



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 403 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF THE BETTING, CONTROL AND GAMING ACT

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

BETTING CONTROL AND LICENSING BOARD.....RESPONDENT

EX PARTE :

ADVANCED GAMING LIMITED

JUDGMENT

The Application

1. The *ex parte* Applicant herein is Advanced Gaming Limited (hereinafter referred to as the “Applicant”), and is a company incorporated in Kenya under the Companies Act and is licenced as a bookmaker under the Betting, Lotteries and Gaming Act. The Applicant has sued the Betting Control and Licencing Board which is the Respondent herein, and is a statutory body established under the Betting, Lotteries and Gaming Act and tasked with the mandate of regulation of the gaming business inclusive of issuing licences and permits, and dealing with complaints that arise from them.

2. The Applicant brought its action through a Notice of Motion dated 16th October 2018 in which it is seeking the following orders:

a) An order of Certiorari to bring to this Court for the purpose of being quashed the decision of the Respondent communicated/contained in its letter dated 27th September 2018 purporting to suspend the Applicant’s valid Bookmakers licence.

b) An order of Prohibition to prohibit the Respondent by itself, directors, servants, agents or whomsoever from executing and/or enforcing its decision to suspend the Applicant’s licence or in any manner whatsoever interfering with the lawful operations of the Applicant or other variation or cancelation of the Applicant’s subsisting and valid license.

c) That costs of the application be awarded to the Applicant.

3. The application is premised on the grounds of its face and is supported by a Statutory Statement dated 3rd October 2018 and a verifying affidavit of sworn on the same date by Viktoriia Smolnikova the Operations Manager of the Applicant. The Applicant stated that it operates entertainment facilities including betting and gaming, and holds a valid bookmakers licence issued by the Respondent set to expire on the 30th June 2019. That pursuant to the licence it set up its principal base of operation along Mombasa Road known as Captain Casino and has also invested heavily in the business, operating six premises.

4. The Applicant averred that the Respondent issued them with a letter dated 20th September 2018 which it received on 24th September 2018, and which was titled "compliance with conditions of your license and the betting lotteries". That the said letter alleged contravention of unspecified licensed conditions, operating unspecified unlicensed premises and commission of unspecified offences by the Applicant, and gave seven days in which to show cause why the license should not be suspended. The Applicant further averred that it served its responses on the 24th and 27th September 2018 well within the seven day period addressing all the issues raised in the letter, and sought to appear and make representation and classified any perceived misunderstandings.

5. That on 27th September 2018, which was the same day it had served its responses, the Respondent convened a meeting which purported to suspend their license for failure to respond to the notice to show cause. The Applicant contends that the Respondent therefore ignored and/or refused to consider the Applicant's written and timely responses, and its request to appear and make representation, and condemned it unheard, contrary to Constitutional and statutory imperatives of due process and procedural fairness. The Applicant contended that the Respondent's decision was thus patently illegal and arbitrary.

6. Furthermore, that contrary to the contents of the notice to show cause, there are no conditions attached to the Applicant's license, it does not operate unlicensed premises and the Respondent did not specify the offences that the Applicant is alleged to have committed under the. Therefore that the decision to suspend the Applicant's licence is also unreasonable, arbitrary and illogical. In addition, that the Respondent's decision to call a meeting to discuss the suspension of the Applicant's license and proceeding to suspend the same before the deadline for the response for the notice to show cause is indicative of malice, ill will and bad faith.

7. Lastly, it was the Applicant's case that the term of the Respondent's board was expiring on 28th September 2018, making the timing of the meeting and the purported suspension of the Applicants license on 27th September 2018 highly suspicious and pointing to a premeditated verdict by the Respondent. Therefore, if the Respondent's actions are not redressed the Applicant stands to suffer irreparable harm as a result of business losses, loss of reputation and good will, and will be exposed to criminal sanctions for lawful operations if it does not shut down its business despite holding a valid license. The Applicant annexed copies of the letters sent to it by the Respondent, and its responses thereto.

8. The Respondent did not make any appearance or file any response to the application, which proceeded to hearing by way of written submissions.

The Determination

9. The Applicant urged the application through written submissions dated 4th December 2018 filed by Mbugua Ng'ang'a & Co Advocates, his Advocates on record. They reiterated the arguments made in the pleadings as to the Respondent's decision being arbitrary, unreasonable and irrational, and being motivated by malice and bad faith.

10. The Applicant further submitted that the Respondents decision was procedurally unfair, improper and breached its right to be heard and to fair administrative action. The reasons given for this position by the Applicant were that it responded to the notice to show cause in time, which response was dully acknowledged, and further requested for an opportunity to make oral representations before the Respondent. However, that the responses were ignored and instead they were accused of not responding. Therefore they were condemned unheard against the rules of natural justice and contrary to Article 47(1) and (2) of the Constitution which guarantees administrative action that is lawful, reasonable and procedurally fair, and require that where their right is likely to be affected they be given written reasons for the action.

11. Section 4(1) and 4(3) (b) of the Fair Administrative Action Act was also cited by the Applicant for the argument that the Respondent as a statutory body is legally enjoined to carry out its functions with scrupulous fairness. In addition, that section 4(1) (b) of the Betting Lotteries and Gaming Act specifically outlaws suspension of a license without giving the license the opportunity to show cause against the suspension.

12. Lastly, reliance was placed on the case of **Republic vs National Transport & Safety & 2 others Ex-parte Rengcom Communications Ltd (2017) eKLR** for the holding that a decision which is in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right.

13. I have considered the pleadings and submission made by the Applicant and find that there are two issues before this Court for determination. The first is whether the Respondent denied the Applicant an opportunity to be heard before making its decision of 27th September 2018, and second, whether the Respondent acted unreasonably, and lastly, whether the Applicant is deserved of the orders sought.

14. A core requirement of the duty to act fairly, as laid down in the Constitution in Article 47 and also by the Fair Administrative Act of 2015 and common law rules of natural justice is the need to ensure that a person affected by a decision has an effective opportunity to make representations before it is taken, so that he or she has the chance to influence it. Article 47 of the Constitution in this regard provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the

person has the right to be given written reasons for the action.

15. Section 4(3) and (4) of the Fair Administrative Action Act expound on the key procedural steps that are required to satisfy the requirements of fairness as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
- (b) an opportunity to be heard and to make representations in that regard;**
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
- (d) a statement of reasons pursuant to section 6;**
- (e) notice of the right to legal representation, where applicable;**
- (f) notice of the right to cross-examine or where applicable; or**
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

- (a) attend proceedings, in person or in the company of an expert of his choice;**
- (b) be heard;**
- (c) cross-examine persons who give adverse evidence against him; and**
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.**

16. In the present case, in addition to the aforementioned duty to act fairly, there is an applicable statutory procedure that was required to be followed by the Respondent when suspending a licence under section 4(1) of the Betting, Lotteries and Gaming Act which reads as follows:

“(1) The Board shall have power—

- (a) to issue licences and permits in accordance with this Act and any regulations made thereunder;**
- (b) during the subsistence of a licence or permit, to vary, or for good cause to suspend or cancel it; but the Board shall not suspend a licence or permit for more than fourteen days and shall not vary or cancel a licence or permit without giving the licensee or permit-holder opportunity to show cause against the variation or cancellation; and**
- (c) to inquire into complaints against licensees or permit-holders.”**

17. It is not in dispute that the Respondent is possessed of the power to cancel the Applicant’s license but the same is tempered by the requirements that the Applicant must be given a chance to show cause. From the Respondent’s letter to the applicant dated 20th September 2018, which was annexed to the Applicant’s Verifying Affidavit as “Annexure VS2”, the Applicant was given seven days upon which to respond to the issues raised therein. The Applicant responded in a letter dated 27th September 2018 which was annexed to its Verifying Affidavit as “Annexure VS4”. The said letter bore a stamp of the Respondent showing receipt on 27th September 2017.

18. The Applicant in its response addressed the issues set out in the Respondent’s letter dated 20th September 2018, and sought a meeting to further discuss the issues. The Respondent then wrote a letter on the 27th September 2018 which was annexed to the Applicant’s Verifying Affidavit as “Annexure VS5”, suspending the Applicant’s license for failure to respond to its earlier letter.

19. I find that the decision in the Respondent’s letter dated 27th September 2018 is evidently unfair and wrong for three reasons. Firstly, the seven days that had been accorded to the Applicant within which to respond had not lapsed. It is in this respect provided for in Article 259(5) of the Constitution in this regard provides that:

“ in calculating time between two events or any purpose under this constitution, if the time is expressed;

- (a) as days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included,....”**

20. This position is also restated in section 57 of Interpretation and General Provisions Act, which provides as follows as regards

computation of time:

“ In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”

21. Order 50 Rule 8 of the Civil Procedure Rules also stipulates that:

“In any case in which any particular number of days not expressed to be clear days is prescribed under these rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day.”

22. Therefore, in the instant application, time started to run for purposes of the Applicant’s response on 21st September 2018, and seven days thereafter was on 28th September 2018, and the Respondent could not act on its letter of 20th September 2018 until then, and by suspending the licence before the time for responding had expired, it effectively denied the Applicant the time and opportunity to respond.

23. Secondly, the Respondent indicated that the basis of the cancellation of the licence is because of the Applicants failure to respond, which was not the case as shown from the “Annexure VS4” that was provided by the Applicant, and which shows receipt by the Respondent. The Respondent’s decision was therefore made without taking into account the Applicant’s response.

24. Lastly, section 4(1)(b) of the provides that a suspension of a licence shall not be more that the Respondent shall not suspend a licence or permit for more than fourteen days, whereas in the letter dated 27th September 2018 purported to suspend the Applicant’s licence indefinitely. The Applicant was thus not given a reasonable opportunity to present his case before the Respondent, which was also in violation of the provision section 4(1) b of the Betting, Lotteries and Gaming Act in its decision.

25. On the second issue as to whether the Respondents’ decision was unreasonable, it is evident that on its face the said decision was unreasonable, as it was not supported by the response provided by the Applicant. Unreasonableness is an established ground for judicial review, and was settled by the decisions in Associated Provincial Picture Houses vs Wednesbury Corporation (1948)1KB 223 and Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374. This ground was also explained in Pastoli vs Kabale District Local Government Council & Others, (supra) as follows:

“...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...”

26. The reason given by the Respondent in its decision of 27th September 2018 was not supported by the facts, and in particular that a response that had been provided by the Applicant, and was therefore manifestly unreasonable.

27. Lastly, on the issue of the remedies sought of certiorari and prohibition, the Court of Appeal in the case of Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR explained the circumstances when the same can issue as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

28. This Court has found and the Applicants have established that the Respondents acted unfairly and illegally, and the order of certiorari is therefore merited. The orders of prohibition sought by the Applicant cannot however lie for two reasons. Firstly, this Court cannot prohibit the Respondent from undertaking its statutory duty and exercising its statutory powers if good cause or reason is shown, and secondly, the order of certiorari that will granted will effectively and adequately remedy the impugned actions which were the subject of this application.

29. In the premises, I find that the Applicant's Notice of Motion dated 16th October 2018 is merited only to the extent of the following orders:

i. contained in its letter dated 27th September 2018 suspending the *ex parte* Applicant's Bookmakers licence, and requiring the Applicant to cease operations.

ii. The Respondent shall meet the Applicant's costs of the Notice of Motion dated 16th October 2018.

30. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2019

P. NYAMWEYA

JUDGE