

Promoting Sports Arbitration in Africa

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**A discussion Paper for the Chartered Institute of Arbitrators
(Kenya Branch) 2nd Annual Lecture on the theme 'Promoting
Sports Arbitration in Africa' held on Thursday 28th November,
2019 in Nairobi**

PROMOTING SPORTS ARBITRATION IN AFRICA

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Abstract

Sports are considered as an essential part of the social and cultural aspect of most societies across the world. With the emergence of professional sports and subsequent commercialisation of the industry, the traditional understanding of sports as merely being occasions for recreational purposes is no longer tenable. Sports have now become important in not only the social and cultural but also the economic discourse around the globe with sports personalities being among the most highly paid individuals. Further, a lot of resources are invested by both governments and private entities to sponsor sporting activities. Consequently the growth and success of sports has also led to emergence of sports disputes. These disputes mainly revolve around issues such termination of contract, non -payment and suspension.

The paper explores the suitability of Alternative Dispute Resolution (ADR) mechanisms in management of such disputes. The author argues that despite the advantages of these mechanisms, there are several shortcomings in both the legal and institutional framework governing settlement of sports dispute through arbitration. The paper finally proposes reforms to enhance sports management.

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LIST OF ABBREVIATIONS

ADR- Alternative Dispute Resolution

CAF- Confederation of African Football

CAS- Court of Arbitration for Sport

FIFA- Fédération Internationale de Football Association

FKF- Football Kenya Federation

IAAF- International Association of Athletics Federations (World Athletics)

ICAS- International Council of Arbitration for Sport

IOC- International Olympic Committee

WADA- World Anti-Doping Agency

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1. INTRODUCTION

The role of sports in any given society can hardly be overemphasized. It has been argued that participating in sports can improve the quality of life of individuals and communities through promoting social inclusion, improving health, countering anti-social behavior and raising individual self-esteem and confidence.¹ Sports are essential to both developing and non-developing nations, through economic incentives, improving health, happiness, and inculcating values.² Sports are more than just a game.³

Sports are important to the culture of Africa societies and most people in the continent are passionate about football in particular. ⁴The euphoria witnessed across the continent during the 2010 FIFA World Cup is a perfect illustration of this fact. Further, sporting events such as the Olympic Games and English Premier League attract huge audiences across the continent. In Kenya, athletics hold a sacred place in the sports fraternity and athletes have brought much pride to the country through their impressive performances in athletic competitions such as World Marathons, World Athletic Championships the Olympics and other competitions.

Sports traditionally emphasized participation over winning. ⁵ However, this view of sports is no longer tenable since politics and economic incentives continue to encroach

¹ Coalter Fred, *'The Social Benefits of Sport: An Overview to Inform the Community Planning Process'* SportsScotland Research Report no. 98, available at http://www.sportni.net/sportni/wp-content/uploads/2013/03/the_social_benefits_of_sport_an_overview_to_inform_the_community_planning_process.pdf (Accessed on 27/11/2019)

² Develop Africa, *'The Benefits of Sports in Africa'* available at <https://www.developafrica.org/blog/benefits-sports-africa> (Accessed on 27/11/2019)

³ Ibid

⁴ Federal Ministry for Economic Cooperation and Development, *'More Space for Sport-1,000 Chances for Africa'* available at https://www.bmz.de/en/publications/type_of_publication/information_flyer/flyer/booklet_sport.pdf (Accessed on 27/11/2019)

⁵ McLaren Richard, *'The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes'* Valparaiso University Law Review, Volume 35 no. 2, p 379-405

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the sports arena. ⁶ The rise of professional sports has seen the focus shift from participation with emphasis now placed on winning to serve the economic incentives at stake. To cater for the training, travel, accommodation needs in sports, the concept of sponsorship has grown with individuals and corporations injecting money for these purposes.⁷ Athletes in both individual and team sports now need to enter into contracts with their respective managers, teams or sponsors to govern their affairs. The best athletes or teams in respective sports fields end up being sought by companies to market their products in lucrative endorsement contracts.⁸

With all these factors, it is not surprising that sports disputes have emerged. Such disputes take various forms including employment disputes due to termination of employment contracts of athletes or coaches, anti-doping rule violations and match fixing.⁹ While disputes are inherent in every human interaction, the nature of sports disputes and the underlying needs are peculiar. Sports disputes are unique in nature since there is need for efficient and expeditious management of such disputes to ensure that the value of sports are maintained and the athletes and teams involved continue to pursue their sporting activities. It has been argued that for the management of sports disputes to be effective, it should be concluded before a particular competition takes place. For example, a finding by an arbitral tribunal that a particular athlete may compete at the Olympic Games would be of limited value if the arbitral award was issued after the competition in question has already finished.¹⁰

⁶ Ibid

⁷ Kumar R., 'Commercialization of Sports and Competition Law' available at https://www.researchgate.net/profile/Dr_Raj_Yadav2/publication/311912413_Commercialization_of_Sports_and_Competition_Law_ISBN_No-978-9381771532/links/58621b3408ae329d61ffc5fc/Commercialization-of-Sports-and-Competition-Law-ISBN-No-978-9381771532.pdf (Accessed on 27/11/2019)

⁸ Ibid

⁹ Rigozzi Antonio et al, 'International Sports Arbitration' <http://lk-k.com/wp-content/uploads/rigozzi-besson-mcauliffe-international-sports-arbitration-GAR-2016.pdf> (Accessed on 27/11/2019)

¹⁰ Ibid

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It is out of this unique feature of sports disputes that the field of sports arbitration has emerged at both the global and national level. This paper seeks to critically examine the efficacy of arbitration in management of sports disputes. The paper further attempts to analyse the role of Sports Tribunals in management of sports disputes and the extent to which this role has been facilitated. Finally, the paper proposes reforms for efficient management of sports disputes in Africa.

2. FRAMEWORK FOR MANAGEMENT OF SPORTS DISPUTES

2.1 International Legal and Institutional Framework

2.1.1 The Olympic Charter

The Charter is a codification of the fundamental principles of olympism and contains rules and by laws adopted by the International Olympic Committee (IOC) to regulate the operation and actions of the Olympic movement.¹¹ Chapter six of the Charter sets out a disciplinary mechanism framework in case of violation of the charter, the World Anti-Doping Code, the Olympic Code on the Prevention of Manipulation of Competition or any other regulation.¹² The charter gives jurisdiction to the Court of Arbitration for Sport to handle exclusively any dispute arising in connection with the Olympic Games.¹³

2.1.2 Fédération Internationale de Football Association (FIFA) Statute

The statute establishes FIFA as an association governing the sport of football. It recognises the importance of integrity in sports and seeks to promote fair play and

¹¹ Olympic Charter, 'International Olympic Committee' available at <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf> (Accessed on 27/11/2019)

¹² Ibid, chapter six

¹³ Ibid, Article 61 (2)

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ethics in order to prevent practices such as corruption, doping or match manipulation, that may jeopardise the integrity of matches, competitions, players, officials and member associations or give rise to abuse of association football.¹⁴ FIFA recognizes the jurisdiction of the Court of Arbitration for Sport (CAS) to settle disputes involving players, clubs, confederations and member associations.¹⁵ An appeal against final decisions by FIFA's legal bodies, member association or confederations shall be lodged with CAS within 21 days from the date of such a decision. However such appeals are subject to exhaustion of all internal dispute management mechanisms.¹⁶

The statute obligates member associations, confederations and leagues to recognise CAS as an independent judicial authority and comply with its decisions. It further prohibits recourse to ordinary courts unless specifically provided for by regulations.¹⁷

2.1.3 International Association of Athletics Federation (IAAF) Constitution, 2019

IAAF is established under a constitution to develop, promote and govern the sport of athletics in the world. The constitution sets out an internal dispute resolution mechanism for athletic related disputes. Such disputes are managed by the IAAF Disciplinary Tribunal in the first instance.¹⁸

Appeals against final decisions made by IAAF lie exclusively with the Court of Arbitration for Sport which is mandated to settle such disputes mandatorily in accordance with its code of Sports-related Arbitration.¹⁹ Such appeals must be lodged within twenty one (21) days upon receipt of the decision by IAAF.²⁰

¹⁴ FIFA Statute, August 2018 Edition, Article 2 (g)

¹⁵ Ibid, Article 57 (1)

¹⁶ Ibid, Article 58 (1 and 2)

¹⁷ Ibid, Article 59

¹⁸ International Association of Athletics Federations (IAAF) Constitution, 2019, Article 76

¹⁹ Ibid, Article 84.3

²⁰ Ibid, Article 84.4

2.1.4 World Anti-Doping Code, 2015

It is the fundamental universal document upon which the World Anti-Doping Program in sport is based. The code is a globally recognized commitment against doping in sports and has been adopted by numerous sports federations, national Olympic committees and anti-doping organizations.²¹ It is aimed at protecting the athletes' fundamental right to participate in doping free sport and enhancing equality and fairness in sports worldwide.²² The code defines doping and sets out anti-doping rule violations and a list of prohibited substances. Further, it entails a disciplinary mechanism and disciplinary measures that may be imposed in case of violation of the code.

Decisions made under the code may be appealed to the Court of Arbitration for Sport. Such appeals lie exclusively to CAS where the decision involves international events or international level athletes.²³ The code also allows appeals to independent and impartial bodies in accordance with rules established by the National Anti-Doping Organization where the decisions do not involve international events or international level athletes.²⁴

2.1.5 Court of Arbitration for Sport (CAS)

The Court of Arbitration for Sport (CAS) is an independent institution whose role is to facilitate management of sports related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world.²⁵ The institution was established in 1984 and comprises of nearly 300 arbitrators from 87

²¹ James Nafziger and Stephen Ross, '*Handbook on International Sports Law*' <https://books.google.co.ke/books?id=fnLIOA0JtgC&pg=PA61&lpg=PA61&dq=international+sports+code&source> (Accessed on 27/11/2019)

²² World Anti-Doping Code, available at https://www.wada-ama.org/sites/default/files/resources/files/wada_anti-doping_code_2018_english_final.pdf (Accessed on 27/11/2019)

²³ Ibid, Article 13.2.1

²⁴ Ibid, Article 13.2.2

²⁵ General Information on the Court of Arbitration for Sport, available at <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (Accessed on 27/11/2019)

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countries who are selected for their specialist knowledge of arbitration and sports law. According to the CAS around 300 cases are registered with it every year.²⁶

CAS has three divisions; *ordinary arbitration division* that settles disputes submitted to the ordinary procedure; *anti-doping division* that settles dispute related to anti-doping and *appeals arbitration division* which reviews decisions by sports organizations such as FIFA and IAAF (emphasis added).²⁷

The operation of CAS is governed by the Code of Sports-Related Arbitration. The code sets out the procedural rules on the *seat, language, representation, time limits, costs and awards*. An award rendered by CAS is *final and binding on the parties* and is *enforceable internationally under the New York Convention* on the Recognition and Enforcement of Foreign Arbitral Awards to the extent that it binds a state where enforcement is sought (emphasis ours).²⁸ Awards rendered by CAS do not constitute precedent but important in providing guidance in future disputes.

2.1.6 International Council of Arbitration for Sport (ICAS)

The purpose of ICAS is to facilitate settlement of sport related disputes through mediation or arbitration and to safeguard the rights of parties to a dispute and the independence of CAS.²⁹ ICAS is responsible for the administration and financing of CAS.³⁰ The body plays supervisory functions over CAS and has the powers to appoint arbitrators and mediators to CAS and remove such arbitrators or mediators through its Challenge Commission.³¹ This also extends to the CAS Secretary General who is

²⁶ Ibid

²⁷ Code of Sports-Related Arbitration, Part 3 (S 20)

²⁸ McLaren Richard, 'The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes' Op cit

²⁹ Statutes of ICAS and CAS, 'Joint Dispositions' S 2

³⁰ Ibid

³¹ Ibid, s 6

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appointed and may be removed from power by ICAS upon proposal of the president. It plays an important role in promoting sports arbitration by overseeing the administration and financing of CAS.

2.2 Legal and Institutional Framework for Management of Sports disputes in Africa

Unlike the CAS, there is no central institution for management of sports disputes in Africa. Such disputes are managed by institutional mechanisms established by the various continental sports federations in Africa. However, the statutes establishing these federations *recognize the jurisdiction of the CAS as the global institution for management of sports disputes* (emphasis ours). The Confederation of African Football statute authorises appeals to the CAS to manage any dispute between the Confederation of African Football (CAF), national associations, clubs, players and officials.³² These appeals relate to any decision or disciplinary sanctions given in the last instance by any legal body of CAF or FIFA, a national association, league, or club.³³ Such appeals must be lodged with CAS within ten (10) days following the notification of the decision.³⁴

Further, some African countries such as Kenya have made strides in the establishment of national sports tribunals. However, other countries such as Nigeria and South Africa are yet to establish such institutions. Sports disputes in these countries are managed in the first instance by the internal mechanisms established by the various sports federations.³⁵

³² Confederation of African Football (CAF) Statute, Article 55 (1)

³³ Ibid, Article 55 (3)

³⁴ Ibid

³⁵ Omuojine. K, 'Dispute Resolution in Nigeria Football: The Need for a National Dispute Resolution Chamber' *African Sports Law and Business Bulletin* 2/2014

2.3 Legal and Institutional Framework for Management of Sports Disputes in Kenya

2.3 1 Sports Disputes Tribunal

The Sports Act³⁶ which is the principal legal instrument on sports in Kenya establishes the Sports Disputes Tribunal.³⁷ The jurisdiction of the Tribunal is set out under section 58 of the Act. The Tribunal is mandated to determine 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, such appeals include those against disciplinary decision and not being selected for a Kenyan team or squad. The jurisdiction of the Tribunal also extends to other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear and appeals from decisions of the Registrar under this Act.³⁸

While granting jurisdiction to the Tribunal, the Sports Act has taken cognizant of provisions of the Constitution of Kenya that requires Tribunals including the Sports Disputes Tribunal to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.³⁹ To this extent, the Act provides that the Tribunal may, in determining disputes apply alternative dispute resolution methods for sports disputes and provide expertise and assistance regarding alternative dispute resolution to the parties to a dispute.⁴⁰ While this provision is not construed in mandatory terms, it nevertheless *demonstrates an intention to promote alternative dispute resolution in sports disputes* (emphasis added).

Appeals against decisions of the Tribunal lie with the Court of Arbitration for Sport and the same cannot be challenged in national courts. However, they are subject to the

³⁶ No. 25 of 2013, Government Printer, Nairobi

³⁷ Ibid, S 55

³⁸ Ibid, S 58

³⁹ Constitution of Kenya, 2010, Article 159 (2) (c)

⁴⁰ Sports Act, No. 25 of 2013, S 59

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judicial review jurisdiction of the High Court pursuant to the provisions of articles 47 and 165 (6) of the Constitution of Kenya, 2010.

2.3.2 Athletics Kenya Arbitration Panel

The panel is established under article 40 of the constitution and Rules of Athletics Kenya which is the governing body for the sport of athletics in Kenya.

The panel is mandated to settle disputes or differences between the Executive and any member, or between one or more members.⁴¹ Disputes settled by the panel are non-disciplinary in nature and this excludes any dispute arising in the field of competition.⁴²

2.3.3 Football Kenya Federation (FKF) Constitution

The Constitution of Football Kenya Federation, which is the governing body for the sport of football in Kenya, contains provisions pertinent to arbitration. The Constitution seeks to give *priority to arbitration and limits involvement of ordinary courts in management of disputes related to the sport of football* (emphasis ours). To this effect, it provides that disputes within the football association in Kenya or disputes affecting football leagues, members of leagues, clubs, members of clubs, players, officials and other Association Officials shall not be submitted to ordinary courts, unless the FIFA regulations, the FKF Constitution or binding legal provisions specifically provide for or stipulate recourse to Ordinary Courts.⁴³ The constitution of FKF requires such entities to give priority to arbitration as a means of dispute settlement.⁴⁴

⁴¹ Constitution and Rules of Athletics Kenya, Article 40.3

⁴² Ibid

⁴³ FKF Constitution, Article 69 (1)

⁴⁴ Ibid, Article 69 (2)

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To give effect to this provision, the constitution of FKF provides that such disputes shall be taken to an independent Arbitration Tribunal recognised by Football Kenya Federation (FKF) or the Confederation of African Football (CAF) or to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.⁴⁵

3. CHALLENGES IN SPORTS MANAGEMENT

3.1 Doping

Doping is one of the most contentious issues in the sports arena across the globe. The World Anti-Doping Code defines doping as the occurrence of one or more of the anti-doping rule violations set out in the code.⁴⁶ These include presence of a prohibited substance in an athlete's sample, use or attempted use by an athlete of a prohibited substance, possession of a prohibited substance, evading or failing to submit to sample collection among other things.⁴⁷ In Kenya, the Anti-Doping Act defines doping as the use of prohibited substances and methods in any sporting activity whether competitive or recreational in order to artificially enhance performance.⁴⁸

Violation of anti-doping rules has serious consequences which include automatic disqualification of results and forfeiture of any prize, points or medals obtained in the competition.⁴⁹ A prominent case is that of Marion Jones an American athlete who won three gold medals and two bronze medals at the 2000 Olympic Games in Sydney, Australia but was stripped off the medals for admitting to doping violation.⁵⁰ Recently,

⁴⁵ Ibid, Article 69 (3)

⁴⁶ World Anti-Doping Code, Article 1, available at <https://www.wada-ama.org/en/what-we-do/the-code> (Accessed on 27/11/2019)

⁴⁷ Ibid

⁴⁸ Anti-Doping Act, No. 5 of 2016, S 2

⁴⁹ World Anti-Doping Code, Article 9

⁵⁰ Douglas D.D, 'Forget Me.....Not: Marion Jones and the Politics of Punishment' *Journal of Sport & Social Issues*, Volume 38 (No. 1), February, 2014, p 3-22

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one of Kenya's most celebrated athletes Asbel Kiprop who won a gold medal at the 2008 Olympic Games in Beijing, China in the 1,500 m category was banned for four years for a doping related offence.⁵¹

Doping continues to be a challenge since it affects the integrity of sports. However, some critics have questioned the severity of punishment imposed upon athletes found guilty of doping and the investigation process to curb this vice. Others have alluded to violation of the right to fair hearing in such investigations.⁵² Doping therefore constitutes a major dispute area in sports.

3.2 Taxation

Tax related disputes have been on the rise in the sports arena. This issue arises since an athlete may be plying his trade in an overseas country thus subject to two tax regimes, one in the overseas country and the other in his/her home country. Lionel Messi and Cristiano Ronaldo, two elite footballers, from Argentina and Portugal respectively have been embroiled in tax evasion cases with Spanish authorities during their football career in Spain.⁵³ These cases are common across the globe.

In Kenya, sports personalities are not exempted from tax and are subject to taxation pursuant to the provisions of the Income Tax Act. Where sports income is earned overseas by a sportsperson who is a resident of Kenya for tax purposes, such income is considered to have accrued in or to have been derived from Kenya and is therefore taxable in Kenya.⁵⁴ Under section 39 (2) of the Act, the tax paid overseas is offset

⁵¹ 'Asbel Kiprop: Former Olympic 1,500 m champion banned for four years for doping' available at <https://www.independent.co.uk/sport/general/athletics/asbel-kiprop-doping-ban-olympic-champion-1500m-a8879691.html> (Accessed on 27/11/2019)

⁵² Douglas D.D, Op cit

⁵³ Robert W. W, 'Tax Lesson's from Soccer's Messi & Ronaldo Tax Evasion Cases' *Forbes* available at http://www.woodllp.com/Publications/Articles/pdf/Tax_Lessons_From_Soccer.pdf (Accessed on 27/11/2019)

⁵⁴ Income Tax Act, Cap 470, S 3; See also Ohaga J.M and Kosgei F. C, 'Organisation of Sports Clubs and Sports Governing Bodies' *The Sports Law Review*, Edition 4, January 2019, available at

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against the tax computed locally on the income earned overseas. The sports person should however furnish evidence of tax paid overseas in order to be allowed to offset it against tax computed locally.⁵⁵ A clear understanding of the tax regime is thus necessary among sports personalities since it has been a major dispute area.

3.3 Employment Disputes

Under Kenyan law, an employee is defined as a person who is employed for wages or a salary.⁵⁶ Athletes especially those involved in team sports such as football and rugby fit in this category since they are under a contract with a specific club. The relationship between the athlete and the club is governed by the Employment Act which sets out principles on the employment relationship, rights and duties in employment, termination and dismissal. Consequently employment related disputes such as unfair dismissal and non-payment of wages are common in the Sports Disputes Tribunal in Kenya.⁵⁷

It is thus imperative to have an efficient mechanism for handling such sports related issues in order to promote the growth of sports.

4.0 USE OF ADR MECHANISMS IN MANAGEMENT OF SPORTS DISPUTES

Alternative Dispute Resolution (ADR) mechanisms including arbitration have now become the mainstream form of dispute management in sport related disputes across the world as evidenced by the sporting codes, rules and regulations that provide for these mechanisms. The foregoing discussion has demonstrated that the Court of Arbitration for Sport is granted jurisdiction by several international sports organisations

<https://thelawreviews.co.uk/edition/the-sports-law-review-edition-4/1177318/kenya> (Accessed on 27/11/2019)

⁵⁵ Ibid

⁵⁶ Employment Act, No. 11 of 2007, S 2

⁵⁷ Ohaga J.M and Kosgei F. C, Op Cit

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such as FIFA and IAAF to settle sports related disputes. The main reasons that make ADR mechanisms preferable over the courts in resolution of sports disputes is that such mechanisms can be expeditious, flexible, cost effective, confidential, result in a win - win situation in some instances as parties compromise, maintain and preserve business relations; and are conducted by people with expertise and experience in the relevant field of sport.⁵⁸

One of the advantages of Alternative Dispute Resolution mechanisms is confidentiality. In sports, there is the need by sportspersons and sports federations to avoid washing their dirty linen in public due to the publicity involved with sports.⁵⁹ This can be well cured by the use of ADR mechanisms which ensure that disputes are resolved within the sporting family.⁶⁰ ADR mechanisms and in particular arbitration have been heralded as mostly private and confidential.⁶¹ Parties are thus able preserve their secrets during and after the dispute resolution process. At the global level, the issue of confidentiality has been succinctly addressed by the Court of Arbitration for Sport (CAS) whose arbitration rules provide that the arbitrators and CAS undertake *not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS* (emphasis ours).⁶² Awards shall not be made public unless all parties agree or the Division President so decides.⁶³ This is unlike court proceedings which are open to the public thus negating the concept of confidentiality.

⁵⁸ Farai Razano, 'Keeping Sport Out of the Courts: The National Soccer League Dispute Resolution Chamber- A Model for Sport Dispute Resolution in South Africa and Africa' African Sports Law and Business Bulletin, No. 2 of 2014

⁵⁹ Cloete R (ed). 2005. Introduction to Sports Law in South Africa. LexisNexis Butterworths, Durban p205.

⁶⁰ Ibid

⁶¹ Kariuki Muigua, 'Alternative Dispute Resolution and Access to Justice in Kenya', Glenwood Publishers Ltd (2015)

⁶² Court of Arbitration for Sport, 'Code of Sports-related Arbitration' Rule 43, available at https://www.tas-cas.org/fileadmin/user_upload/Code_2019_en.pdf (Accessed on 27/11/2019)

⁶³ Ibid

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However, ADR mechanisms including arbitration suffer from several drawbacks that could affect their suitability in management of sports disputes. It has been argued that these mechanisms lack vigorous enforcement measures that are sometimes needed in dispute management.⁶⁴ Unlike ADR mechanisms, courts have powers to summon witnesses, grant orders and injunctions and execute its decisions. The remedy of contempt is available for violations of a court's decisions. These measures are essential in facilitating efficient dispute management by ensuring that orders and decisions of the courts are adhered to.⁶⁵ Further, through injunctions, a court is able to grant temporary reliefs pending the final determination of the dispute which may be necessary in preserving the subject matter of the dispute. ADR mechanisms such as mediation are not suitable when a party needs urgent protection like an injunction.⁶⁶

Further, there are no precedents in ADR and decisions made are not based on prior disputes.⁶⁷ However, at the global stage, sports dispute management benefits from *lex sportiva* which is the jurisprudence developed by CAS and acts as a guide in subsequent matters. On the other hand, courts rely on precedents where prior decisions by higher ranking courts are considered in deciding a dispute. This has the advantage of creating certainty in dispute resolution and it is *possible to predict the outcome of a dispute by looking at previous court decisions on disputes with the same facts* (emphasis ours). This advantage could be defeated in ADR which has the likelihood of creating uncertainty in dispute resolution since it is possible to have differing decisions on the same issues.

Finally, expeditious management of sports disputes through ADR mechanisms such as arbitration may be defeated where such disputes end up in court due to appeals. In Kenya, decisions of the Sports Disputes Tribunal may be appealed to the High Court.

⁶⁴ Owen M. Fiss, 'Against Settlement' *Yale Law Journal*, Volume 93, Issue 6 (1984)

⁶⁵ Ibid

⁶⁶ Kariuki Muigua, Op Cit

⁶⁷ Ibid

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Where this happens, then usual ills facing the judicial process especially delays emerge and this affects sports disputes management.

It is thus evident that despite of their unique advantages, ADR mechanisms suffer from several setbacks that could pose a challenge in sports dispute management.

5.0 EFFICACY OF ARBITRAL INSTITUTIONS IN FACILITATING MANAGEMENT OF SPORTS DISPUTES

The Court of Arbitration for Sport (CAS) plays an important role in setting global standards on settlement of sports disputes. In the absence of such an independent sports Tribunal, sports disputes would be managed by domestic courts or institutions where such disputes arose. This would likely result in conflicting decisions across jurisdictions owing to the differences in legal systems, culture and policy.⁶⁸ Further, where disputes relate to athletes, sports organisations or federations belonging to different nationalities, there a likelihood of bias and favoritism for those litigating in their home countries.⁶⁹ It has been argued that handing these disputes over to the CAS minimizes the potential for bias.⁷⁰ The process also guarantees fairness since CAS has no personal interest in the outcome of disputes giving parties to the dispute the benefit of having a neutral arbitrator that will administer fair results. Further, the CAS has the potential of facilitating efficient outcomes due to the skill and expertise of its arbitrators.⁷¹

⁶⁸ See Ian Blackshaw, *The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively Within the Family of Sport*, 2 ENT. L. 61, 61-62 (2003)

⁶⁹ Melissa Hewitt, 'An Unbalanced Act: A Criticism of How the Court of Arbitration for Sport Issues Unjustly Harsh Sanctions by Attempting to Regulate Doping in Sport' *Indiana Journal of Global Legal Studies*, Volume 22, Issue 2 (2015)

⁷⁰ Ibid

⁷¹ Ibid

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In making its decisions, the CAS has the duty of interpreting and applying rules and regulations established by sports governing bodies since disputes submitted to CAS would normally involve an athlete and such bodies. Consequently, CAS has over the years developed a rich jurisprudence in sports disputes which has been coined as *lex sportiva*.⁷² It has been argued that owing to the contractual principle of party autonomy, *lex sportiva* is the governing law in certain sports contracts.⁷³ To this extent, CAS has contributed in ensuring certainty and consistency in sports disputes management.

However, there are several concerns which may hinder the effectiveness of CAS in management of sports disputes. The location of CAS could impose huge costs on athletes or sports organisations during dispute settlement. Where a dispute has been lodged or referred to CAS, the parties will be expected to attend the proceedings in Lausanne, Switzerland where the CAS is located unless an ad hoc tribunal is formed in the area where such dispute arose. This creates the challenge of *accessibility and costs especially where attendance of witnesses is required*. Athletes and sports organisations may thus find themselves overburdened by costs. (emphasis ours)

Further, it has been suggested that there is a danger that some CAS actions and decisions could erode core national values. In rendering its decisions, there is a possibility that CAS will disagree with, rule against, or render interpretations that run counter to what athletes or sports organisations might have wanted, and what the democratic majority might prefer based on the concept of justice in their countries.⁷⁴ This is especially true in Africa where the traditional concept of justice was understood differently from the rest of the world. Justice processes were aimed at *restoration of relationships as opposed to punishment peace-building and parties' interests and not the*

⁷² De Oliveira. L , 'Lex Sportiva as the Contractual Governing Law' *The International Sports Law Journal* , Volume. 17, issue 1-2, December 2017

⁷³ Ibid

⁷⁴ Karen J. Alter, 'Delegating to International Courts: Self-Binding us. Other-Binding Delegation', 71 *Law & Contemp. Probs.* 37, 39 (2008)

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allocation of rights between disputants (emphasis ours).⁷⁵ Sports have always played an integral part in African societies. Games such as traditional wrestling, camel races and water games such as canoe and boat racing were deeply entrenched into the culture of African societies and provided occasions that brought the whole community together.⁷⁶ These games emphasized participation over competition.⁷⁷ This is partly true with modern sports due to commercialization of the sports. However, it can be argued that sports in Africa still play a crucial role in social cohesion and promote the value of inclusivity. An arbitral award rendered by CAS may not fully consider these issues.

A challenge also arises in respect of appeals against decisions by CAS. These decisions can only be appealed before the Swiss Supreme Court. Under Swiss law, only lawyers admitted to the Swiss Bar or lawyers authorized by an international treaty to practice in Switzerland may represent parties in actions to set aside arbitral awards.⁷⁸ Thus, where an athlete was represented before the CAS by a lawyer from his/her jurisdiction and decides to challenge the decision before the Swiss Supreme Court, the athlete will be required to seek the services of lawyer admitted to the Swiss Bar. This requirement is likely to erode the confidence of the athlete in the process due to difficulties that could arise in dealing with a lawyer from a different jurisdiction.

⁷⁵ Francis Kariuki, 'African Traditional Justice Systems' available at <http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf> (Accessed on 27/11/2019)

⁷⁶ Michael Hirth, 'Games, Sport and Tradition in West Africa' Available at <https://pdfs.semanticscholar.org/34c4/92af4481fe81512f71c9a06bb77fe1c08cda.pdf> (Accessed on 27/11/2019)

⁷⁷ Ibid

⁷⁸ Antonio Rigozzi, 'Challenging Awards of the Court of Arbitration for Sport' *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), pp. 217–265

6.0 THE SPORTS DISPUTES TRIBUNAL AND MANAGEMENT OF SPORTS DISPUTES IN KENYA

The enactment of the Sports Act, 2013 and the establishment of the Sports Dispute Tribunal marked an important step towards promoting sports arbitration in Kenya. The Tribunal has been operationalized and has heard and determined various appeals and disputes lodged before it in relation to several sports organizations such as *Kenya National Paralympic Committee, Kenya Rowing & Canoe Federation, Kenya Rugby Union and National Olympic Committee of Kenya* among others.⁷⁹ The Tribunal has contributed towards streamlining the operations of sports federations in the country through measures such as cancelling elections not held in accordance with the requisite rules and guidelines.⁸⁰ However, the operation of the Tribunal may be hindered by several challenges.

The wording of section 58 of the Sports Act raises several issues on the jurisdiction of the Sports Dispute Tribunal. The Tribunal derives jurisdiction from the statute but this is limited to rules by national sports organizations allowing appeals to the Tribunal and agreement between the parties.⁸¹ As framed, this provision poses a jurisdictional challenge since Sports organizations can avoid the jurisdiction of the tribunal within their rules.⁸² Further, section 58 (b) of the Sports Act poses a challenge in that parties have the power to determine the jurisdiction of the Tribunal. Where there is no such agreement, challenges on jurisdiction may be raised by either party in court. This was the issue in the case of *Dennis Kadito v Office of The Sports Disputes Tribunal & another [2017] eKLR*. In the case, the petitioner filed a claim before the Sports Disputes Tribunal seeking a commission of USD, 17500/= from Sofapaka Football Club in relation to

⁷⁹ Sports Dispute Tribunal decisions, available at <http://kenyalaw.org/kl/index.php?id=9711> (Accessed on 27/11/2019)

⁸⁰ See for example Kwalimwa, D, 'Sports Tribunal Cancels FKF Polls' *Daily Nation*, Wednesday, December 4, 2019

⁸¹ Sports Act, S 58 (a) and (b)

⁸² 'Growth of Sports Arbitration in Kenya and Globally' *Sports Monthly*, Issue 143, November 2019

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transfer of players. Despite serving the football club with the claim, it did not enter appearance or file a defence. The Tribunal heard the dispute in the absence of the football club 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 football club's failure to enter appearance and file a defence or submitting to the Tribunal's jurisdiction.

The petitioner challenged the decision in court on the basis that section 58(b) of the Sports Act is unconstitutional for violating Article 48 of the Constitution on access to justice. In dismissing the petition, the court decided that:

'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... 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.'

There is need to revisit section 58 (b) of the Sports Act to provide certainty on the jurisdiction of the Tribunal and avoid instances where a party to a dispute may be denied access to justice by failure of the other party to submit to the jurisdiction of the Sports Disputes Tribunal.

Another issue that emerges from the wording of section 58 of the Sports Act is that the Tribunal only enjoys appellate jurisdiction. It can only exercise original jurisdiction upon agreement of parties to a dispute.⁸³ It would have been prudent to at least confer

⁸³ Ibid, S 58 (b)

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original jurisdiction on specific matters to the Tribunal.⁸⁴ The Act creates a challenge by giving wide discretion to parties to determine which disputes can be determined by the Tribunal.⁸⁵

Another notable shortcoming in the Sports Act, 2013 is that the Act does not specify the remedies that can be granted by the Tribunal upon hearing a dispute. The upshot of this shortcoming is that a decision of the Tribunal can be challenged on the basis of the remedy granted.

There is thus need to revisit the Sports Act, 2013 to clarify these issues and make the Tribunal more vibrant and effective.

7.0 WAY FORWARD ON SPORTS DISPUTES IN AFRICA

The foregoing discussion has demonstrated the nature of sports disputes and the need for efficient management of such disputes. The discussion has also examined the efficacy of arbitration in management of such disputes by analyzing its advantages and disadvantages. With the increasing commercialisation of sports, disputes are bound to increase due to the growing need to re-evaluate and clarify sports relationships.⁸⁶ However, as demonstrated, there are several shortcomings in both the legal and institutional framework on sports arbitration which may hinder the efficacy of the process of sports dispute management. The paper proposes reforms on the issues raised as discussed hereunder.

⁸⁴ 'Growth of Sports Arbitration in Kenya and Globally' Op Cit

⁸⁵ Akech B, 'Public Regulation of Sports in Kenya' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423247#references-widget (Accessed on 27/11/2019)

⁸⁶ Farai Razano, 'Keeping Sport Out of the Courts: The National Soccer League Dispute Resolution Chamber- A Model for Sport Dispute Resolution in South Africa and Africa' Op Cit

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7.1 Efficient Management of Sports

Sports disputes in Africa are majorly as a result of mismanagement by the various stakeholders involved such as clubs, sports organisations, players and governments. Sports in Africa have suffered several setbacks as a result of poor management and interference by movement officials.⁸⁷ There have been numerous cases of countries in Africa being banned from international competitions by federations such as FIFA due to government interference such as Kenya in 2006 and Nigeria in 2010.⁸⁸ Further, cases of mismanagement of sports resources have also been documented such the case of the Kenyan team at the 2016 Olympic Games in Rio de Janeiro, Brazil.⁸⁹ There have also been instances of clubs mistreating their players through instances such as non-payment of wages and summary dismissal.⁹⁰

Such issues ultimately contribute to sport related disputes. Efficient management of sports becomes necessary to prevent some of these disputes. African sports organisations should enhance sports administration in their respective countries and promote the value of sports. National governments should also promote sports through allocation of sufficient resources to avoid instances where sports teams have often found themselves stranded while on national duties abroad due to insufficient resources. Corruption which is also a contributing factor in some of these disputes

⁸⁷ Majan E, and Osoro N, 'Sports Management and Government Interference in Africa' *African Sports Law and Business Bulletin* 1/2013

⁸⁸ Ibid

⁸⁹ The Standard, 'Two Kenyan Athletics Officials in Court over Rio Games fiasco' available at <https://www.standardmedia.co.ke/article/2000213873/two-kenyan-athletics-officials-in-court-over-rio-games-fiasco> (Accessed on 27/11/2019)

⁹⁰ Africa Centre for Open Governance (africog), 'The crisis of football management in Kenya' available at <https://africog.org/wpcontent/uploads/2010/07/The20crisis20of20football20management20in20Kenya1.pdf> (accessed on 27/11/2019)

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especially among sports federations should be curbed through prosecution of those involved in such vices.⁹¹

Further, there is need for efficient post retirement measures for professional sports persons in Kenya. It has been argued that for many athletes, retirement is an idea that is not thought about in great detail.⁹² The process induces dramatic changes in social, personal and occupational lives of sportspersons which could have negative impacts on them.⁹³ In some instances, the athletes go through poverty and substance abuse.⁹⁴ Support can be given to athletes through career and financial advice upon retirement. Retired athletes should also be supported through measures such as appointments in sports federations and teams. Further, professional sports persons should consider establishing and joining associations that can protect their welfare. A good example can be drawn from FIFPRO which represents professional footballers at the global stage.⁹⁵ This will enhance the image of sports in the country and encourage other people to take up the profession.

7.2 Adherence to Sports Rules by Athletes

One of the major causes of sports disputes discussed relates to the violation of sports rules by athletes such as anti-doping rules and tax rules. Athletes should be encouraged to abide by such rules in order to enhance integrity in sports. However, some athletes found themselves engaging in such acts of violation due to being misled by their agents

⁹¹ Liwewe P, 'The Challenges Facing African Football' *The Africa Report* available at <https://www.theafricareport.com/9084/the-challenges-facing-african-football/> (accessed on 27/11/2019)

⁹² 'Post Retirement for Professional Sports Persons in Kenya' *Sports Monthly*, Issue 143, November 2019

⁹³ Rintaugu. E et al, 'From Grace to Grass: Kenyan Soccer Players' Career Transition and Experiences in Retirement' *African Journal of Physical and Health Sciences (AJPHEs)*, Volume. 22 (1:1), March 2016, p 163-175

⁹⁴ See the example of Henry Rono; Namunwa. K, 'Stranded abroad, legendary Henry Rono appeals for help to return home' *Business Today*, January 23, 2019, available at <https://businesstoday.co.ke/stranded-abroad-legendary-henry-rono-appeals-help-return-home/> (Accessed on 04/12/2019)

⁹⁵ See the Activities of FIFPRO at <https://www.fifpro.org/en> (Accessed on 27/11/2019)

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or coaches for their selfish gains.⁹⁶ However, it is the athletes who bear the heaviest burden in form of sanctions while some of the agents walk away scot free.⁹⁷ There is need for the CAS, WADA and other sports tribunals to consider such cases and protect innocent athletes who might have been exploited by third parties by preferably imposing lesser sanctions than those prescribed.

7.3 Strengthening National Sports Dispute Management Mechanisms

Since disputes are bound to occur even where sufficient measures have been implemented to curb them, it is imperative to have efficient mechanisms to deal with them. Thus, national sports disputes management mechanisms in Africa need to be strengthened in both the legal and institutional dimension. The example of the Sports Disputes Tribunal in Kenya highlights that the operation of such institutions may be hindered by loopholes in the legal instruments establishing them. It is essential for such laws to have the input of sports experts. Further, it is important to strengthen the capacity of sports tribunals through allocation of resources and efficient manpower.⁹⁸

National sports federations should endeavour to effectively utilize their internal dispute management procedures which recognise ADR mechanisms such as negotiation and mediation. This is to prevent such disputes from escalating to the CAS.

African countries should strengthen However, unlike Kenya which has made progress through the establishment of a Sports Tribunal, not all countries in Africa have done so. In South Africa, proposals have been made for the establishment of an ad-hoc Sport Arbitration Tribunal. Proponents of this idea have argued that such a Tribunal will be able to manage disputes in the sports industry expeditiously and promote the growth of

⁹⁶ Douglas D.D, 'Forget Me.....Not: Marion Jones and the Politics of Punishment' Journal of Sport & Social Issues, Volume 38 (No. 1), February, 2014, p 3-22

⁹⁷ Ibid

⁹⁸ Mehrotra A 'The need for better dispute resolution systems in Indian sport and the Government's new Guidelines' Law in Sport, November 2016

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sports in South Africa.⁹⁹ This argument has also been advanced in Nigeria where suggestions have also been made for the establishment of a sports tribunal to help athletes and sports practitioners get a fast and professional judgment on sports-related issues.¹⁰⁰ It has been argued that the conventional court in the land cannot address sports related issues like a sports tribunal.¹⁰¹ Establishment of sports tribunal can go a long way in facilitating management of sports disputes in Africa.

African countries should also consider establishment of sports courts due to the advantages which have been discussed including availability of efficient enforcement mechanisms and temporary remedies. It has also been asserted that courts can play an oversight role in terms of public law and maintain checks and balances in sport through review of decisions of sports organisations and bodies.¹⁰² However, this could be problematic due to the shortcomings associated with litigations such as delays and costs.

7.4 Setting up a CAS Platform in Africa

CAS has previously set up ad hoc divisions for specific sporting occasions in various parts of the world. CAS can further enhance its operation by decentralizing its activities to Africa. This is to cure against the challenges of accessibility and costs that face the current set up. This can be implemented by setting up basis infrastructure such as registries in pilot countries. Further, CAS can embrace the use of technology such as video conferencing when conducting hearing sessions to limit the requirement of sportspersons and other parties having to travel all the way to Switzerland to attend such hearings.

⁹⁹ Lombard F, 'Committee Told That Sport Arbitration Tribunal is much Needed' Parliament of the Republic of South Africa, available at <https://www.parliament.gov.za/news/committee-told-sport-arbitration-tribunal-much-needed> (Accessed on 27/11/2019)

¹⁰⁰ Agbakoba calls for Sports Tribunal in Nigeria, 'The Guardian, 19/11/2019' available at <https://guardian.ng/sport/agbakoba-calls-for-sports-tribunal-in-nigeria/> (Accessed on 27/11/2019)

¹⁰¹ Ibid

¹⁰² Razano F, 'Judicial Review in South Africa-How Local Courts Approach Sports Disciplinary Decisions' *Law in Sport*, 05 February 2019

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7.5 Capacity Building in Sports Law

The field of sports law is yet to be fully embraced by most legal practitioners in Africa. With the important role that sports play in a society and the increasing commercialisation of sports, there is need for experts in the field of sports law to aid in the management of legal issues that continue to emerge from this field. Emerging legal issues in sports such as termination of sports contracts, disputes between teams over transfer of players and violation of rules e.g doping rules will be better handled by experts on such matters.¹⁰³ Appointments to the various sports tribunals should be based on knowledge and experience on issues related to sports. A good example is the Court of Arbitration for Sports (CAS) whose arbitrators are chosen for their specialist knowledge of arbitration and sports law. There is need to enhance training of legal professionals across Africa in sports law. This can be achieved by making Sports law part of the curriculum in legal institutions across the continent. Further CAS can provide tailor made courses in sports arbitration in collaboration with various arbitral institutions such as the Chartered Institute of Arbitrators (Kenya) Branch and Nairobi Centre for International Arbitration.

7.6 Creating Awareness among Sports Personnel on Sports Related Issues

Some of the sports related issues such as the issue of tax evasion and doping are partly due to lack of awareness on such issues by athletes. There is need for sensitization on these issues by sports federations, the government, clubs and stakeholders to enhance awareness among athletes. With such information, it would be easier for athletes to deal with the issues and avoid sports disputes.

¹⁰³ Mitten M, and Opie H, 'Sports Law': Implications For The Development Of International, Comparative, And National Law And Global Dispute Resolution' Marquette University Law School Legal Studies Research Paper Series Research Paper No.10-31, June 2010

8.0 CONCLUSION

Sports are essential and form part of culture in African societies. There is need to create an enabling environment for the growth of sports. With the rise of sports disputes, it is important to have such disputes settled expeditiously and minimise their impact on development of sports. It is therefore vital that conflict management mechanisms be put in place to ensure that sports go on smoothly and the rights and interests of all parties are upheld.

It is also necessary to take into account specific and deferring cultural variances in dealing with sports disputes. Africa is a major contributor to global sporting activities. Promotion of sports arbitration in Africa is thus timely. It is an ideal that is worth pursuing now.

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