayers:
 - a. A declaration that the respondents have violated Articles 2, 10, 24, 27, 36, 38, 40, 81 and 118 of the Constitution.
 - b. A declaration that the Respondents have violated the Petitioners’ rights under Article 24, 27, 36, 38, 40, 81 and 118 of the Constitution.
 - c. A permanent injunction to restrain the Respondents jointly or severally from applying or enforcing Section 46 (5) of the Sports Act and paragraph (c) of the Second Schedule to the Sports Act.
 - d. A declaration that Section 46 (5) of the Sports Act and paragraph (c) of the Second Schedule to the Constitution are inconsistent with the Constitution and or that the act of passing the said law was in contravention of the Constitution and hence void and or invalid.
 - e. A declaration that there was no public participation and or meaningful and real public participation in the enactment of the Sports Act and or Sections 46 (5) of the Sports Act and paragraph (c) of the Second Schedule to the Sports Act.



- f. A Judicial Review Order of *Mandamus* directed at the 2 and 3rd Respondents to respect and abide by the Constitution of Football Kenya Federation in terms of the electoral process and or on term limit.
- g. Costs of the Petition.
10. On filing the petition, the petitioners contemporaneously filed a notice of motion application seeking for conservatory orders, which motion was compromised by the parties to pave way for the expeditious hearing and determination of the petition.
11. The petition is supported by an affidavit dated 5th April 2024 sworn by the 1st petitioner Francis Oliele with the authority of the 2nd and 3rd petitioner. The petitioners aver that they are public interest spirited individuals and have instituted this proceeding pursuant to the provisions of Article 22 of the Constitution. Further they aver that they have bring the petition in their capacity as members and/or elected office bearers of branches of Kenya Football Federation.
12. It is the petitioners' case that they are currently serving their second term in office but are ineligible to participate in the coming election for the third term because section 46(5) of the Sports Act and paragraph (c) of the Second Schedule limits their office tenure to two terms.
13. That section 46 (5) of the Act as read with paragraph (c) of the Second Schedule to the Act, provide a pre-requisite condition that for a sports organization to be registered, the organization must provide the 3rd respondent with a certified copy of its constitution, which must inter alia contain a clause to the effect that its office bearers shall hold office for a term not exceeding four years, and are eligible for re-election for one more term.
14. Consequently, the petitioners contends that the impugned provisions are inconsistent, in conflict and/or contravenes the Constitution, the FIFA Statutes and the FKF Constitution and violates their rights under the Bill of Rights
15. The petitioners further argue that since FKF is an affiliate member of FIFA and thus the subject term limits should be aligned to FIFA term by import of Article 2(5) and (6) of the Constitution which allows application of international law.
16. The petitioners further contends that the process leading to the enactment of the Act is flawed for lack of public participation in that, the provisions of Paragraph (c) of the Second Schedule were introduced into the Act during debate of the bill at the Committee Stage.
17. Accordingly, the petitioners argue case that as section 46(5) of the Act and Paragraph (c) of the Second Schedules has unfairly limited their constitutional right pursuant to Article 24 of the Constitution, the court should declare the impugned provisions as void and invalid.

C.1st Respondent's case

18. The 1st Respondent opposed the petition vide the replying affidavit dated 29th April 2024, sworn by Samuel Njoroge CBS, the Clerk to the National Assembly.
19. The 1st Respondent argue that by bringing the petition ten (10) years after enactment of the Act, the challenge is an afterthought.
20. Further the provisions of the Act requiring office bearers of a sports organization to be elected for only two (2) terms are meant to give people of diverse backgrounds an opportunity to be office bearers of sports organizations.



21. Furthermore, the petitioners have failed to demonstrate how the impugned provisions have contravened the cited provisions of the Constitution and/or violated their fundamental rights under the Constitution.
22. He argues that the petition is brought in bad faith and without bona fide as the petitioners have enjoyed their full two terms in office under the impugned section 46(5) of the Act and paragraph (c) of Second Schedule.
23. That, with regard to public participation, the 1st Respondent states that the Act was passed during the transitional period following the enactment of the Constitution and therefore the operation of Article 118 of the Constitution had been suspended by paragraph 2(i)(b) of the Sixth Schedule of the Constitution and in the circumstances public participation was not pre-requisite for the enactment of the Act.
24. Finally, the 1st respondent aver that FIFA statutes do not constitute General rules of International law under Article 2(5) of the Constitution as conceded by the petitioners in the petition and therefore the Act does not contravene the FIFA statutes. Further, that the FIFA statutes cited relate to election of the President, Vice-President and members of the Council of FIFA and not the Interested party.

D. 2nd to 4th Respondent's case

25. The 2nd, 3rd and 4th Respondents equally opposed the petition vide their grounds of opposition dated 3rd May 2024 which largely were in response to the application that was compromised save for a few grounds that relate to the petition.
26. The respondents contend that petition is misconceived and an abuse of court process.
27. That section 46 of the Sports Act does not violate Articles 2, 27, 32, 36, 38, 40, 47, 81 and 94 of the Constitution.
28. Further that the term limit for office bearers are reasonable and not discriminatory and that the rights complained of are not absolute but subject to limitations under Article 24 of the Constitution.
29. Furthermore, the fact that the Act passed through Parliament and debated is clear indication that there was reasonable public participation.
30. Finally, the respondents argue that FKF ought to amend its Constitution to conform with the Act and urged the Court to dismiss the petition.

E. Interested party's case

31. The Interested party neither entered appearance nor participated in the hearing of the petition.

Analysis

32. The petition was disposed of through written submissions, highlighted by the parties and considered herein.
33. At the close of the pleadings and arguments by the respective parties, I find that the following issues have arisen for determination:
 - a. Whether the petition meets the threshold of a constitutional petition as set out in Anarita Karimi Njeru v Republic [1979] eKLR and restated in Mumo Matemo v Trusted Society of Human Rights Alliance [2013] eKLR.



- b. Whether the petition is an abuse of the process of Court.
- c. The application of Articles 2(5) and (6) in relation to FIFA statutes.
- d. Whether the respondents have violated the cited provisions of the Constitution and/or the petitioners' rights under the subject constitutional provisions
- e. Whether the impugned provisions are in contravention of the Constitution of Kenya and hence void and invalid.
- f. Whether the court should grant the relief prayed for
- g. Who should bear the costs of the petition

F. The application of articles 2(5) and (6) in relation to FIFA statutes.

34. The provisions of article 2(5) and (6) of the Constitution states as follows: -
- (5) The general rules of international law shall form part of the law of Kenya. Constitution of Kenya, 2010
 - (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.
35. The petitioners at paragraph 108 (v) of the petition concede that FIFA statutes do not constitute rules of International law but contend that they hold a significant regulatory mandate within the local realm and international sport of football.
36. The petitioners state at paragraph 39 of the petition, that the non- interference principles of FIFA and FIFA statutes operate in tension with domestic law and that the political truth is that FIFA statutes regulate football at country level.
37. At paragraph 48 of the petition, the petitioners argue that the impugned provisions are in conflict with the Kenya constitution, FIFA statutes and FKF constitution
38. The 1st respondent on its part avers at paragraph 17 to 22 of its replying affidavit that FIFA statutes do not constitute General rules of International law provided by Article 2(5) of the Constitution of Kenya which fact is admitted by the petitioners in the petition and therefore they cannot claim that the Act contravenes the FIFA statutes.
39. Further, that the FIFA statutes cited by the petitioners relate to election of the President, Vice-President and members of the Council of FIFA and not the interested party.
40. Furthermore, the provisions that limits the petitioners to two term do not interfere with neither the independence of FKF nor the democratic procedure that guarantees complete independence of the elections or appointment as required by FIFA.
41. The issue of application of Article 2(5)(6) of the Constitution is well settled in the case of Attorney General (On behalf of the National Government) v Karua (Reference E001 of 2022 (2025 KES 21 (31 May 2025) (Advisory Opinion) where the court stated as follows: -
52. We also note that, article 2(5) of the Constitution provides that the general rules of international law shall form part of the law of Kenya while article 2(6) of the Constitution stipulates that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. The EAC Treaty therefore is part of the Kenyan laws that must be subservient to



the Constitution and if there is any conflict regarding the hierarchy of the Kenyan courts and the courts created by the Treaty, the provisions of the Constitution take precedence over those of the Treaty.

53. In addressing that issue, this court in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) stated as follows: “Articles 2(5) and (6) is inward looking in that, it requires Kenyan Courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, as long as the same are relevant, and not in conflict with, the Constitution, local statutes, or a final judicial pronouncement”. [Emphasis added]
54. Therefore, based on the provisions of article 2(6) and the reasoning adopted in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa* (supra) we emphasize that international law, including treaty law, applies in Kenya and by extension to the organs of the state as long as the same are not in conflict with the Constitution, local statutes, and final judicial pronouncements. This connotes that the Constitution embodies the primacy of domestic laws and the subsidiarity of international laws. The principle of subsidiarity respects national sovereignty by recognizing that each state retains the ultimate authority over matters occurring within its territory, because in the case of Kenya, article 1 of the Constitution declares that “All sovereign power belongs to the people of Kenya” power to be exercised only in accordance with the Constitution.
55. This was also the position adopted by the European Court of Human Rights in the case of *Handyside v United Kingdom*, Application No 5493/72 where, in the context of human rights, it held as follows: “The court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (judgment of 23 July 1968 on the merits of the “Belgian Linguistic” case, Series A no 6, p 35, para 10 in fine)...Consequently, article 10 para 2 (art 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (“prescribed by law”) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.” [Emphasis added]
42. From the afore findings, the court underscored the supremacy of Constitution, statutes and final decision findings by the Kenyan courts and reiterated its decision in *Mitu-bell Welfare Society v Kenya Airport Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition No 3 of 2018) 2021 KESC 34 (KLR)
43. Thus international law including treaty law, applies in Kenya and by extension to organs of state so long as they are not in conflict with the Constitution, local statutes of final judicial pronouncements.
44. Pursuant thereto, the primacy of domestic laws and subsidiary of international laws is accentuated. The principle of subsidiary respects national sovereignty by recognizing that each state retains ultimate authority over matters occurring within its territory.
45. In the light of the aforesaid, the argument by the petitioners that, the impugned provisions ought to have been and should be aligned with the FIFA statutes is not tenable and fails.

F. Whether the petition meets the threshold of a constitutional petition

46. It is settled law that a party seeking relief for breach of fundamental rights under Article 22 of the Constitution must set out with precision the complaints, the rights and the manner in which the subjects right has been violated.



47. The afore principles were set out in *Anarita Karimi Njeru v Republic* (*supra*) where the Court of Appeal stated: -

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (emphasis added)

48. The Court of Appeal reaffirmed the above principles in *Mumo Matemo v Trusted Society of Human Rights Alliance* (*supra*) stated as follows: -

“The principle in *Anarita Karimi Njeru* (*supra*) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective. Principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* Cap 9.

Procedure is also a hand maiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (*Supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extract of this principle”.

49. Further, whenever a petitioner alleges that his constitutional rights have been contravened, it is incumbent to prove that such right has indeed been proved. The Court of Appeal in *Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR stated that: -

“In the Zimbabwean case of *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General* (1993) 2 LRC (Const) 279, when considering where the burden of proof rested in disputes concerning fundamental rights, Gubbay, CJ stated thus;

“I consider that the burden of proof that a fundamental right, of whatever nature has been breached is on he who asserts it...[it] is essentially a matter of fact and some evidence would have to be adduced to support the contention. The Respondent is not obliged to do anything until a case is made out which requires to be met”.

This is to say that, ordinarily, the burden of demonstrating that a right was infringed would be upon the person alleging such violation, as, that person would be in the better position to prove it. It is for the petitioner to show that, compared to another person, he or she has been denied a benefit or suffered a disadvantage, which are matters that are within the petitioner’s knowledge. Once the case is made out, the burden shifts to the other party.”

50. In the instant matter the petitioners have set out at paragraphs 23 to 69 the summary of the complaints and at paragraphs 95 to 107 they have set out legal foundation touching on the provisions of the *Constitution* alleged to have been infringed or violated.



51. At this stage it is important to determine whether the petitioners have demonstrated how the impugned provisions have violated their constitutional rights.
52. The impugned provisions of section 46(5) of the Act states that: -
- (5) A constitution submitted under subsection (3) shall contain, as a basic minimum, the provisions set out in the Second Schedule.
53. The paragraph (c) of Second Schedule of the Act provides: -
- “(c) the elections contemplated in paragraph (a) above shall be held at regular intervals after a period of between two years and four years, and persons elected as officials thereof shall consequently hold office as follows—
- (i) the Chairperson shall hold office for a term not exceeding four years, but is eligible for re-election for one more term;
- (ii) any other official shall hold office for a term not exceeding four years, but is eligible for re-election for one more term;”
54. In the instant matter the constitutional provisions alleged to have been violated by the afore provisions are set out under paragraph(b) of the prayers as Articles; 24, 27, 36, 38, 40, 81, and 118. In that respect, I shall examine each of these constitutional provisions.
55. I note that articles; 24, and 81 of the Constitution do not per se create any human rights and/or fundamental freedoms that are capable of violation by the impugned provisions but rather general principles.
56. Article 27 deals with equality and freedom from discrimination. Its apparent from the pleadings that the petitioners have simply averred at paragraph 102 of the petition that their right under Article 27 is guaranteed and at paragraph 108 (vii) merely allege that their rights are limited under Article 27.
57. However, the petitioners have not demonstrated how the impugned provisions have denied them equality or discriminated against them or differential treatment with other office bearers and/or other sports association registered under the Act.
58. I take judicial notice that to the contrary even the Constitution has term limits including the term limit for Presidential and Gubernatorial positions
59. Article 36 deals with freedom of association. The petitioners aver that with the commencement of the Sports Act, section 50 obligated all sports organizations, which were hitherto registered under either the Societies Act or football clubs registered under the Companies Act, to apply to the Registrar Sports, the 3rd Respondent, for a transitional registration under the Act.
60. That following an application dated 29th July 2016, FKF was registered and issued with a certificate of registration No 45 of 24th May, 2018. The petitioners have pleaded in the petition that they are members and officials of County and Sub-County offices of FKF. Consequently, by dint of that registration the petitioners have a right and are enjoying the right of association under Article 36 and 38 of the Constitution. The petitioners have not demonstrated how they have been restrained by the respondents from enjoying the fundamental right under Article 36.
61. Article 38 deals with political rights and in particular elections and/or participation in activities of political party and/or voting in referendum. It also relates to candidates vying for public office or office within a political party.



62. Section 46(2) of the *Sports Act* recognizes entities that are registrable under that section as; a sports club, county sports association or national sports organization. The petitioners aver that FKF is a registered national sports organization. Although it is not a political party, none the less Article 38 as read with Article 81 of the *Constitution* apply.
63. However, the petitioners have not demonstrated violation of the right since they have admitted have enjoyed the right to be elected in the office and are serving their second term and the voters on the other hand have had a right to elect them, therefore the right to candidacy and voting has been fulfilled.
64. Article 40 deals with protection or rights to property. In this matter, and in particular, paragraph 95 to 107 on legal foundation as stated in petition, there is no mention of Article 40, as such there is no demonstration on how the right under that article has been violated by the impugned provisions.
65. In the same vein, other than paraphrasing the provisions of Article 81 that deals with electoral system, there is no demonstration of how the said article has been violated. Furthermore, I have already found the petitioners have enjoyed the right under Article 38 which qualifies Article 81 of the *Constitution*.
66. Article 118 deals with public access and participation. However, as submitted by the 1st respondent without rebuttal from the petitioners, the *Sports Act* and by extension section 46(5) and paragraph (c) of the Second Schedule were enacted during the transition period, when the provisions of Article 118 stood suspended pursuant to the 6th Schedule to the *Constitution* and therefore cannot constitute a violation.
67. Further Article 22 of the *Constitution* requires any person claiming infringement of fundamental right or freedom to lay a basis of the claim and or establish the link between the aggrieved party, the constitutional provisions alleged to have been contravened and manifestation of infringement.
68. Based on the foregoing, it is the finding of this court that the petitioners have not provided demonstrated that any of the fundamental rights stated under the provisions cited under prayer (b) have been and the manner in which they have been violated.
69. It is therefore the finding of this court that the petition herein does met the threshold of a constitutional petition.

F. Whether the petition is an abuse of court process

70. The respondent argues that the timing of the filing of the petition more than 10 years later and after the petitioners have served their two terms as provided for under the Act amount to an abuse of the process of court.
71. In the case of *The Kenya section of the International Commission of Jurists v Attorney General & Two others* (Supr Ct Cr. Application No 1 of 2012) considered what constituted “abuse of the process’ and held: -

“The concept of abuse of the process of court bears no fixed meanings but has to do with the motive behind the guilty party’s actions and with a perceived attempt to maneuver the court’s jurisdiction in a manner incompatible with the goals of justice.”
72. Taking into account the petitioners filed this petition at the tail end of their term in office, with intent to vie for the third time, and the timing of the petition, it is inescapable to perceive bad faith and hence the 1st respondent’s argument is not in vain.



73. Before I conclude the court is live to the provisions of Article 24 as read with Article 25 of the *Constitution* on limitation of rights. In the case *Coalition for Reform and Democracy (CORD) and 2 others v Republic of Kenya and 10 others* (2015) eKLR at paragraph 209, the court affirmed the reasoning in the case of *S v Zuma & others* (1995) 2 SA 642 (CC) (A3) that a party alleging violation of a constitutional right or freedom must demonstrate that the exercise of a fundamental right has been impaired, infringed or limited. Once a limit has been demonstrated, then the party which would benefit from the limitation must demonstrate a justification for the limitation.
74. In the instant petition, the impugned provisions of statute relate to registration of a sports organization, under Article 36 of the *Constitution*. As already held the petitioners have not demonstrated violation of Article 36 and 38 which are relevant to the impugned provisions.
75. In the premises, there is no basis to delve into the merits of the allegation infringement of the constitutional provisions under prayer (a).
76. Having considered the petition and petitioners' grievances, it is clear that what is impeding the petitioners from vying for a third term is the FKF constitution which limits them to two terms and which they submitted at the time of seeking for registration and not section 46(5) and paragraph (c) of the Second Schedule.
77. It is the considered opinion of the court that, if the petitioners were to invoke the process of the court fairly in this case, they ought to either amended their constitution to the term limits they want, or come up with a new FKF constitution and present it before the Registrar for registration and if the Registrar declines it is then that, they can approach the court to challenge section 46(5) of the Act as read with paragraph (c) of Second Schedule.
78. In the case of *Bernard Murage v Fine Serve Africa Limited & others* (2015) eKLR the court stated where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy be pursued first.
79. Similarly, in *Paul Okutoyi & others v Habil Olaka & another* (2018) eKLR Chacha J at Paragraph 65 decried the tendency of people rushing to file a constitution petition alleging violation of fundamental freedom where there is none.
80. The upshot of the aforesaid is that the petition did not meet the threshold of a constitutional petition and is struck out with costs.
81. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 11TH DAY OF OCTOBER, 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr Kalii for the Petitioners

Mr Emacar for the 1st Respondent

Mr. Rotich for the 2nd, 3rd and 4th Respondent

Mr. Komen: Court Assistant

