



Aluochier v Kenya Swimming Federation & 10 others (Tribunal Case E046 of 2023) [2024] KESDT 1571 (KLR) (Civ) (20 February 2024) (Ruling)

Neutral citation: [2024] KESDT 1571 (KLR)

**REPUBLIC OF KENYA
IN THE SPORTS DISPUTES TRIBUNAL
CIVIL**

TRIBUNAL CASE E046 OF 2023

JOHN M OHAGA, CHAIR, MN KIMANI & E. G. KIPLAGAT, MEMBERS

FEBRUARY 20, 2024

BETWEEN

ISAAC ALUOCHIER APPELLANT

AND

KENYA SWIMMING FEDERATION 1ST RESPONDENT

MAUREEN JANET OWITI 2ND RESPONDENT

STANLEY MWANGI KABIRU 3RD RESPONDENT

HILLARY LIBOY SERU 4TH RESPONDENT

COLLINS MARIGIRI 5TH RESPONDENT

GRACE KINGÓRI 6TH RESPONDENT

ELIZABETH JELAGAT KERRETS MATIMU 7TH RESPONDENT

DORIS WANGUI NJUE 8TH RESPONDENT

JEREMIAH KAHINDO MURIITHI 9TH RESPONDENT

OMAR OMARI 10TH RESPONDENT

SPORTS REGISTRAR 11TH RESPONDENT



RULING

Appearance

The Appellant is appearing in person; the 1st to 10th Respondents are represented by Ms. Winfred Wanjama-Warui instructed by Wanjama & Associates LLP, Advocates; the 11th Respondent is represented by Mr. Martin Munene, Senior State Counsel, Office of the Attorney General.

The Parties

1. The Appellant is a member of the public aggrieved by the elections of the 1st Respondent.
2. The 1st Respondent is a national sports organization.
3. The 2nd to 10th Respondents are the officials elected to the office of the 1st

Respondent.

4. The 11th Respondent is a public service office established under the [Sports Act](#).

Introduction and background

5. The Appellant lodged an appeal before this Tribunal on 6th November, 2023 seeking a declaration that the election results of the 1st Respondent be invalidated and that the 2nd to 10th Respondents are not lawful officials of the 1st Respondent.
6. In response, the 11th Respondent filed a replying affidavit dated 19th January 2023 seeking a declaration that the elections held on 7th October 2023 be invalidated to allow proper elections to be held
7. The 1st to 10th Respondents however, responded by filing a Notice of Preliminary Objection together with the 5th Respondent's replying affidavit dated 15th November 2023 and 30th November 2023 respectively.
8. The Appellant filed a response dated 10th December, 2023 contesting all the grounds of the preliminary objection.
9. It is this notice of Preliminary objection that is the subject of this ruling.

E. The 1st -10th Respondents case

10. The 1st -10th Respondents in their Notice of Preliminary objection dated 15th November, 2023 contend that the matter before the Tribunal is sub- judice as there is a similar application and suit in *Petition No. E088 of 2021*
- In the Matter of the Governance of Kenya Swimming Federation between issues, subject matter and prayers are different from the High Court petition.
11. He affirmed that he derives his locus standi from section 46(6) of the [Sports Act](#) 2013 and Regulation 20 (7) of the [Sports Registrar Regulations](#) 2016. He concluded by affirming that this Tribunal has jurisdiction to hear and determine the matter as it relates to how the election of the 1st Respondent was conducted.



12. He relied on Regulation 20(7) above, and the decision of the Supreme Court in *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* (2019) eKLR and *Margaret Njeri Gitau v Julius Mburu & 2 others*(2022) eKLR.
13. 11th Respondent associated himself with the submissions of the 1st to 10th Respondent.

G. Analysis

14. We have looked at the preliminary objection, the submissions by the parties and we have identified the following issues for determination;
 - i. Whether this Tribunal has jurisdiction to determine the appeal.
 - ii. Whether the preliminary objection meets the required threshold.
 - iii. If (ii) above is in affirmative, the merits thereof.
 - iv. Whether the appellant has locus standi.
15. We shall analyze the issues in turn.

I. Whether the Tribunal is devoid of jurisdiction

16. The Respondents in their submissions stated that this Tribunal does not have jurisdiction to determine matters of alleged violation of the Constitution and Bill of Rights and against World Aquatics which is an international federation governed by international law.
17. It is against this backdrop that will determine whether this Tribunal has jurisdiction to hear the appeal.
18. The Tribunal, being a creature of statute, must derive its jurisdiction from the *Sports Act* and the Constitution of Kenya 2010. This position has been established by the Supreme Court in Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 Others, where it was 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.”

19. Section 58 of the *Sports Act* sets out the jurisdiction of this Tribunal 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 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.”



20. We have looked at the appeal dated 6th November 2023 and we note that it is brought under Section 46(6) of the *Sports Act* 2016 and Regulation 20(7) of the Sports Registrar Regulations 2013 which provides; Regulation 20(7)

“ A person dissatisfied with the results of an election may appeal to the Tribunal within 30 days of the election. ”

Tribunal. The Appellant s shall, in the first instance, approach the Tribunal for the resolution of the dispute...’

We therefore hold that this Tribunal has jurisdiction to determine the appeal before it.

II. Whether the preliminary objection meets the required threshold.

21. The principle underpinning preliminary objections is settled in the celebrated *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was,

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. ”

22. At page701 paragraph B-C Sir Charles Newbold, P. added the following: "A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion

23. These principles have been cited with approval in a number of cases just to wit; J.B. Ojwang J (as he then was) in a simple and clear manner in the case of *Oraro v Mbajja* [2005] eKLR that:

“ I think the principle is abundantly clear. A "preliminary objection", correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to Waweru Ribiro (2021) eKLR, where the Court was faced with a similar question as to whether sub-judice can be raised as a preliminary point and held as follows;

For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court's considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited. Consequently, the court finds and holds that the notice of preliminary objection dated 30th August, 2019,



by the defendant/objector is not merited and the same is dismissed entirely with costs to the plaintiff/Respondent”.

24. The Learned Judge thus held,

“I agree entirely with the reasoning in the above decision which is in all fours with the instant case. As such, I find and hold that the Notice of Preliminary Objection dated 21st October, 2021, by the 1st defendant/objector is not merited and the same is hereby dismissed with costs to the plaintiff. It is so ordered.”

25. It is not in doubt that the Respondents invited us to ascertain the facts in determining whether the matter before us is sub-judice. It is our finding that doing so will exceed our jurisdiction when it comes to determining the validity of the preliminary objection. Therefore, the Respondents' objection fails on this ground.

III. Whether the Appellant has locus standi.

- i. The Notice of Preliminary Objection dated 15th November, 2024 is hereby dismissed;
- ii. Each party shall bear its own costs.

DATED AT NAIROBI THIS 20TH DAY OF FEBRUARY 2024.

JOHN M. OHAGA SC, CArb

CHAIRPERSON

MS. MARY KIMANI - MEMBER

E. GICHURU KIPLAGAT, MEMBER

