



**Burugu & another v Okwama & 4 others (Constitutional Petition  
E016 of 2023) [2024] KEHC 14656 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14656 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CONSTITUTIONAL PETITION E016 OF 2023**

**S MBUNGI, J**

**NOVEMBER 21, 2024**

**BETWEEN**

**ERICK BRIAN BURUGU ..... APPLICANT**

**AND**

**EDWARD OKWAMA ..... PETITIONER**

**AND**

**EDWARD OKWAMA ..... 1<sup>ST</sup> RESPONDENT**

**MILESTONE GAMING LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**STANDARD GLOBAL EAST AFRICA LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY ..... 4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

**Background.**

1. The Petitioner filed a Petition dated 21<sup>st</sup> August, 2023 challenging paragraph 4A of Part II of the First Schedule of the *Excise Duty Act* of 2015, which imposes a 12.5% excise duty on players for placing a bet, regardless of whether the player wins or loses. The Petitioner contended that the impugned provision contravenes public finance principles as outlined in Article 201 of *the Constitution* of Kenya, 2010 (*the Constitution*).
2. The Petitioner further contended that the impugned provision contravenes the prescription of taxes under Articles 209 and 210 of *the Constitution* violates various constitutional provisions, including Articles 2 (1) (2) (4), 6 (2), 10, 26, 27, 28, 40, 41 (1) (2) (b) and 4 (a), 43, 46 (1) (c), 110, 186, 189, 201, and 210, as well as established international principles of taxation.



3. The Petitioner sought the following prayers inter alia that the Court declares that the imposition of 12.5% excise duty under paragraph 4A of Part II of the First Schedule of the Excise Duty Act of 2015 is discriminatory and violates the Petitioner's right to property hence unconstitutional. The Petitioner further sought to bar the Kenya Revenue Authority from collecting the impugned tax.

4. The court also gave interim conservatory orders on the 21.08.2023.

#### **Facts.**

5. The applicant herein filed an application dated 30.08.2023 under Certificate of Urgency in this court seeking the following orders:

I. Spent

II. This Honorable court be pleased to allow joinder of the Applicant herein as a Co-Petitioner in the proceedings herein.

III. Pending hearing and determination of the Application herein, the Court be pleased to order that the interim Order issued on 21<sup>st</sup> August, 2023 and any extension of the said Order as may be granted by the Court shall apply to the proposed Respondents.

IV. This Honorable Court be pleased to join the following entities as Respondents in the Petition and Application dated 21<sup>st</sup> August, 2023.

a. Shop and Deliver (K) Limited trading as 'Betika'

b. Kereko Holdings Limited trading as 'OdiBets

c. Reys and Meyers Limited trading as 'Patakumi'

d. Mozartbet (K) Limited trading as 'Mozartbet'

e. Nuntis Holding Limited trading as '22Bet'

f. South Cape Investment Limited trading as 'Palmsbet

g. Nanovas Investment Limited trading as 'BetPawa'

h. Playco Technologies Limited trading as 'Shabiki'

i. Advanced Gaming Limited trading as 'IXBet

j. Rainbow Limited trading as 'BangBet'

V. That the Court be please to order and direct that the Petition filed herein or an Amended version and the application dated 21<sup>st</sup> August 2023 be served upon the said proposed Respondents.

VI. The Court be pleased to grant the Applicant leave to file pleadings and Submissions in the matter.

VII. Costs of this Application be provided for.

6. The application was premised on the following grounds:

a. The 1<sup>st</sup> Respondent herein filed a Petition dated 21<sup>st</sup> August, 2023 together with an Application under a Certificate of Urgency seeking among other Orders restraining the 1<sup>st</sup>



and 2<sup>nd</sup> Respondents from deducting 12.5% excise duty from wagers and participants of sport gaming activities.

- b. The said 1<sup>st</sup> and 2<sup>nd</sup> Respondents are not the only players in the gaming and sport betting industry as there are many other entities that have been issued with book makers licences by the Betting Control and Licencing Board. The Applicant is aware of the following entities; Shop and Deliver (K) Limited trading as 'Betika', Kereko Holdings Limited trading as 'OdiBets, Reys and Meyers Limited trading as 'Patakumi, Mozartbet (K) Limited trading as Mozartbet, Nuntis Holding Limited trading as '22Bet, South Cape Investment Limited trading as 'Palmsbet, Nanovas Investment Limited trading as 'BetPawa', Playco Technologies Limited trading as 'Shabiki, Advanced Gaming Limited trading as 'IXBet and Rainbow Limited trading as 'BangBet.
  - c. The Applicant participates in betting activities through online platforms offered by the entities listed above and is also aware many other Kenyans are also involved in sport betting through the entities listed above which entities are also under an obligation to deduct and remit to the 3<sup>rd</sup> Respondent (KRA) 12.5% excise duty and other applicable taxes from wagers.
  - d. The first order among the Orders issued by this Honorable Court is directed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents only to the exclusion of all other entities involved in the sport betting industry in Kenya. The Applicant is apprehensive that the said entities shall continue to deduct excise duty and retain the proceeds for themselves since they are under no obligation to remit it to the 3<sup>rd</sup> Respondent (KRA) unless the order issued by this Honorable Court expressly directs them not to do so.
  - e. The Court is empowered to join any party who ought to have been a made a party to the proceedings or is a necessary party for the just and effective determination of issues in controversy.
  - f. By orders applying to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents only, it shall be discriminatory and prejudicial to other Kenyans using other platforms for gaming as they shall be subjected to deductions which players in 1<sup>st</sup> and 2<sup>nd</sup> Respondents are at the moment exempted from.
  - g. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents who have been offered a respite from deducting the 12.5% excise duty shall have unfair advantage over others entities who have not been included in the Petition. They shall also have an opportunity to be heard and the rest of the entities may not be afforded such an opportunity since they have not been made parties to the Petition.
  - h. Whereas the Applicant supports the Petition by the petitioner, he has an identifiable and distinct interest from the petitioner in the matter to the extent he seeks to prosecute his case in the presence or with the full participation of all parties who have a stake in the provisions of the law which the Petition has challenged
  - i. It is in the paramount interest of justice that the Applicant be granted leave to join the proceedings as a Co-Petitioner together with the identified entities engaged in sport betting and gaming in Kenya.
7. Vide grounds of opposition dated 04.09.2023, the 4<sup>th</sup> respondent(KRA) opposed the application stating that the applicant herein had not demonstrated his stake in the matter or the outcome or what prejudice he would suffer if not enjoined as a co-petitioner.
  8. The 4<sup>th</sup> respondent further submitted that the applicant had not demonstrated that his presence was necessary to enable this court to effectively adjudicate and finalize the petition.



9. Further, the 4<sup>th</sup> respondent stated that the application was bad in law, since the applicant sought to amend or vary the orders issued by the court on 21.08.2023 by extending it to 3<sup>rd</sup> parties who are not part of the petition who are purported to be affected by the order but have not sought to be enjoined as parties in the proceedings.
10. The 4<sup>th</sup> respondent submitted that the applicant cannot seek to enjoin third parties, who are legal persons, with capacity to seek to be enjoined in the petition in their own right, when he himself is not a party to the petition and has not been enjoined as the co-petitioner.
11. The 4<sup>th</sup> respondent stated that the applicant had not demonstrated his nexus or locus standi as relates to the third parties he sought to enjoin who have not appointed the applicant as their agent or legal representative.

### **Analysis.**

12. I have looked at the application, the supporting affidavit, the grounds of opposition filed by the 4<sup>th</sup> respondent and the petition itself (limited to purposes of making a determination on whether to join the applicant as a co-petitioner).
13. The issue for determination is whether the applicant has met the threshold required for a party to be enjoined as a party in ongoing proceedings.

### **The Law.**

14. The law on joining parties is entrenched under Order 1 Rule 10 (2) of the Civil Procedure Rules and Rules 7 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
15. Order 1 Rule 10(2) of the Civil Procedure Rules provides as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
16. Rules 7 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 states: “Interested party.
  7.
    - (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party. (2) A court may on its own motion join any interested party to the proceedings before it.”
17. The said provisions empower the court to join a party on the application by a party or Suo Moto to participate in proceedings where they have an identifiable stake in the proceedings.
18. This Honorable Court is required to evaluate the importance of joining a party to a suit and the relevance of the joinder in the just determination of the suit.



## Case Law.

19. The supreme court in *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR set out the elements to be established by a party in order to be successful in an application for joinder. At paragraph 37 the court said;

“ [37] From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party: One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

20. The Court of Appeal in *Mombasa COA App No. 15 Of 2015 JMK V MWM & another* [2015] eKLR quoted with approval the Court of Appeal of Tanzania in the case of *Tang Gas Distributors Ltd -v- Said & Others* [2014] EA 448 which echoed the Order 1 Rule 10 (2) of the Civil Procedure Rules: stated that:

“...the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage ...”

21. In the case of *Civicon Limited -v-Kivuwatt Limited and 2 Others* [2015] eKLR it was held as follows:

“...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial...”



22. In the case of Julius Meme -v- Republic & another [2004] eKLR (Supra) the court in establishing that it was empowered to direct joinder of parties in such a way as to "enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit" it was held as follows:

".... So important is this principle that, in our view, the participation of interested parties in constitutional litigation should never be kept under the restrictions of any technical rules. As constitutional interpretations and litigations are important matters embraced by the High Court's jurisdiction, we hold that this Court must retain a broad discretion for entertaining applications such as the one that has been brought by the Kenya Anti-Corruption Commission, by way of chamber summons... "

### **Determination.**

23. The applicant herein faults the petitioner for not including all the entities who are players in the gaming and sports betting industry but only sued the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the petition because he participates in betting activities through online platforms offered by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents therefore discriminating other entities who are also under obligation to deduct and remit to the 4<sup>th</sup> respondent (KRA) 12.5% excise duty and other applicable taxes from wagers.
24. He further submits that the conservatory order only gives a respite to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the petition but not other players in the betting and gaming industry.
25. The applicant as a sport betting person, is directly affected by the provisions of paragraph 4A part 2 of the first Schedule of the Excise Duty Act, 2015, just like the petitioner. But the petitioner in his petition has not listed the entities the applicant engages in the sport of betting like the ones listed in his application, yet the petitioner in his petition (paragraph 9), states: "The Petitioner is petitioning this Honorable court under Article 22(1), (2)(c) as read with Article 258(1), (2) of the Constitution in his own interest as a sports enthusiast and in the interest of the general public and the Kenyan youths involved in the sport betting activities to protect their rights which have been violated and/or threatened with violations by the impugned Section."
26. I find the inclusion of the applicant as a co-petitioner will assist in bringing in more players in the petition which will afford the court the opportunity to sufficiently and completely establish and resolve the alleged challenges faced by the petitioner and other players in the industry brought about by the operation of paragraph 4A part 2 of the first Schedule of the Excise Duty Act, 2015 as amended by the Finance Act, 2023.
27. Therefore, his prayer to be enjoined as a co-petitioner is allowed. (prayer 2)
28. Prayer (3), (4) and (5) are declined for the entities he wants to be joined as respondents were not parties to the petition at the time the conservatory orders were issued.
29. On prayer (4), Order 1 Rule 10(2) of the Civil Procedure Rules in part states:
- "...The court may at any stage of the proceedings, either upon or without the application of either party..." The entities listed cannot be joined as respondents (parties) in the petition and the application dated 21.08.2023 for at the time the applicant sought for the enjoinder he was not a party to the petition. It is only after him being made a party, that he can move the court for such orders.
30. On prayer (5), the applicant since he has been made a co-petitioner is at liberty to proceed with the petition as it is or make amendments as he deems fit.



31. On prayer (6), the applicant having been made a co-petitioner enjoys the rights for a party in a suit just like any other party and is given 14 days to file whatever he may want to file within 14 days and serve all the parties. Any party who wishes to respond shall also have 14 days to respond after service.
32. No orders as to costs. The petition is a public interest litigation.
33. Right of appeal 30 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024.**

**S.N MBUNGI**

**JUDGE**

**In the presence of:**

Applicant – absent

Edward Okwama the petitioner present online

Mr. Limiso and Judith Kithinji for the 3<sup>rd</sup> respondent present

Mr. John Ochieng for the two alleged contemnors present

Mr. Mureithi for Level X Ltd present online

Mr. Mola holding brief for Mr. Ndolo for the 1<sup>st</sup> Respondent and also appearing for the 2<sup>nd</sup> Respondent present online.

Mr. Kiilu for the proposed 5<sup>th</sup> Respondent present online.

Mr. Kang'ethe holding brief for Mr. Simiyu for the 4<sup>th</sup> Respondent present online

No appearance for the Intended Interested Party/Applicant

Court Assistant – Fred Owegi

