



**Republic v Betting Control and Licensing Board; Safaricom Plc & 3 others  
(Interested Parties) (Judicial Review Miscellaneous Application E061 of 2020)  
[2022] KEHC 13093 (KLR) (Judicial Review) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13093 (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 the court is the question whether a consent dated May 26, 2022 entered into between the ex parte applicant on the one hand and the respondent should be adopted as orders of this court. I reproduce the consent here for ease of reference:

' Whereasthe honourable court vide a ruling issued on the February 21, 2022 found the board members of the respondent in contempt of court and directed that the act of court be purged within a period of 60 days thereof; the parties in execution of the orders of the honourable court enter into this agreement to facilitate the full implementation of the orders of the honourable court and to finally settle the dispute herein.

The parties hereby agree by consent;



1. That the applicant shall supply the respondent with all the returns for the FY 2020/2021 and FY 2021/2022.
2. That the applicant provide the respondent with evidence of payment of relevant taxes to date.
3. That the applicant all the statutory application forms for renewal of its licenses for the period the respondent had not issued it with a license or had its license illegally revoked and in particular supply the respondent with the following: Application form for renewal of bookmakers license for FY 2021/2022. Application form for renewal of bookmakers license for FY 2022/2023. This will be submitted upon the lapse/close of the FY 2021/2022. A banker's cheque of Kshs 100,000 in the name of the State Department for Interior and Citizen Services being license renewal fees for year FY 2021/2022. A banker's cheque of Kshs 100,000 in the name of the State Department for Interior and Citizen Services being license renewal fees for FY 2022/2023. This will be submitted upon the lapse/close of the FY 2021/2022. A banker's cheque for Kshs 200,000 in the name of State Department for Interior and Citizen Services being investigation fee for new directors. Tax clearance certificate of the applicant and all natural persons who are shareholders in the company. A letter for confirmation of remittance of betting taxes from the petitioner's bankers. Summarized monthly returns for the period up to June 30, 2021 (for the 2021/2022 license). Summarized monthly returns for the period of up to June 30, 2022 (for the 2022/23 license). This will be submitted upon the lapse/close of the FY 2021/2022.
4. That the applicant shall pay all necessary administrative charges and fees to the respondent for the FY 2020/2021 and FY 2021/2022. In respect of FY 2022/2023, this will be done at the point of making the requisite application(s).
5. That the applicant shall notify the respondent of the dates, time and venue of pending and due jackpot draws as and when due and seek approval to conduct the same.
6. That the respondent shall issue and maintain on its website information indicating that the applicant is duly licensed and authorized to carry on the business of gaming in the Republic of Kenya.
7. That having confirmed that the applicant has complied with the aforesaid, the respondent shall forthwith issue the applicant with:
  - a) The operating licenses for the FY 2021/2022;
  - b) The operating licence in respect of the FY 2022/2023 upon the commencement of the said financial year, which operating licence will run for a period of 12 months' operative from the July 1, 2022.
8. That the respondent shall consider and duly approve and authorize the applicant to carry out advertisements of its business in a manner prescribed



by the board's operating requirements. This will be done once the applicant submits an application to that effect.

9. That the applicant undertakes not to initiate or pursue any commercial claims against the respondent in relation to loss of revenue and its reputation that may arise as a result of the conduct or actions of the respondent in relation to matters canvassed in these proceedings.
  10. That the suit herein be and is hereby settled on the above terms with no order as to costs.'
2. According to the ex parte applicant and the respondent, the consent filed purges the contempt of court found against the respondent and settles the whole suit. The position is supported by Mr Wanjohi for the respondent.
  3. Mr Gatheru, counsel for one Paul Wanderi Ndung'u filed an application dated June 21, 2022 seeking inter alia that Paul Wanderi Ndung'u be admitted to join these proceedings as an interested party for the benefit of the 4<sup>th</sup> interested party, Pevans East Africa Limited.
  4. Mr Gatheru was, for purposes of adoption of the consent, given audience by the court before his application for joinder was canvassed.
  5. He submitted that the consent seeks to entrench illegalities. It wishes to controvert Constitutional Petition No 252 of 2019 between Pevans (EA) Ltd v BCLB & others.
  6. Ms Opakas for the 1<sup>st</sup> interested party, Mr Khayega for the 4<sup>th</sup> interested party, Mr Muhandi for 2<sup>nd</sup> interested party and Mr Banji for the 3<sup>rd</sup> interested party did not oppose the adoption of the consent.
  7. By constitutional edict espoused in article 159 (2) (c) this court is bound to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. It is thus not within the province of this court to come between an amicable settlement of a suit where parties so desire.
  8. *In Hausram Limited v Nairobi City County Civil Case No 421 of 2013*; [2013] eKLR Havelock J, held:  

' Further, I am of the belief that article 159(2)(c) of the [Constitution](#), 2010 is expressed in mandatory terms and this court is under a duty to promote alternative forms of dispute resolution. This is all the more so when the parties themselves have chosen the forum as is the case here. This court, as the defendant has pointed out in its submissions, cannot rewrite the contracts already entered into between the parties'
  9. The Supreme Court in the case of [Council of Governors v Senate & another Reference No 1 of 2014; \[2014\] eKLR](#) the court emphasized the liberty of the parties to withdraw a matter so as to pursue out of court settlement. It stated thus:  

' (26) Suffice it to say that indeed a party's liberty to withdraw a matter cannot be taken away. Courts have to facilitate pursuance of other means of dispute resolution. Hence, it is only in order that the law allows a party who has approached the court to withdraw such a matter if he deems so fit to do. Barring parties from withdrawing matters once filed in courts of law will be contrary to the constitutional principle of alternative dispute resolution as provided in article 159 of the [Constitution](#).'



10. The supreme court, in *Geoffrey Asanyo & 3 Others v Attorney General [2018] eKLR* this time citing the decision in *Star Paper Mill Ltd & Anor v Bashiru Adetunji & Ors (2009) 7 iLAW/SC 292/2002*, stated;

' The Supreme Court of Nigeria was called upon to determine whether the Court of Appeal was right in striking out an appeal when the parties had amicably resolved the dispute between them. The respondents (plaintiffs) before the Court of Appeal had moved the High Court seeking a declaration that a lease granted had been determined by reason of forfeiture for failure to pay rent, which order was granted. The defendants were adjudged trespassers and a perpetual injunction against issued. Aggrieved, the defendants appealed to the Court of Appeal. Before the respondents could file their brief of argument, the parties agreed to resolve the matter amicably and as a result 'a terms of settlement' (akin to a consent) was filed in the Court of Appeal.'

- (94) However, rather than adopt the terms of settlement on the day of hearing, the Court of Appeal struck out the appeal, hence the subsequent appeal to the Supreme Court. In its judgment, the Supreme Court of Nigeria rendered itself as follows regarding the rationale for consent judgments:

It must be pointed out that it is one of the cardinal principles of our judicial system to allow parties to amicably resolve the disputes between them. By doing so, the otherwise hostile relationship between the parties would be amicably resolved and cemented. It is this amicable resolution of disputes by the parties that is called settlement. When the terms of such settlements are reduced into writing, it is now called 'terms of settlement', when the terms of settlement are filed they are called, and made the judgment of the court. It is then crystalised into 'consent judgment'. When consent judgment is given, none of the parties has the right of appeal, except with the leave, of court. Hence, consent judgment, is a contract between the parties whereby rights are created between them in substitution for order of consideration of the abandonment of the claim or claims pending before the court. This is intended to put a stop to litigation between the parties just as such as a judgment which results from the decision of the court.

The Supreme Court of Nigeria further observed that the court has discretion in recording the 'terms of settlement' to ensure that the same is not vague. It also found that in the circumstances of the matter before it, the Court of Appeal was right in not recording the terms of settlement as they were vague, ambiguous and un-ascertainable. However, the Supreme Court noted that as the parties were inclined to settle the matter amicably, it referred the matter back to the Court of Appeal to adopt a new 'terms of settlement' to be filed by the parties.'

11. In addition to the terms of the consent being vague, ambiguous and unascertainable one can add to the list terms that are illegal, contested or which confer rights at variance with the prayers sought in the suit. I hasten to add that the court need not be moved by any party opposing the adoption of a consent. It is the duty of the court to, suo moto, consider the terms of the consent and make a determination whether the consent is vague, ambiguous, unascertainable, illegal, contested or confers rights or obligations that do not form the substratum of the subject suit. This is important because once adopted the consent becomes a judgement of the court since, as held in *Star Paper Mill Ltd & Anor v Bashiru Adetunji & Ors (supra)*, When the terms of such settlements are reduced into writing, it is now called 'terms of



settlement’, when the terms of settlement are filed they are called, and made the judgment of the court. It is then crystalised into ‘consent judgment’. When consent judgment is given, none of the parties has the right of appeal, except with the leave, of court. Hence, consent judgment, is a contract between the parties whereby rights are created between them in substitution for order of consideration of the abandonment of the claim or claims pending before the court.

12. I have carefully considered the consent as drafted. Even without considering the uncertainty brought into the terms of the consent by the contestations in the submissions on record, a plain reading of the consent readily brings the following to the fore.
13. The consent is couched in a manner that directs the board to act in a particular manner. Whereas the primary parties have the right to terminate the proceedings through a withdrawal of the suit or a settlement, this court cannot shut its eyes to facts on record that bring to the fore discordant voices among members of the board over the propriety of the consent and there is a need therefore to interrogate and confirm whether the consent has been reached through a procedural and regular resolution of the board. It is worthy of note that the respondent is a public body. Its interests in this litigation are not private but of public interest. The need for utmost circumspection when considering a consent entered into by it cannot be gainsaid.
14. In the circumstances this court must decline the adoption of the consent at this stage.

**DATED SIGNED AND DELIVERED THIS 22ND DAY OF SEPTEMBER, 2022**

.....

**AK NDUNGU**

**JUDGE**

