



**Republic v Betting Control and Licensing Board; Safaricom PLC & 3 others  
(Interested Parties) (Judicial Review Miscellaneous Application E061 of 2020)  
[2022] KEHC 13024 (KLR) (Judicial Review) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13024 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E061 OF 2020  
AK NDUNG'U, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**BETTING CONTROL AND LICENSING BOARD ..... RESPONDENT**

**AND**

**SAFARICOM PLC ..... INTERESTED PARTY**

**BHARTI AIRTEL NETWORK (K) LIMITED ..... INTERESTED PARTY**

**COMMUNICATIONS AUTHORITY OF KENYA ..... INTERESTED PARTY**

**PEVANS EAST AFRICA LIMITED ..... INTERESTED PARTY**

**RULING**

1. Before court is the notice of motion dated August 5, 2022 and one dated August 8, 2022.
2. The notice of motion dated August 5, 2022 was filed by Sabrina Kanini, Peter Kanaiya and Paul Njaga. Peter Kanaiya and Paul Njaga have since withdrawn from the application leaving Sabrina Kanini as the sole applicant.
3. The motion dated August 5, 2022 seeks orders:
  1. Spent
  2. The applicants in this application, be granted leave as a matter of course to bring the prayers in this application before this honourable court.



3. There be a temporary stay of any further proceedings or substantive determination of this cause pending the inter partes hearing and determination of this application. In particular, there be a stay of the ruling scheduled to be delivered on the September 22, 2022.
  4. This honourable court be pleased to review and set aside the ruling of the honourable lady Justice Pauline Nyamweya in this matter, dated and signed at Mombasa on the February 17, 2022 (then dated and delivered at Nairobi on the February 21, 2022), in its entirety.
  5. This honourable court be pleased to hold that the consent dated the May 26, 2022 between the *ex parte* applicant and the respondent is illegal, fraudulent and an aberration of justice and therefore null and void *ab initio*, as it seeks to subvert justice by circumventing the express mandatory provisions of the law as laid down by the *Betting Lotteries and Gaming Act* (cap 131).
  6. In furtherance of the order in prayer 5 hereinabove, this honourable court be pleased to strike out the consent dated the May 26, 2022 as between counsel for the *ex parte* applicant and counsel for the respondent herein.
  7. This honourable court be pleased to lift and discharge unconditionally forthwith the order in the impugned ruling dated and signed on the February 17, 2022 holding the applicants and other members of the board of the betting control and licensing board are in contempt of court.
  8. Costs of this application be provided for.
4. In a nutshell, the gist of this application is that Sabrina Kanini is a member of the board of the betting control and licensing board. She impugns a ruling of this court (Nyamweya J, as she then was) dated February 17, 2022 at Mombasa and delivered by me on February 21, 2022 which ruling found Sabrina and the other members of the board in contempt of court for allegedly disobeying an order of the court given on the November 16, 2020.
  5. Sabrina urges that the ruling of the Hon Nyamweya, J (as she then was) dated February 17, 2021 was given pursuant to *inter alia*, an application by the *ex parte* applicant, Milestone Games Limited, which was based on an alleged disobedience of the order of the court given on the December 3, 2020 and not the order given on November 16, 2020.
  6. For a raft of reasons given in the grounds and supporting affidavit the applicant seeks a review of the ruling dated February 17, 2022.
  7. The applicant challenges a consent concluded, signed and filed by counsel for the *ex parte* applicant and senior state counsel representing the respondent which consent is intended to be adopted by the court. That consent, it is urged, reaffirms that the applicant and other directors were found in contempt via a ruling of court dated February 17, 2022 and the consent is intended to purge the contempt of court.
  8. The applicant denies ever having been contacted regarding the content of the said consent and has not approved the terms thereof in any way.
  9. The applicant seeks a review and setting aside of the ruling dated February 17, 2022.
  10. The application dated August 8, 2022 is by Joy Masinde. Joy is also a member of the board of the betting control and licensing board. Her application and the grounds in support as well as the



supporting affidavit mirror the application dated August 5, 2022 almost word for word and I need not reproduce the same here, at least, not at this stage of the proceedings.

11. When these 2 applications came up for directions before court on the August 15, 2022, Mr Otieno for the applicant was of the view that the application should be left in abeyance awaiting a ruling of court on the adoption of a consent which ruling was slated for the September 22, 2022. Mr Macharia held a different view. Directions were given that the issue be ventilated through brief oral submissions by counsel on August 30, 2022.
12. Mr Macharia on his part held the view that his clients had been found in contempt. Contempt is personal to them. He asserted that the members of the board seek to be heard in their personal capacity.
13. Mr Otieno in his submissions stated that the main issue is that the primary parties in the dispute have entered a consent and have complied with the terms of the consent and the license has been issued. The applicant is claiming nothing from the court. Only an administrative issue of adopting the consent is pending. It is not appropriate when a primary party is being stopped to close or settle their case. If there be some grievance that the parties have, their right to access to justice remains. They can file their claims as they desire.
14. He urged that it is in bad faith for the parties to say that they were not aware of the orders they seek to review. Counsel urges that if the court was to be satisfied that a consent be entered, the matter will remain settled. Further, that the remedy sought was against the board as a corporate body. A dissenting member of the board cannot oppose the board's decision.
15. In his submissions, Mr Macharia states that the question of the consent is material to the two applications. The matter herein is not a private one per se. It is a judicial review with public interest involved. Parties who were supposed to be part of the decision making were not involved.
16. He asserts that the consent seeks to compromise the ruling on the finding on contempt. In all fairness, the applicants should be heard on the question of the terms of the consent. Counsel urges that blocking the hearing of the current applications does not serve the interests of justice. He acknowledges that it is nearly impossible to set aside a consent. He states that no prejudice, shall be occasioned to the respondents should the applications be heard.
17. On his part, Mr Wanjohi associated himself with the sentiments of Mr Otieno. The respondent board was found in contempt. He urges that there has been a series of serious meetings and the contempt was purged. The board members had affidavits sworn in opposition of the contempt application. They are coming late in the day when there is no suit before the court. If the applicant wishes to withdraw the matter, that should be allowed. The parties have a leeway to ventilate their issues.
18. Mr Banji associated himself with the submissions of Mr Otieno and Mr Wanjohi.
19. Mr Khayega stated that the principal parties are the *ex parte* applicant and the respondent. They have concluded the matter. They cannot be forced into the matter. No one's rights are taken away. Any aggrieved party can pursue their rights elsewhere. Counsel for the applicant has not stated how the application will be rendered nugatory. Counsel added that arguments on whether consent should be adopted have already been made and in his view, there is nothing different from what is now placed before court and the earlier arguments on consent.
20. Mr Gatheru submitted that as a judicial review judge, the court has no powers to issue some of the prayers sought as per the consent. He urges that the consent seeks to insulate the applicant from future infractions. The JR matter has not been heard to the end. The court should not allow illegalities.



- Counsel submits that Mr Macharia’s clients should come on board. If the *ex parte* applicant wishes to withdraw the matter, there would be no objection.
21. In rejoinder, Mr Otieno emphasized that the dispute between the applicant and respondent has been settled.
  22. I have considered the subject applications and submissions by learned counsel. Of determination is what directions are appropriate in the circumstances of this case.
  23. Granted, there is a consent filed on record between the *ex parte* applicant and the respondent who indisputably are the primary parties in this matter. Sabrina Kanini and Joy Masinde are members of the respondent and they together with other board members were found to be in contempt of the orders of this court. They seek through the applications dated August 5, 2022 and August 8, 2022 respectively to challenge the decision of the court that found them in contempt.
  24. The legal challenge to the finding of a court is a right of any person who is adversely affected by the order of the court. It is stated by Mr Wanjohi that the contempt has been purged by the board. The applicants in the subject applications deny this, indeed deny ever being in contempt. That issue can only be resolved upon hearing the parties.
  25. It matters not how weak or frivolous the applications may seem to be in the eyes of the other parties in the litigation. The right to be heard is inalienable. The applicants are personally directly affected by adverse orders that found them to be in contempt of court. The right to be heard in those circumstances becomes more pronounced.
  26. Notably, the applications dated August 5, 2022 and August 8, 2022 are restricted to challenging the finding of the court on contempt against them. They are in no way forcing the *ex parte* applicant to sustain the suit.
  27. The right to a fair hearing is enshrined in article 50(1) of the [Constitution](#). The article provides:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
  28. The right to be heard was reiterated in the case of [Mbaki & Others v Macharia & another](#) (2005) 2 EA 206, where the court stated:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”
  29. In the case of [Martha Wangari Karua v IEBC](#), Nyeri civil appeal No 1 of 2017, the Court of Appeal held as follows:

“The rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.”
  30. Notably, the applicants have challenged the propriety of the consent filed between the *ex parte* applicant and the respondent. The applicants are members of the respondent.



- 31. The Betting Control and Licensing Board is established under section 3 of the [Betting Lotteries and Gaming Act](#); cap 131 Laws of Kenya which section also governs its operations. The powers of the board are provided under s 4 of the Act.
- 32. From a reading of the applications before the court, it is only upon hearing the parties on the applications dated August 5, 2022 and August 8, 2022 that this court would satisfy itself that the consent filed is regular and within the law governing the board.
- 33. I inevitably make directions that the applications dated 5<sup>th</sup> August and August 8, 2022 be heard. The applicants to serve (where not already served) the applications within the next 3 days. Responses be filed within 7 days of service. The applications shall be disposed of by way of written submissions. The applicants to file within 7 days of service of responses and the respondents and interested parties within 7 days of service of rival submissions. The matter be mentioned on a date suitable to all the parties.

**DATED SIGNED AND DELIVERED THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022**

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**A.K. NDUNGU**  
**JUDGE**

