



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. E061 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, AND ROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

BETTING CONTROL AND LICENSING BOARD.....1ST RESPONDENT

AND

SAFARICOM LIMITED.....1ST INTERESTED PARTY

ARTEL NETWORKS KENYA LIMITED.....2ND INTERESTED PARTY

COMMUNICATIONS AUTHORITY OF KENYA.....3RD INTERESTED PARTY

PEVANS EAST AFRICA LIMITED.....4TH INTERESTED PARTY

EX PARTE: MILESTONE GAMES LIMITED

RULING

The Application

1. Milestones Games Limited, the *ex parte* Applicant herein, is aggrieved by decisions made on 30th October 2020 and 31st October 2020 by the Betting Control and Licensing Board, the Respondent herein. The *ex parte* Applicant states that it was prohibited by the Respondent, by its letters dated 30th October 2020 and 31st October 2020, from using the tradename 'Sportpesa' and from using the domains www.ke.sportpesa.com, www.sportpesa.co.ke, short codes 29050 and 79079, Pay Bill numbers 521521, 9555700 and 955700.
2. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons dated 9th November 2020, seeking the following orders:

1. **THAT this application be certified urgent and be heard ex-parte in the first instance for the reasons of urgency set out in the Certificate of Urgency.**
2. **THAT the ex-parte Applicant be granted leave to apply for an order of Certiorari to move into this Court for purposes of being quashed, a decision of the Respondent to prohibit the Applicant from using the name 'Sportpesa', domain www.ke.sportpesa.com, www.sportpesa.co.ke, short codes 29050 and 79079, Pay Bill numbers 521521, 9555700 and 955700 communicated in its letter referenced BCLB 11/152 VOL.I (9) addressed to the Ex Parte Applicant and dated 30th October 2020.**

3. THAT the Ex-Parte Applicant be granted leave to apply for an order of Certiorari to move into this Court for purposes of being quashed, a decision of the Respondent contained in the letter dated 31st October 2020 Ref No. BCLB 11/152 VOL.I (14) indefinitely and unilaterally suspending the lawfully issued license to the Ex Parte Applicant.

4. THAT the Ex-Parte Applicant be granted leave to apply for an order of Prohibition to prohibit the implementation of the decision of the Respondent barring the Applicant from using the name 'Sportpesa', domain www.ke.sportpesa.com, www.sportpesa.co.ke, short codes 29050 and 79079, Pay Bill numbers 521521, 9555700 and 955700 communicated in its letter referenced BCLB 11/152 VOL.I (9), dated 30th October .

5. THAT the Ex-Parte Applicant be granted leave to apply for an order of Prohibition to prohibit the implementation of the decision of the Respondent communicated vide letter dated the 31st October 2020, Ref No. BCLB 11/152 VOL.I (14) indefinitely suspending the Ex Parte Applicant's license.

6. THAT the grant of leave to operate as a stay to stop the implementation of the Respondent's decisions communicated in the impugned letters dated the 30th October 2020 Ref No. BCLB 11/152 VOL.I (9), and 31st October 2020 Ref No. BCLB 11/152 VOL.I (14) by the Respondent and the Interested Parties.

7. THAT the Court be pleased to grant such other or further relief as it may deem fit in the circumstances.

8. THAT the cost of this Application be provided for

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 9th November 2020, and a verifying affidavit sworn on the same date by Bernard Chauro, the *ex parte* Applicant's Operations Manager. In summary, the main grounds are that the *ex Parte* Applicant is the holder of Bookmaker's Off-The Course License Number 000205 issued on the 6th October 2020 by the Respondent and set to expire on the 30th June 2021, and that the Respondent has acted unlawfully and beyond its powers in making the impugned decisions, and also unilaterally and arbitrarily suspended the *ex parte* Applicant's Bookmakers Off-The Course License Number 000205 without according the it an opportunity to be heard or make representations.

4. The *ex parte* Applicant annexed copies of various documents in support of his application, including the impugned decisions made by the Respondent in the letters dated on 30th and 31st October 2020, its bookmaker's licence, and of correspondence exchanged on the impugned decision.

The Determination

5. I have considered the application dated 9th November 2020 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent. This for reason that there are likely effects of the impugned decision on the *ex parte* Applicant's rights and business.

6. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

7. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

8. In the present application, the *ex parte* Applicant has provided evidence of its bookmaker's licence, the Respondent's decision suspending the same, and has averred as to the grounds and reasons why it considers the Respondent's decision to be illegal. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

9. On the question of whether the said leave can operate as a stay of the impugned report, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

10. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

11. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006**.

12. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held as follows:

“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.”

13. It therefore follows that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

14. In this regard, the orders given by the Respondent in the impugned decision require certain actions of a continuing nature to be taken by the *ex parte* Applicant and some of the Interested Parties, said the said decisions are therefore not only amenable to stay, but the *ex parte* Applicant's application would also be rendered nugatory if they are not stayed. In the premises the stay orders are merited to this extent.

The Orders

15. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 9th November 2020 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 9th November 2020 be and is hereby certified as urgent, and is hereby admitted for hearing *ex parte* and on a priority basis.

II. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to move into this Court for purposes of being quashed, a decision of the Respondent to prohibit the Applicant from using the name 'Sportpesa', domain www.ke.sportpesa.com, www.sportpesa.co.ke, short codes 29050 and 79079, Pay Bill numbers 521521, 9555700 and 955700 communicated in its letter referenced BCLB 11/152 VOL.I (9) addressed to the Ex Parte Applicant and dated 30th October 2020.

III. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to move into this Court for purposes of being quashed, a decision of the Respondent contained in the letter dated 31st October 2020 Ref No. BCLB 11/152 VOL.I (14) indefinitely and unilaterally suspending the lawfully issued license to the Ex Parte Applicant

IV. The *ex parte* Applicant is granted leave to apply for an order of Prohibition to prohibit the implementation of the decision of the Respondent barring the Applicant from using the name 'Sportpesa', domain www.ke.sportpesa.com, www.sportpesa.co.ke, short codes 29050 and 79079, Pay Bill numbers 521521, 9555700 and 955700 communicated in its letter referenced BCLB 11/152 VOL.I (9), dated 30th October 2020.

V. The *ex parte* Applicant is granted leave to apply for an order of Prohibition to prohibit the implementation of the decision of the Respondent communicated vide letter dated the 31st October 2020, Ref No. BCLB 11/152 VOL.I (14) indefinitely suspending the Ex Parte Applicant's license.

VI. The grant of leave herein shall operate as a stay of execution and implementation by the Respondent and Interested Parties of the Respondent's decisions communicated in the letters dated the 30th October 2020 Ref No. BCLB 11/152 VOL.I (9), and 31st October 2020 Ref No. BCLB 11/152 VOL.I (14), pending the hearing and determination of the substantive judicial review application or until further orders by this Court.

VII. The costs of the *ex parte* Applicants' Chamber Summons application dated 9th November 2020 shall be in the cause.

VIII. The *ex parte* Applicant shall file and serve the Respondent and Interested Parties with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 9th November 2020 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.

IX. Upon being served with the said pleadings and documents, the Respondent and Interested Parties shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.

X. The hearing of the substantive Notice of Motion shall be held on 25th January 2021.

XI. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's substantive Notice of Motion on the basis of the

electronic copies of the pleadings and the written submissions filed by the parties.

XII. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

XIII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XIV. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 25th January 2021.

XVI. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Thursday, 19th November 2020.

XVII. Parties shall be at liberty to apply.

16. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF NOVEMBER 2020

P. NYAMWEYA

JUDGE